



LEXSEE 70 CAL COMP CASES 1519

CALIFORNIA COMPENSATION CASES  
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Majestic Insurance Company, insurer for Associated Vintner's Services, Inc./Associated Vintner's, Inc., Petitioner v. Workers' Compensation Appeals Board, Safeco Insurance Companies, California Insurance Guarantee Association by its servicing facility Intercare Insurance Services for HIH America in liquidation, (**Oscar Marin**), Respondents

Civil No. A110333--

Court of Appeal, First Appellate District, Division Three

*70 Cal. Comp. Cas 1519; 2005 Cal. Wrk. Comp. LEXIS 275*

August 31, 2005

**PRIOR HISTORY:** [\*\*1]

*Prior History:* W.C.A.B. Nos. SFO 0437980, SFO 0453423--WCJ Richard Newman (SFO); WCAB Panel: Commissioners Caplane, O'Brien, Brass

**DISPOSITION:** *Disposition:* Petition for writ of review denied

**HEADNOTE:** California Insurance Guarantee Association--Contribution and Reimbursement--Timeliness of Filing Claims--WCAB found that CIGA's claim for reimbursement/contribution against solvent insurance carriers for all benefits paid by itself and previously paid by insolvent carrier was timely under *Labor* [\*1520] *Code* § 5500.5, when claim was filed within one year of approved settlement between applicant and solvent carriers and was sufficient to put solvent carriers on notice that it was pursuing reimbursement/contribution. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 2.84[3][c].]

California Insurance Guarantee Association--Contribution and Reimbursement--WCAB relied on *Liberty Mutual v. W.C.A.B. (Barineau) (2001) 66 Cal. Comp. Cases 1108* (writ denied), to find that CIGA had right to reimbursement from solvent insurance carriers for pre-insolvency payments made by insolvent carrier. [See [\*\*2] generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 2.84[3][c].]

Applicant sustained industrial injuries to his low back on 10/21/97 and during the CT period ending 6/13/2000, while employed as a delivery driver by Defendant Associated Vintner's Services. The 10/21/97 injury occurred while Defendant was insured by Safeco Insurance Company, and coverage for the CT injury was split nine percent by HIH America and 91 percent by Majestic Insurance Company. Initially, HIH was the only carrier joined with respect to Applicant's CT claim, and it accepted liability and paid benefits without notice to Majestic until 3/7/2001. On 5/8/2001, HIH went into liquidation, and its claims were taken over by CIGA. Majestic was joined as a party defendant on 4/19/2002, and CIGA was dismissed on 6/24/2002 pursuant to *Insurance Code* § 1063.1.

On 9/24/2002, both Applicant's specific and cumulative injury claims were settled by way of a Joint C&R Agreement negotiated by Applicant, Safeco, and Majestic. CIGA filed a lien for reimbursement on 1/22/2003 and, in 10/2003, a Petition for Contribution for all benefits previously paid by HIH and CIGA.

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The lien dispute proceeded to a trial on 5/17/2004 on the issues of timeliness of the lien, amount of the lien, CIGA's standing to seek reimbursement for benefits paid by HIH, and allocation of liability for the lien between Majestic and Safeco. On 8/30/2004, the WCJ issued an F&O, in which he found that CIGA's claim was timely filed and was allowable under *Labor Code* § 4903 with respect to medical and medical-legal payments, and indemnity payments made to Applicant. The WCJ further found that CIGA did not have standing to seek reimbursement for that portion of its lien based on pre-insolvency payments made by HIH, and that there was insufficient evidence in the record to make a specific award of reimbursement to CIGA. The parties were ordered to adjust CIGA's lien consistent with the WCJ's opinion. In his Opinion on Decision, the WCJ cited *Industrial Indemnity Company v. W.C.A.B. (Garcia) (1997) 60 Cal. App. 4th 548, 70 Cal. Rptr. 2d 295, 62 Cal. Comp. Cases 1661*, in which the court of appeal held that, under *Insurance Code* § 1063.1(c)(9), CIGA \*\*\*4] was not liable for benefits on behalf of an insolvent insurer in a CT case, when two other insurers were jointly and severally liable. The WCJ concluded that, since CIGA never paid, as a "covered claim," the money it sought to recoup on behalf of HIH, CIGA did not have standing to assert that portion of its lien claim comprised of pre-insolvency payments made by HIH. [\*1521]

