WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

RONALD EHMAN, *Applicant*

vs.

AMERICAN CIVIL CONSTRUCTORS; OLD REPUBLIC GENERAL INSURANCE CORPORATION, administered by GALLAGHER BASSETT SERVICES; CALIFORNIA ENGINEERING CONTRACTORS, INC., insured by TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, *Defendants*

Adjudication Number: ADJ8534435
Oakland District Office

OPINION AND DECISION AFTER RECONSIDERATION

We granted reconsideration to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.[1]

Defendant California Engineering Contractors ("CEC") seeks reconsideration of the Findings and Award ("F&A") issued on May 8, 2021, wherein the arbitrator found that CEC was not entitled to a credit of $189,000.00 against the contribution it owed to American Civil Constructors ("ACC") in connection with applicant's claim. CEC argues the arbitrator erred, and that it should be entitled to reduce the contribution it owes by $189,000, the amount it settled with applicant for in applicant's federal Longshore and Harbor Workers' Compensation Act ("Longshore Act") claim (33 U.S.C. § 901 et seq.).

We received an Answer from ACC. We also received a Report and Recommendation on Petition for Reconsideration from the arbitrator, recommending that reconsideration be denied.

We have reviewed the record and considered the arguments of the Petition and the Answer. For the reasons discussed below, as our decision after reconsideration, we will affirm the arbitrator's finding that CEC is not entitled to assert a credit for the amount of its Longshore Act

[1] Commissioner Lowe, who was on the panel that granted reconsideration to further study the factual and legal issues in this case, no longer serves on the Appeals Board. Another panelist has been assigned in her place.

settlement, though we will amend the F&A to clarify that CEC has never been awarded such a credit in any proceeding.

FACTUAL BACKGROUND

Applicant filed two workers' compensation claims, and settled both. One claim, this one, was filed in the California workers' compensation system against ACC, for a cumulative trauma injury to multiple body parts sustained during his employment for ACC from March to May of 2012.[2] The second claim was filed in the federal system, pursuant to the Longshore Act, against California Engineering Contractors (CEC), for a cumulative trauma injury to the same body parts,[3] sustained while employed from September 2009 to November 2011.[4]

Applicant settled his California workers' compensation claim against ACC on March 9, 2015 via an Order Approving Compromise and Release, with an award of future medical care, along with monetary compensation. (Order Approving Compromise and Release, at p. 1.) He settled his federal workers' compensation case against CEC on August 15, 2016, for a total of $189,000, which included $40,000 for "resolution of future medical benefits" and $149,000 for "resolution of past and future compensation benefits, penalties and interest." (Ex. 105, at p. 2.)

On September 30, 2016, ACC filed a Petition for Credit, asserting entitlement to a credit in the full amount of the Longshore Act settlement CEC had entered into, $189,000. ACC also filed a Petition for Contribution against CEC, which resulted in the current F&A.

The matter of the credit went to trial on March 15, 2017; on June 8, 2017, a workers' compensation administrative law judge ("WCJ") issued a finding that ACC was entitled to a credit against future medical treatment for the full amount of the Longshore Act settlement with CEC. CEC filed a petition for reconsideration ("First Petition"); we granted reconsideration and issued a Notice of Intention ("NIT"), writing:

> **NOTICE IS HEREBY GIVEN** that we intend to rescind the WCJ's F&O and substitute a new order finding ACC is not entitled to a credit for applicant's Longshore Act settlement, unless ACC files a response within twenty (20) days

[2] The claim was originally filed as a specific injury sustained May 14, 2012, but it was settled as a cumulative trauma injury.
[3] Previously, applicant contended there was a small difference in the claimed body parts; applicant has subsequently abandoned this argument and we now consider the parties to agree that the body parts involved in both claims are identical.
[4] Applicant also appears to have worked for at least one other employer, Proven Management, during the relevant time period.

> plus five (5) additional days for mailing (Cal. Code Regs., tit. 8, §§ 10507(a)(1), 10508) of service, showing good cause to the contrary. If ACC files a response, any party may file a reply within ten (10) days plus five (5) additional days for mailing of service of the response.

After receipt of responses, on October 19, 2019, we issued our Decision After Reconsideration, finding ACC was not entitled to a credit. That finding was not appealed and is now final.

Subsequently, the Petition for Contribution went to arbitration. In the contribution proceeding, CEC asserted that any contribution assessed against it should be reduced by $189,000, the amount of its Longshore Act settlement. The issues were therefore framed as (1) ACC's entitlement to contribution from CEC; and (2) CEC's right to assert a $189,000 credit against any contribution owed. (F&A, at p. 4.)

On May 8, 2021, the arbitrator issued his F&A, finding in relevant part that ACC was entitled to contribution from CEC, and that CEC was not entitled to assert any credit for the $189,000 it paid to settle its Longshore Act claim. (F&A, at pp. 6–7.) The Arbitrator therefore awarded contribution to ACC in an amount to be determined by the parties, with jurisdiction reserved. (*Id.* at p. 7.)

