

Fremont Compensation Insurance Group/Fremont Compensation Insurance Company, insurer for Los Angeles Turf Club, Petitioners v. Workers' Compensation Appeals Board, Oak Tree Racing Association, insured by Reliance Insurance Company, in liquidation, represented by California Insurance Guarantee Association, (Mercedes Sariol), Respondents

Civil No. B163907--

Court of Appeal, Second Appellate District, Division Three

68 Cal. Comp. Cas 479

Writ of Review Denied March 10, 2003

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

On 10/6/91 and 11/14/91, Applicant sustained specific injuries to her back, upper extremities, psyche, and right knee while employed as a customer relations patron employee by Oak Tree Racing Association. At the time of Applicant's injuries, Oak Tree Racing Association was insured by Reliance Insurance Company.

On 4/25/94, Applicant sustained an industrial injury to the right knee, back, upper extremity, and psyche, while employed as a customer relations patron services employee by Defendant Los Angeles Turf Club. At the time of her injury, Defendant was insured by Fremont Compensation Insurance Company.

Applicant's three specific injury cases were consolidated. Dr. Daniel Capen declared Applicant P&S on 7/13/98 and opined that all three of Applicant's specific injuries contributed to Applicant's PD. Based on the medical opinion of Dr. Capen, and the psychiatric factors of PD set forth in the defense medical report of Dr. Lawrence Moss dated 10/12/98, a formal rating was issued.

On 6/30/2000, the WCJ issued a Joint F&A, finding joint and several liability and awarding 100-percent PD. In his Opinion on Decision, the WCJ indicated that Applicant became P&S for the three specific injuries at the same time. He also indicated that liability for the combined total PD award under *Wilkinson v. W.C.A.B.* (1977) 19 Cal. 3d 491, 138 Cal. Rptr. 696, 564 P.2d 848, 42 Cal. Comp. Cases 406, was apportioned equally, one-third to each of the three specific injuries, based upon Dr. Capen's medical opinion. Fremont Compensation was assessed liability for one-third of the award, and Reliance Insurance Company was liable for two-thirds of the award. Fremont Insurance was designated as the administrator of the award.

On 6/22/2001, Fremont Insurance filed a Petition for Contribution/Reimbursement of the two-thirds portion of the award it was ordered to administer, for which Reliance Insurance Company had liability. Fremont Insurance also sought to alter or amend the Joint F&A under Labor Code § 5803, to sever the award and to relieve Fremont from the responsibility of administering Reliance Insurance Company's portion of the award.

Subsequently, Reliance Insurance Company became insolvent, and CIGA began administering its workers' compensation claims.

On 4/8/2002, the WCJ issued a notice of intention to sever the Joint F&A and to grant Fremont's request for reimbursement. Reliance/CIGA objected. Following a trial in this matter, the WCJ issued a decision finding that the WCAB had continuing jurisdiction over his 6/30/2000 Joint F&A to act on Fremont's motion to sever and order CIGA, on behalf of Reliance Insurance, to reimburse Fremont for benefits paid under the Joint F&A. Accordingly, the WCJ granted Fremont's motion to sever the award, designated Fremont and Reliance to each administer its own portion of the award, and ordered Reliance/CIGA to reimburse Fremont for payments already made.

CIGA filed a Petition for Reconsideration, contending in pertinent part that: (1) the WCJ erred in finding that he had jurisdiction to alter the Joint F&A dated 6/30/2000 because more than five years had elapsed since Applicant's dates of injury; and (2) the WCJ erred in finding that the Joint F&A did not bar a

claim for contribution against CIGA under Insurance Code § 1063.1(c)(9). CIGA further contended that Fremont's only remedy was to file a claim against the estate of Reliance, in liquidation.