Safeco filed a letter dated 9/10/2004, which the WCAB deemed to be a petition for reconsideration, requesting clarification as to whether it was dismissed from the lien claim. If it was not dismissed, Safeco contended in relevant respects that: (1) it provided coverage for the period 9/1/97 through 5/10/99 and had coverage only for Applicant's specific injury of 10/21/97; and (2) it should be relieved of liability for the lien claim because it was not involved in the CT period.

CIGA sought reconsideration, essentially contending that the WCJ erred in finding that it did not have standing to seek reimbursement for that portion of its lien based on pre-insolvency payments made by HIH. Specifically, CIGA contended that: (1) it had standing to collect pro-rata contribution for payments made by HIH \*\*\*5] before HIH's insolvency, pursuant to *Liberty Mutual v. W.C.A.B. (Barineau) (2001) 66 Cal. Comp. Cases 1108* (writ denied); and (2) solvent insurers should not be permitted to escape liability at CIGA's expense pursuant to *Garcia*.

Majestic also sought reconsideration of the WCJ's decision, essentially contending that: (1) in the CT case, HIH was the only carrier initially joined, and HIH accepted liability and paid benefits without notice to Majestic until two months before it went into liquidation; (2) the WCJ erred in finding that CIGA's claim was timely filed; (3) CIGA failed to meet its burden of proof under *Labor Code* § 4903, sufficient to support its lien award; (4) the WCJ's F&O did not conform with *Labor Code* § 5313; (5) liability for reimbursement to CIGA should be similarly allocated as in the C&R negotiated by Safeco and Majestic, e.g., 73 percent to Majestic and 27 percent to Safeco; (6) the full value of the PD caused by Applicant's two injuries was paid to Applicant without any deduction for CIGA's PD advances, and Majestic and Safeco should not be liable for \*\*\*6] paying PD benefits twice; and (7) benefits paid to Applicant after CIGA was dismissed as a party defendant should not be ordered reimbursed to CIGA because they did not fall within CIGA's statutory obligation to pay benefits.

The WCJ recommended that Safeco's petition be dismissed and that the petitions filed by Majestic and CIGA be denied. Initially, the WCJ stated that Safeco's petition for reconsideration should be dismissed because the F&O did not constitute a final order with respect to Safeco's liability for any portion of CIGA's lien.

As to the timeliness of CIGA's lien, an issue raised in Majestic's petition, the WCJ noted that *Labor Code* § 4903.5(a), effective 1/1/2003, provided that no lien claim may be filed after six months from the date on which an order approving a C&R was issued. Here, the C&R executed by Majestic and Safeco was approved on 9/24/2002, and CIGA filed its lien on 1/22/2003, within the six-month period prescribed by *Labor Code* § 4903.5(a). However, the WCJ found that *Labor Code* § 4903.5(a) did not apply retroactively to this case. \*\*\*7] Nonetheless, the WCJ was not persuaded that CIGA's lien was untimely because, prior to the enactment of *Labor Code* § 4903.5, there was no statute of limitations with respect to the filing of a lien claim. Moreover, citing *Bethlehem Steel Corp. v. W.C.A.B. (1985) 50 Cal. Comp. Cases 186* (writ denied), the WCJ found that Majestic, by way of a letter from CIGA, was aware of CIGA's lien before

it entered into a settlement with [\*1522] Applicant, and did not show any prejudice or detriment by CIGA's filing of its lien after approval of the C&R.