The instant Petition for Reconsideration followed.

DISCUSSION

The Longshore Act "establishes a comprehensive federal workers' compensation program that provides longshoremen and their families with medical, disability, and survivor benefits for work-related injuries and death." (*Howlett v. Birkdale Shipping Co.* (1994) 512 U.S. 92, 96.) Jurisdiction under the Longshore Act is not exclusive; amendments made in 1972 allow states to apply their own workers' compensation schemes to land-based injuries that fall within the coverage of the act. (*Sun Ship, Inc. v. Pennsylvania* (1980) 447 U.S. 715.)

When an injured worker sustains an injury or injuries that fall within the concurrent jurisdiction of the Longshore Act and the California workers' compensation system, the worker may bring suit and recover in both forums. (*Sea-Land Serv. v. Workers' Comp. Appeals Bd.* (1996) 14 Cal.4th 76, 83.) However, "[a] basic premise of compensation law is that there shall be but a single recovery of benefits on account of a single injury or disability; to permit a double recovery would be to place a double burden on industry and encourage malingering; the right to recovery of compensation from more than one source is subject to the rule that a credit shall be allowed

against an award for any payment to the extent that it permits a double recovery." (*Sea-Land, supra,* 14 Cal.4th at 82, *quoting Raischell & Cottrell, Inc. v. Workers' Comp. Appeals Bd.* (1967) 249 Cal.App.2d 991, 997.)

In order to avoid a double recovery, the Longshore Act provides for a credit in cases of concurrent jurisdiction for any benefits received "for the same injury, disability, or death . . . pursuant to any other workers' compensation law." (See 33 U.S.C. § 903(e); see also *Calbeck v. Travelers Insurance Co*. (1962) 370 U.S. 114 (holding credit is required under the act to avoid double recovery).)

Although no similar provision of California statutory law mandates credit for recovery under the Longshore Act for a subsequent recovery in the state workers' compensation system, the California Supreme Court has ruled that such a credit is required, both in order to avoid a double recovery and in order to avoid a discrepancy in the amount a worker can recover based upon the forum where the worker first obtains an award. (*Sea-Land, supra*, 14 Cal.4th at 87–92.) Where applicable, the credit "must be calculated on a dollar-for-dollar basis, regardless of category [of benefits received]." (*Ibid*.)

Labor Code section 5500.5(c) addresses the issue of cumulative injury with multiple employers. It provides, in relevant part:

> In any case involving a claim of occupational disease or cumulative injury occurring as a result of more than one employment within the appropriate time period set forth in subdivision (a)[5], the employee making the claim, or his or her dependents, may elect to proceed against any one or more of the employers. Where such an election is made, the employee must successfully prove his or her claim against any one of the employers named, and any award which the appeals board shall issue awarding compensation benefits shall be a joint and several award as against any two or more employers who may be held liable for compensation benefits.

(Lab. Code, § 5500.5(c).)

Pursuant to section 5500.5(c), then, an "employee may . . . obtain an award for the entire disability against any one or more of successive employers or successive insurance carriers if the disease and disability were contributed to by the employment furnished by the employer chosen or during the period covered by the insurance even though the particular employment is not the

[5] Pursuant to section 5500.5(a), for injuries occurring after January 1, 1981, liability for a cumulative injury is a period of one year.

sole cause of the disability." (*Colonial Ins. Co. v. Industrial Acc. Com.* (1946) 29 Cal.2d 79, 82 [11 Cal.Comp.Cases 226].) An applicant may also choose not to elect against a particular defendant and proceed against all insurers or employers. (*Industrial Indemnity Co. v. Workers' Comp. Appeals Bd.* (1997) 60 Cal.App.4th 548, 554-556 [62 Cal.Comp.Cases 1661].) However, if an applicant elects to proceed against a single insurer, the insurer is entitled under section 5500.5 to seek contribution for awarded benefits from the remaining insurers in subsequent proceedings. (See *Schrimpf v. Consolidated Film Industries, Inc.* (1977) 42 Cal.Comp.Cases 602 (Appeals Board en banc).)

Turning to the case at hand, we note that the F&A incorrectly states that CEC was previously awarded a credit in these proceedings. (F&A, at p. 6, ¶ 10.) In fact, no such credit was awarded, and we will therefore amend the F&A to correct this error.[6]

As to the merits, applicant elected against ACC in his California claim. ACC settled the California workers' compensation claim first, with CEC settling the Longshore Act claim after the California settlement. Therefore, pursuant to 33 U.S.C. § 903(e), it appears undisputed that CEC was entitled to a credit in its Longshore Act settlement for all payments made by ACC "for the same injury, disability, or death . . . pursuant to any other workers' compensation law." (33 U.S.C. § 903(e).)[7] If CEC's Longshore Act settlement reflected this credit, any concern of double recovery would have been thereby addressed.