The WCJ recommended that reconsideration be denied, noting in his report that the WCJ's supplemental order severing the award and ordering reimbursement was a ministerial order and did not affect the merits of his underlying decision awarding 100-percent PD, which was apportioned equally among each of Applicant's three injuries. The supplemental order was issued merely to facilitate the provision of benefits and did not change Applicant's entitlement to benefits. Accordingly, the WCJ found that he had continuing jurisdiction to issue the supplemental order that was collateral to the issue of Applicant's entitlement to benefits. The WCJ concluded that:

"Because the designation of Fremont Compensation Insurance Company as administrator of the joint & several award is a ministerial act, and because the parties' respective liabilities have already been adjudicated and determined to be 1/3rd by Fremont and 2/3rd by Reliance Insurance Company, and given the failure and/or refusal of Reliance/CIGA to reimburse Fremont for Reliance's clear and separate liability for its 2/3rd portion of the award, there was good cause to grant the motion to sever, and designate each party defendant to administer its own portion of the award. CIGA's contentions to the contrary are without merit."

The WCJ next addressed CIGA's contention that whenever there is a joint and several award, Insurance Code § 1063.1(c)(9) bars any claim for contribution against CIGA, since "other workers' compensation insurance is available." He indicated that the issuance of a Joint F&A in this matter did not create liability on the part of Fremont Insurance for injuries sustained by Applicant while employed by Oak Tree Racing Association, then insured by Reliance Insurance Company. The WCJ noted that, here, there was no insurance providing the required coverage to Oak Tree Racing Association other than that provided by Reliance Insurance Company. Thus, according to the WCJ, CIGA was responsible for the two-thirds portion of Applicant's 100-percent PD award, and CIGA's refusal to reimburse Fremont for its percentage of the award justified the severing of the award, the order that CIGA administer its portion of benefits owed, and the order that CIGA reimburse Fremont Insurance for benefits already paid.

Although the WCAB agreed with the WCJ that it had jurisdiction to adjudicate contribution issues more than five years from the DOI when there was a joint and several award, it disagreed that Fremont's claim was a "covered claim" for purposes of establishing liability of CIGA to Fremont. Accordingly, the WCAB granted reconsideration and rescinded the WCJ's finding of liability.

The WCAB reasoned as follows:

"In the J&S Award of June 30, 2000, the WCJ found that applicant sustained three industrial injuries, two while employed by Oak Tree Racing Association, insured by Reliance, on October 6, 1991 (VNO 328816) and on November 14, 1991 (VNO 328844); and a third injury on April 25, 1994 while employed by Los Angeles Turf Club, insured by Fremont (VNO 373756). The WCJ also found, among other things, that the injuries resulted in temporary total disability during the period November 8, 1996 to July 13, 1998, permanent disability of 100% with no legal basis to apportion the disability, and need for further medical treatment. In the Joint Findings of Fact and Award, there was no specific finding as to apportionment of liability between the injuries, although in the Joint Opinion on Decision the WCJ indicated that permanent disability is apportioned & 1/3 to each injury based upon the medical opinion of Dr. Capen. The language in awarding benefits to applicant read [*sic*] as follows, in pertinent part:"

"JOINT AWARD

""JOINT & SEVERAL AWARD IS MADE in favor of MERCEDES SARIOL against RELIANCE INS. CO. and FREMONT COMP. INS. CO., to be administered and paid by Fremont Compensation Insurance Company as follows: ""

"Fremont sought reconsideration of the J&S Award unsuccessfully wherein it attempted to challenge the WCJ's finding of back and psyche injury as a

compensable consequence of her right knee injury. The J&S Award became final when the Board dismissed the petition for reconsideration on January 17, 2001. Reliance became insolvent in October of 2001 and CIGA then had liability for "covered claims." (Ins. Code § 1063.1 et seq.) "

"On or about October 2, 2001, Fremont filed a petition seeking to alter or amend the J&S Award to sever the administration of benefit payments and for an order directing Reliance to reimburse Fremont for its share of the J&S Award, a sum totaling \$58,707 allegedly paid of Reliance's share. This eventually led to the WCJ's decision of September 13, 2002 now challenged by CIGA on behalf of Reliance, in liquidation."

