

Alfred R. Lee, Jr. (Dec'd), Valerie L. Lee (Widow), Applicant v. Miracle Ford, California Insurance Guarantee Association, administered by Intercare Insurance Services for HIH America Compensation (In Liquidation), West Covina Toyota, Universal Underwriters Insurance Company/Zurich North America, Defendants

W.C.A.B. No. LAO 781284--WCJ George Reny (LAO); WCAB Panel:  
Commissioners Brass, O'Brien, Chairman Rabine

Workers' Compensation Appeals Board

68 Cal. Comp. Cas 213  
Opinion Filed February 18, 2003

DISPOSITION:

*Disposition:* The petition for removal filed by CIGA is *granted*, and the matter is *removed* to the Appeals Board. The WCJ's orders granting applicant's election against CIGA and submitting this matter for decision are *rescinded*, and the matter is *returned* to the trial level for further proceedings by the WCJ, consistent with this opinion.

OPINIONBY: Commissioner Frank M. Brass

OPINION: OPINION AND ORDER GRANTING PETITION FOR REMOVAL AND DECISION  
AFTER REMOVAL

Defendant, California Insurance Guarantee Association ("CIGA"), administered by Intercare Insurance Services for HIH America Compensation ("HIH") in liquidation, seeks removal in response to an interlocutory order issued by the workers' compensation administrative law judge (WCJ) on August 22, 2002, in which the WCJ submitted this matter for decision and granted applicant's election against CIGA, noting that CIGA "has the last four months" of applicant's cumulative trauma claim. In this case, it is alleged that decedent Alfred Lee, while employed as a car salesman/financial manager by Miracle Ford (insured by HIH) during the period February 7, 2000 through June 7, 2000, sustained industrial injury to his cardiovascular and cerebral vascular system on June 7, 2000, resulting in his death on June 11, 2000.

CIGA contends that (1) pursuant to Insurance Code section 1063.1(c)(9), n1

-----Footnotes-----

Insurance Code section 1063.1(c)(9) provides in relevant part: "Covered claims" does not include (i) any claim to the extent it is covered by any other insurance of a class covered by this article available to the claimant or insured . . . "

-----EndFootnotes-----

the applicant may not elect against CIGA because there is a legally-joined, viable insurance carrier, Universal Underwriters Insurance Company/Zurich North America ("Zurich") on the risk for the alleged cumulative trauma, and (2) CIGA must be dismissed as a party defendant because there is a viable carrier, Zurich, on the risk for the alleged cumulative trauma, hence there is "other insurance available to the claimant" and no "covered claim" for which CIGA can be held liable. n2

-----Footnotes-----

CIGA also contends that Zurich should be ordered to administer benefits, but the contention is premature because there has yet to be a finding on whether the decedent's death arose out of and occurred in the course of employment.

-----EndFootnotes-----

## I. STATEMENT OF THE CASE

The decedent was a car salesman/finance manager who worked for several employers with different carriers during the period of one year preceding his death. The issue is whether the WCJ properly allowed applicant to elect against CIGA, where it appears there are other viable carriers on risk during the one-year cumulative trauma period under Labor Code section 5500.5. For the reasons discussed below, we conclude that an applicant may *not* elect against CIGA when there are other viable carriers having liability during the alleged exposure period. Therefore, we will grant removal, rescind the order allowing election against CIGA, and return this matter to the WCJ for further proceedings. We also conclude that it is premature to dismiss CIGA as a party defendant at this point in the proceedings.

## II. BACKGROUND

On June 28, 2000, the applicant, widow Valerie L. Lee, filed an Application for Adjudication of Claim alleging that her husband, decedent Alfred R. Lee Jr., while employed as a finance manager/salesman during the period February 7, 2000 through June 7, 2000, sustained cumulative trauma which hastened and caused his death on June 11, 2000. The application named Miracle Ford as the employer and HIH as the insurance carrier. Defendant HIH denied the injury and subsequently became insolvent in May 2001. Thereafter, CIGA took over defense of the claim. Various preliminary proceedings ensued, and the matter proceeded to trial on July 31, 2001. At that time, the WCJ determined that the medical reports of both sides were deficient, and he ordered further development of the medical record in the form of a new opinion from a physician chosen by the WCJ, Dr. Markovitz. (These determinations are not in dispute.) Dr. Markovitz issued a report on December 4, 2001, and he was deposed on May 1, 2002.

On May 7, 2002, CIGA filed a Petition to Amend Application for Adjudication of Claim According to Proof, alleging that applicant had three employers in the year before he died, namely Mike Miller Toyota from 6/7/99-11/11/99, West Covina Toyota from 10/15/99-1/15/00 and Miracle Ford from 2/7/00-6/7/00. (The record is unclear whether the decedent worked for both Mike Miller Toyota and West Covina Toyota during the overlapping period October 15, 1999 to November 11, 1999, as alleged in the Petition to Amend.) The petition also alleged that the application should be amended to reflect an alleged date of injury from June 7, 1999 to June 7, 2000, because Dr. Markovitz had opined that the decedent's work at all three employers that year had hastened his death. n3

-----Footnotes-----

CIGA's petition for removal essentially concedes that Dr. Markovitz has found an industrial basis for the decedent's death. We express no opinion on the point, as it would be premature and unnecessary to determine the issues presented here.

-----EndFootnotes-----

Attached to the Petition to Amend was a proposed amended application, which stated that the insurance carriers for Mike Miller Toyota and West Covina Toyota were "under investigation." Applicant filed an objection to the Petition to Amend. On June 27, 2002, the law firm of Tobin & Lucks filed an appearance on behalf of Zurich North America as carrier for West Covina Toyota.

