

Sherman Loehr Custom Tile Works, Cambridge Integrated Services Group, Inc., administrator for Fremont Indemnity Company, successor in interest to Citation Insurance Company, Petitioner v. Workers' Compensation Appeals Board, California Insurance Guarantee Association, for California Compensation Insurance Company/Superior National Insurance Company, in liquidation, (**Michael Cooke**), Respondents

Civil No. C043963--

Court of Appeal, Third Appellate District

68 Cal. Comp. Cas 1262

July 3, 2003

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

Applicant claimed CT injury AOE/COE ending 7/20/92 to his neck and back, while working for employer as a tile setter. His employer during the year preceding the ending date of his injury was found liable pursuant to Labor Code § 5500.5. During that year, California Compensation Insurance Co. (Cal Comp) and Citation Insurance Co. (Citation) carried workers' compensation insurance for the employer.

The parties submitted stipulations with request for award to the first WCJ, and that WCJ approved the stipulated award on 8/2/95. The award included stipulations that Cal Comp had 94.5 percent of the liability for Applicant's benefits and Citation had 5.5 percent of the liability, and that Cal Comp was to administer the award with right of contribution from Citation. The WCJ issued a joint and several award against both Cal Comp and Citation, with Cal Comp as administrator of the award. The stipulated award also included a stipulation that "Board reserves jurisdiction indefinitely to resolve any dispute between Citation and Cal Comp over relative \$ contributions." The stipulated award provided for 100 percent PTD benefits to Applicant and stated that Applicant had a need for further medical treatment.

After the stipulated award, the WCAB awarded Applicant penalties against Citation for delay in providing medical treatment. Cal Comp subsequently became insolvent and was represented in liquidation by CIGA. Applicant filed a petition for multiple penalties against Citation and CIGA (for Cal Comp) for alleged delay in paying existing penalty awards.

CIGA filed a petition for change of administrator. At a WCAB conference, Citation and CIGA submitted the issue to the second WCJ for determination. On 2/11/2003 the second WCJ issued an Order Changing Administrator and in that

order stated: "Citation/Fremont Insurance Company is ordered to administer the Award of August 2, 1995." In his opinion on decision, the WCJ further explained his order:

"It is appropriate to take judicial notice of the growing number of insolvencies of workers' compensation carriers and the increased burden that these failures are placing on CIGA to meet its obligation on "covered claims." (*Safeco Insurance Co. v. WCAB et al. [Givens]* (2002, wir. [sic] den.) [67 Cal. Comp. Cases 1372, 1374] "

"At the time of the award it was quite appropriate to designate CalComp as the administrator in view of it having almost 95% of the liability. However, there have been several changes in the past eight and a half years which warrant substituting Citation/Fremont as administrator."

"Most significant is that CalComp is in liquidation. Additionally, there are two penalties on medical treatment which are awarded solely against Citation. Finally, applicant has alleged in a Petition for Multiple Penalties, et al. that there have been delays by Citation/Fremont in paying these penalties because of alleged failure of CIGA to provide timely accounting on which to compute the penalties. Thus, with Citation/Fremont assuming administration, it will be in a better position to account for medical costs against which existing penalties are to be computed."

Citation sought removal to the WCAB under Labor Code § 5310, because of the 2/11/2003 order changing administrator, contending that order would cause irreparable harm to Cambridge Integrated Services Group (Cambridge). Citation also contended that it was an abuse of discretion to order a change of administrator, that the WCAB did not have jurisdiction to alter or amend the 1995 stipulated award more than five years after Applicant's date of injury, and that changing the administrator altered or amended the stipulated award. Also, according to Citation's petition for removal, Citation was purchased by Fremont and was administered by Cambridge, and Cal Comp was purchased by Superior National Insurance Co., which later became insolvent and was administered by CIGA.

The WCJ recommended that the WCAB deny removal. The WCJ's report stated in pertinent part:

"It has long been the law that an award for all liability for a cumulative exposure may be made against a single carrier with just a portion of the exposure. (*Colonial Ins. Co. v. I.A.C. [Pedroza]* (1946) [29 Cal. 2d 79, 172 P.2d 884] [11 Cal. Comp. Cases 226, 230] Thus, if applicant in the instant case had elected to proceed only against Citation and had been found to be 100% disabled, an award would properly have issued against Citation for all liability. (Ibid.) Citation could then have proceeded, to have "(t)he issue of contribution (from California Compensation) . . . separately determined." (Ibid.)"

"The fundamental policy underlying "several" liability is that "(t)he burden of the disability is to be borne by industry." (Ibid, 229) It is " 'against the policy of the compensation act, and contrary to its spirit and intent, to allow an agreement between joint obligors to *diminish the remedy of the employee*. Despite any agreement between themselves as to which of them shall bear the burden of their liability, the employers are jointly and severally liable to the employee . . . ' . . . (Emphasis added [by WCJ]) . . . " (Ibid.) It is upon this substrate that the Stipulations and Award of August 2, 1995, must be tested."