Accordingly, CEC's argument appears to be predicated upon the assertion that it did not factor in its credit rights pursuant to 33 U.S.C. § 903(e) when it settled its Longshore Act claim. Because it did not exercise its credit rights in the Longshore Act case, CEC asserts, it should be entitled to assert a credit for the amount of its Longshore Act settlement in ACC's contribution proceeding in the California case instead.

CEC's argument suffers from two fatal flaws. First and foremost, CEC cites no actual authority for the proposition that, having allegedly decided not to pursue its credit rights in its Longshore Act settlement, it may instead elect to use that Longshore Act settlement as a credit against a future California contribution proceeding brought by the party that did settle the

[6] The confusion seems to have stemmed from the fact that the WCJ issued an order awarding *ACC* credit against applicant's recovery, subject to timely objection. Because applicant timely objected, the order was subsequently vacated, and, as described above, we ultimately found ACC had no entitlement to such a credit.

[7] The parties do not appear to contest that the injury in the Longshore Act claim is the same as the injury in this claim, and we therefore proceed on that assumption in our analysis.

California workers' compensation case. CEC's citation to *Sea-Land* – the only citation to authority it provides – tellingly does not include a pin citation. Review of *Sea-Land*, moreover, discloses nothing that would support CEC's claim that it may forgo its federal Longshore Act credit rights in order to preserve the ability to assert a credit in the California proceedings. Indeed, *Sea-Land* specifically notes that there is no provision of California statutory law that authorizes a credit against a Longshore Act settlement at all. (*Sea-Land, supra,* 14 Cal.4th at 87.) Instead, any credit assertable in California workers' compensation proceedings for a Longshore Settlement is limited to the purpose of preventing a double *recovery* by the *applicant*. (*Id.* at pp. 87–91; see also *Duong v. Workers' Comp. Appeals Bd.* (1985) 169 Cal.App.3d 980, 982; *Bobbitt v. Workers' Comp. Appeals Bd.* (1983) 143 Cal.App.3d 845, 849.)

This observation leads neatly into the second fatal flaw in CEC's reasoning: that the issue of double recovery is no longer relevant in these proceedings. Applicant has already been paid, and, as described in our October 19, 2019 Decision After Reconsideration, there was no impermissible double recovery. The instant contribution proceedings do not stand to impact applicant's recovery in any way; instead, they simply represent a divvying up of the responsibility for that recovery. The issue is therefore not double *recovery* but double *liability*: what CEC is really asserting in these proceedings is that a credit is required to avoid it being doubly *liable* in both the California and Longshore Act claims for the same injury.

However, to the extent that contribution being assessed against CEC in the California case may result in double liability, CEC has no one to blame for that double liability except itself. As described above, pursuant to 33 U.S.C. § 903(e), CEC had the right to a credit for the full amount of ACC's settlement in the California claim in the Longshore Act claim. It is therefore most reasonable to place the cost of that election on CEC, as the party who made it. Conversely, it would be unjust to impose the costs of CEC's election on ACC by awarding CEC a credit in the California contribution proceedings; to do so would be to pass ACC the bill for CEC's choices. Just as we rejected ACC's attempt to claim a credit for CEC's settlement, so too we reject CEC's attempt to transfer liability for its own choices to ACC.

CEC argues that because applicant elected against ACC, there was nothing to apply its credit to until the contribution proceeding. This again ignores the fact that CEC had the opportunity to apply a credit for the amount of ACC's settlement in its subsequent Longshore Act settlement, but allegedly chose not to do so, for reasons it has never adequately explained. Similarly, in

asserting that no authority *prevents* a credit in circumstances such as these, CEC puts the cart before the horse: as the party asserting the credit, the burden of proof is on CEC to cite authority *supporting* its entitlement to a credit, not on ACC to cite authority *prohibiting* such a credit. (See Lab. Code, § 5705.)

For all the reasons above, we therefore conclude that CEC has no right to credit in these contribution proceedings stemming from its Longshore Act settlement. Accordingly, we will affirm the arbitrator's F&A, except that we will amend it to clarify that no credit was previously awarded, as described above. In all other respects, including the award of contribution subject to adjustment by the parties with jurisdiction reserved to the arbitrator in the event the parties cannot determine the proper amount of contribution themselves, the F&A remains intact.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award issued by the workers' compensation arbitrator on May 8, 2021 is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

10. On October 20, 2016, ACC/Gallagher Basset was awarded a credit to be applied against future benefits. However, the award was subsequently vacated due to timely objection, pursuant to an order served on November 17, 2016.

AWARD

1. CEC/Travelers has no right to a credit in this case for its settlement in the Longshore Act case.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

DECEMBER 19, 2025

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

RONALD EHMAN
LAURA G. CHAPMAN & ASSOCIATES
WITKOP LAW
RAYMOND E. FROST (ARBITRATOR)
JONES CLIFFORD
KARLIN HIURA
THOMAS QUINN

AW/*kl*

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date.
KL