With regard to Majestic's contention that CIGA failed to sustain its burden of proof to support an award, and that there were no findings with respect to Majestic's and Safeco's specific liability to CIGA, the WCJ noted that he found there was insufficient evidence to make specific findings relative to the underlying benefits comprising CIGA's lien. Thus, there was no final decision with respect to any specific monetary liability.

Next, the WCJ addressed CIGA's assertion that it had standing to assert its lien with respect to pre-insolvency payments made by HIH, pursuant [\*\*8] to the decision in *Barineau*. The WCJ noted that *Barineau* was distinguishable from the instant matter because that case involved a petition for contribution that had already been filed by the insurance carrier prior to its insolvency, so CIGA was allowed to proceed on the carrier's behalf. In the present case, CIGA was seeking, in part, reimbursement for payments made solely by HIH. Since CIGA never paid, as a "covered claim," the money it sought to recoup on behalf of HIH, the WCJ concluded that CIGA did not have standing to assert that portion of its lien claim comprised of pre-insolvency payments made by HIH, but rather could recoup only money that it had paid.

The WCAB granted reconsideration to further study the facts and applicable law in this case. On 1/26/2005, the WCAB issued its Opinion and Decision After Reconsideration. With respect to Safeco's petition, the WCAB adopted and incorporated the WCJ's report and dismissed the petition because it was not taken from a final order under *Labor Code § 5900*, given that the decision was in an amount to be adjusted. As to the petitions of CIGA and Majestic, the WCAB affirmed the WCJ's [\*\*9] decision and adopted and incorporated the WCJ's report. Regarding CIGA's petition, the WCAB noted that *Labor Code § 4903.5* did not apply because CIGA's claim was for reimbursement and CIGA was not a proper lien claimant under that section. However, the WCAB found that CIGA had standing to recoup the payments made by HIH prior to its insolvency and amended the WCJ's decision to reflect that CIGA was entitled to reimbursement to include those payments.

With regard to the petitions of Majestic and CIGA, the WCAB specifically commented in relevant respects as follows:

" Although Majestic argues that CIGA's lien was untimely filed on January 22, 2003, we are persuaded that CIGA's proceedings are in the nature of contribution/reimbursement, and not in the nature of lien claims. However, CIGA filed its petition for contribution/reimbursement within one year of the approved compromise and release of September 24, 2002 and this would satisfy the one year time requirement under *Labor Code section 5500.5(e)*.

Therefore, turning to the merits of CIGA's petition, we agree that it is entitled to reimbursement [\*\*10] for that which it paid and to the payments [\*1523] made solely by the insolvent carrier HIH. In *Liberty Mutual Fire Ins. Co. v. Workers' Comp. Appeals Bd. (Barineau) (2001) [66 Cal. Comp. Cases 1108]* (writ denied), the Board found that *Insurance Code section 1063.2(b)* allowed CIGA to be a party in interest in proceedings involving a covered claim and gives them the same rights as the insolvent insurer would have had, had it not been in liquidation. This includes the right to adjust, compromise, settle and pay a covered claim. The recovery from an insolvent insurance carrier fits within this language. Thus, the fact that CIGA has the same rights as the insolvent insurer would have had, if it had not been in liquidation, means that CIGA has the right to pursue subrogation from third parties to the same extent the insurer could have pursued subrogation, if it were not in liquidation. In *Barineau, supra*, the Board ruled, "since the proceeding for contribution is in the nature of a subrogation proceeding, if CIGA is authorized to institute subrogation proceedings, they are also authorized [\*\*11] to institute contribution proceedings." (*Id.*, p. 1110.) We specifically note that the Court of Appeal allowed to stand the assertion

that CIGA could collect through subrogation proceedings and once having done that, they could keep the funds if they have made the payments, but had to turn the funds over to the insurance commissioner if they had not. Under either circumstance, CIGA would have the right to institute subrogation proceedings and we are persuaded that the disbursement of those assets is irrelevant to the right to collect them.