After several interim conferences, the matter was again set for trial on August 22, 2002. On that day, CIGA filed a Petition for Dismissal and a Petition for Order Joining Party Defendant, and it re-filed its Petition to Amend Application for Adjudication of Claim According to Proof, this time submitting a proposed amended application identifying Zurich as the carrier for West Covina Toyota. The Petition for Joinder alleged that during the last year of exposure, the decedent had been employed with West Covina Toyota from November 13, 1999 through January 9, 2000, and that "per the response from the WCIRB dated 5/16/02, the workers' compensation carrier for West Covina Toyota during that time period was Universal Underwriters Insurance Company/Zurich." The Petition for Dismissal alleged, in substance, that since Dr. Markovitz had opined that the three employments during the last year of decedent's life had contributed to his death, and there was a solvent carrier, Zurich, on the risk at that time, there was no "covered claim" against CIGA because there was "other insurance available to the claimant" under

Insurance Code section 1063.1(c)(9). CIGA cited *Industrial Indemnity v. Workers' Comp. Appeals Bd. (Garcia)* (1997) 60 Cal.App.4th 548 [70 Cal. Rptr. 2d 295] [62 Cal.Comp.Cases 1661] in support of its Petition for Dismissal. In response, the WCJ joined Zurich as a party defendant. However, the WCJ also issued the rulings disputed here, approving applicant's election against CIGA and submitting this matter for decision.

### III. DISCUSSION

#### A. APPLICANT MAY NOT ELECT AGAINST CIGA

Based on the facts set forth above, it appears that CIGA's insolvent carrier, HIH, had the last four months of coverage, while a viable carrier, Zurich, had coverage during some portion of the first eight months of the one-year period of alleged injurious exposure under Labor Code section 5500.5. n4

-----Footnotes-----

We note that the petition for removal alleges that "it was also learned from the WCIRB that the carrier for the employer prior to West Covina Toyota, Mike Miller Toyota, was also a CIGA case due to the insolvency of that carrier." However, no documents from the WCIRB are in the Board's file. The Minutes of Hearing of July 31, 2001 indicate that the only stipulations in the record as to periods of employment and coverage are that Miracle Ford employed the decedent and was covered by HIH from February 7, 2000 through June 7, 2000. Although West Covina Toyota and its carrier Zurich have appeared and have been joined by order of the WCJ, their period of employment/coverage and that of any other employers and carriers between June 7, 1999 to June 7, 2000 should be clarified by the parties and WCJ in further proceedings.

-----EndFootnotes-----

The WCJ points out that all the injurious exposure may have occurred during CIGA's period of liability. We note, however, that if the election against CIGA is allowed and it turns out that even a day of injurious exposure occurred during Zurich's coverage, CIGA would be forced to initiate supplemental proceedings to avoid liability.

For this reason, we conclude that an applicant should not be allowed to elect against CIGA in a single cumulative injury case absent special circumstances. CIGA is presently working with very limited resources that are being severely strained in view of the number of carriers that have become insolvent. Where other solvent carriers are potentially on the risk during the alleged cumulative injury period, and because supplemental proceedings may become necessary if an election against CIGA has been allowed, a WCJ should not ordinarily accept the election against CIGA alone, absent special circumstances showing that the injurious exposure would be solely limited to CIGA's period of risk. In other words, CIGA should not be required to bear the costs of initially defending the claim where there is a great potential for an award against CIGA to be rescinded and other viable carriers to be made jointly and severally liable under the principles of *Industrial Indemnity v. Workers' Comp. Appeals Bd. (Garcia)* (1997) 60 Cal.App.4th 548 [70 Cal. Rptr. 2d 295] [62 Cal.Comp.Cases 1661]. n5

-----Footnotes-----

In *Garcia*, the Court held that the Board properly rescinded an award against CIGA and substituted a joint and several award against two other solvent carriers, where the applicant elected against the three carriers, the award was joint and several against all of them, and each carrier, including CIGA's insolvent carrier, was fully liable for the entire disability during the cumulative injury period. In those circumstances, "other insurance" is available in the form of the other solvent carriers on risk during the cumulative injury period, hence the remaining solvent carriers will be liable for all benefits.

-----EndFootnotes-----

(See also *Denny's Inc. v. Workers' Comp. Appeals Bd. (Bachman)* (2003) 104 Cal.App.4th 1433 [129 Cal. Rptr. 2d 53] [68 Cal.Comp.Cases 1].)

#### B. CIGA MAY NOT BE DISMISSED

In the significant panel decision of *Manzano v. Flavurence Corporation* (2002) 67 Cal. Comp. Cases 914 at 915, the Board held that CIGA should not be dismissed from a case until a determination is made on the issue of the date of injury, or period of injurious exposure, or other underlying issue which if adversely decided against CIGA would result in its liability. In the present case, no determination has been made on the date of injury, or period of injurious exposure, or on any other underlying issue which if adversely decided against CIGA would result in its liability. Therefore, CIGA should not be dismissed as a party defendant at this point. In this connection, the parties and the WCJ should be careful to delineate the date of injury and appropriate defendants. (See footnote 4, *infra*.)

For the foregoing reasons,

IT IS ORDERED, that the petition for removal filed by CIGA is hereby GRANTED, and that this matter is REMOVED to the Appeals Board.

IT IS FURTHER ORDERED, that it is the Appeals Board's Decision After Removal that the WCJ's orders granting applicant's election against CIGA and submitting this matter for decision are RESCINDED, and this matter is RETURNED to the trial level for further proceedings by the WCJ, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD  
Commissioner Frank M. Brass

We concur,

CONCURBY: William K. O'Brien, Commissioner  
Merle C. Rabine, Chairman