"We conclude that prior to Reliance's insolvency, there was no determination of separate liability for the injuries. The J&S Award of June 30, 2000 states that liability is joint and several. The Joint Opinion on Decision does state that liability is &1/3 to each injury, but that is not in the findings or award, and has no legal effect. Fremont attempted to file reconsideration from this decision and failed. But it did not attempt, however, unsuccessfully, to raise the joint and several issue."

"Insurance Code section 1063.1 provides, in part, as follows:"

"(5) "Covered claims" does not include any *obligations to insurers*, insurance pools, or underwriting associations, nor their claims for contribution, indemnity, or subrogation, equitable or otherwise, except as otherwise provided in this chapter."

". . . "

"(9) "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 nor (ii) any claim by any person other than the original claimant under the insurance policy in his or her own name, his or her assignee as the person entitled thereto under a premium finance agreement as defined in Section 673 and entered into prior to insolvency, his or her executor, administrator, guardian or other personal representative or trustee in bankruptcy and does not include any claim asserted by an assignee or one claiming by right of subrogation, except as otherwise provided in this chapter."

"[italics supplied by WCAB]"

"Here, the J&S Award of June 30, 2000 specifically imposed joint and several liability upon Fremont and Reliance. By its terms, it left the insurers to settle their respective liabilities to each other since Fremont was designated to administer benefits awarded."

"The two cases involving Reliance, in liquidation, appear to fall outside of CIGA's liability pursuant to Insurance Code section 1063.1(c)(5)&(9), which excludes from "covered claims" any *obligations to insurers* and excludes a claim to the extent the claim is *covered by any other insurance* available to applicant. "

"We note that Fremont was designated to administer payment of benefits to applicant under the J&S Award that included the injuries of October 6, 1991 and November 14, 1991 under Reliance, in addition to the injury of April 25, 1994. Under these circumstances Reliance no longer had any liability to provide benefits to applicant, and instead any obligation it had extended to Fremont for that portion of benefits Fremont paid applicant on Reliance's behalf. This change [*sic*] the nature of Reliance's liability under the award to a potential

obligation to pay Fremont instead of to applicant. Under these circumstances, it appears that CIGA would be statutorily exempt from liability to pay any obligation owing to *another insurer*, absent other reasons establishing liability."

"More importantly, as a joint and several award, applicant could recover from Fremont the entire award notwithstanding that two of the injuries fell under Reliance's coverage. Accordingly, CIGA has no liability to pay any amount on the June 30, 2000 J&S Award since *other insurance* is available by virtue of the joint and several award of June 30, 2000."

"Accordingly, we will grant CIGA's petition for reconsideration and as our decision after reconsideration we will rescind the WCJ's decision and find that CIGA has no obligation to pay benefits under the J&S Award of June 30, 2000, or reimburse Fremont for benefits it paid under that award."

Fremont Insurance filed a Petition for Writ of Review, contending in pertinent part that: (1) the WCAB improperly created insurance coverage where none existed in order to protect CIGA; (2) the WCAB erroneously ignored the meaning of the phrase "joint and several" as used by the WCJ so as to alter the Joint F&A; (3) the WCAB's decision did not effectively determine the separate liability of Defendants; and (4) the WCAB abused its power by *sua sponte* raising an issue that was not raised as an issue for reconsideration.

CIGA filed an Answer, disputing Fremont's contentions and contending in relevant respects that: (1) Fremont waived its right to contest the finding of joint and several liability since both Fremont and Reliance elected to be represented by the same attorney, thereby waiving any potential conflicts arising out of such representation; (2) Fremont waived its objections to the joint and several award by its failure to file a timely Petition for Reconsideration; (3) Fremont's request for contribution against CIGA violated the principle of law that when multiple defendants are held to be jointly and severally liable, CIGA does not have liability when other insurance is available; and (4) the WCAB has no jurisdiction to alter or rescind its finding of joint and several liability more than five years from the DOI.

WRIT DENIED March 10, 2003.

COUNSEL: *Counsel:* For petitioner--Zaks & Barnard, by Richard Zaks
For respondent California Insurance Guarantee Association and its servicing facility Integrated Claims Administrators for Reliance Insurance Co., in liquidation--Kegal, Tobin & Truce, by W. Joseph Truce