Further, in *Lewis v. California Insurance Guarantee Association (2004) 69 Cal. Comp. Cases 490*, a recent Board panel decision, the Appeals Board found, based on a letter brief submitted by California Department of Insurance (citing *Insurance Code §§ 1063.2(b) and 1037(b)*), that CIGA was a proper party to pursue contributions on behalf of the insurer in liquidation for any pre-insolvency and post-insolvency benefits paid; that CIGA would be entitled to recover benefits paid by the insurer in liquidation prior [\*\*12] to its insolvency, which would be placed in assets of liquidated insurer's estate; and that the benefits paid by CIGA and recovered by it could be retained by it.

On this basis, we will amend the WCJ's decision to reflect that CIGA does have standing to seek reimbursement for that portion of its lien based on pre-insolvency payments made by HIH."

Majestic filed a Petition for Reconsideration of the WCAB's Opinion and Decision After Reconsideration, contending in relevant respects that: (1) the WCAB erred in finding that CIGA's lien was timely filed and was a claim for contribution/reimbursement rather than a lien; (2) the WCAB erred in finding that CIGA was entitled to recover pre-liquidation benefits paid by HIH; (3) the decisions in *Barineau* and *Lewis* did not apply to CIGA's rights in this matter, because CIGA was not seeking contribution provided by *Labor Code § 5500.5*; (4) CIGA had [\*1524] no statutory or legislative authority to file a lien against solvent insurers for benefits paid by insolvent insurers; (5) CIGA failed to sustain its burden of proof sufficient to justify an award because it did not comply with *Labor Code § 4903.1(c)* [\*\*13] by providing a full statement or itemization supporting its lien and right to reimbursement; and (6) CIGA's post-dismissal benefits should not be ordered reimbursed because paying such benefits did not fall within CIGA's statutory obligations.

On 4/20/2005, the WCAB issued an Opinion and Order, in which it denied reconsideration for the reasons set forth in its prior decision. In its decision, the WCAB initially noted that this was not a contribution proceeding under *Labor Code § 5500.5(e)* because CIGA/HIH was not an not an "employer or carrier held liable under the award." There was no award against CIGA. Moreover, the WCAB pointed out, CIGA was not a lien claimant under *Labor Code § 4903* because lien claimants held liens against benefits, which was not the case here. However, under *Barineau*, CIGA did have the right to subrogation or indemnification by the party that should have paid. The WCAB found that CIGA had the right to subrogation, and since the right to contribution was similar to that of subrogation, CIGA had the right to seek contribution. In addition, the WCAB noted that CIGA's lien [\*\*14] filed in 1/2003, followed by its petition for contribution filed in 10/2003, was timely and sufficient to put Majestic on notice that it was pursuing these benefits.

Majestic filed a Petition for Writ of Review, essentially contending that the WCAB erred in: (1) ordering reimbursement to CIGA, when it found that CIGA was neither a lien claimant nor had a contribution claim; (2) finding that CIGA was entitled to recover pre-liquidation benefits paid by HIH; (3) failing to address the issue of whether CIGA lacked statutory authority to pursue a lien claim; (4) finding that CIGA's lien was timely filed; (5) failing to address the issue of whether CIGA met its burden of proof to support the award; and (6) failing to address the issue of whether the WCJ's F&O failed to comply with *Labor Code § 5313*.

CIGA filed an Answer, substantially contending that the WCAB properly found that its lien was timely filed and that it was entitled to recover pre-liquidation payments made by HIH.

WRIT DENIED August 31, 2005.

**COUNSEL:** *Counsel:* For petitioner--Bruyneel & Leichtnam, by Judith A. Leichtnam

For respondents CIGA, Intercare Insurance Services, HIH [\*\*15] America--Laughlin, Falbo, Levy & Moresi, by Randall G. Poppy

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