"It is apparent from *Colonial* that resolution as between defendants is not the same as resolution of liability between a defendant and an applicant. If there were no entity such as CIGA to assume the obligations of failed carriers, would the injured worker be limited in his recovery to, e.g., just 5&1/2 % of each permanent disability payment or 5&1/2 % of the cost of each medical treatment? Such a result would mean that, contrary to *Colonial*, the parties were able to violate the "spirit and intent" of the workers' compensation laws and, by their agreement, "diminish the remedy of the employee." (Ibid.)"

"Labor Code section 5804 provides, "No award of compensation shall be rescinded, altered, or amended after five years from the date of the injury except upon a petition . . . filed within such five years" Citation contends this statute bars changing administrators because the appeals board lacks jurisdiction to do so as no petition was filed."

"The award, as noted, was joint and several in favor of applicant and against Citation and California Compensation. The order changing administrators does not alter the award. Therefore, section 5804 has no bearing."

"The WCJ's power to appoint a single carrier to administer the award is "a matter of discretion." (*General Insurance Company et al v. WCAB et al. [Sale]* (1980) [104 Cal. App. 3d 278, 163 Cal. Rptr. 537] [45 Cal. Comp. Cases 403, 409] Citation contends the WCJ abused his discretion in ordering it to administer the award."

"Citation points out that it "entered into an agreement," under which it has 5&1/2 percent of overall liability for 100 percent permanent disability. [*WCJ's footnote omitted*] "Its reserves were set and its potential exposure ascertained." [*WCJ's citation to record omitted*] The petition goes on to state: "If the WCJ has the power to alter the agreement at this late stage in the claim, it will be tremendously disruptive to Citation's successor, Cambridge. All business decisions on the part of Citation's successor with regard to this claim have been made under the assumption that the status quo with respect to liability and administration of the Award will remain. It will become extremely

difficult, if not impossible, to continue to operate an insurance company in the State of California if the future of individual claims is, to a large degree, uncertain, rendering any business forecasting irrelevant." [WCJ's footnote omitted]"

"Although the WCJ is uncertain that Cambridge can be lawful successor to Citation, [WCJ's reference to footnote omitted] he believes that Citation raises an important point, regardless of what entity lawfully has the risk. This is because the WCJ believes that the change of administrator heralds a determination that the Award August 2, 1995, is not a covered claim pursuant to Insurance Code section 1063.1(c)(9)."

"CIGA was created to establish a fund for claims if insurers could not meet their obligations. CIGA's liability is limited to "covered claims" as described in section 1063.1 (*Industrial Indemnity Co. v. WCAB et al. [Garcia]* (1997) [60 Cal. App. 4th 548, 70 Cal. Rptr. 2d 295] [62 Cal. Comp. Cases 1661, 1666-1667])"

"Section 1063.1(c)(9) provides that "covered claims" do 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" In dicta in a Significant Panel Decision, the appeals board states that a claim would not be covered by CIGA if there were other insurance with "even a day of injurious exposure." . . . [*Lee v. Miracle Ford* (2003) 68 Cal. Comp. Cases 213 (WCAB significant panel decision)]."

"In its Petition For Removal Citation describes its obligation as "*de minimus*," which means, "The law does not care for, or take notice of, very small or trifling matters." (Black's Law Dictionary) If Citation's exposure were *de minimus*, it would have no liability. The very fact that it has liability, though relatively small compared to that of CIGA, takes it out of the category of being *de minimus*."

"The limitations of CIGA are clear. "(I)n creating CIGA, the Legislature 'chose to provided a limited form of protection for the public, not a fund for the protection of other insurance companies from the insolvencies of fellow members.' (citations omitted) Accordingly, as noted by one appellate court, various subdivisions of Insurance Code section 1063.1 express the 'statutory intent not to use CIGA funds to pay the insolvent's obligations to other insurers' (citation omitted) . . . Reasonably read, the statute indicates that a claim does not rise to the level of a 'covered claim' where other insurance providing the required coverage is available to either the claimant or the insured In sum, the Legislature did not intend CIGA to defray or diminish the responsibility of other carriers. Instead, the Legislature intended CIGA to benefit claimants otherwise unable to obtain insurance in payment of their claims." (*Industrial Indemnity, supra*, 1668-69)"

"In view of the foregoing, the WCJ firmly believes he properly exercised his discretion in ordering Citation to become administrator."

The WCAB denied removal and adopted and incorporated the WCJ's report, without further comment.

Citation/Fremont/Cambridge filed a Petition for Writ of Review and in pertinent part repeated the contentions from their Petition for Removal.

CIGA filed an Answer on behalf of Cal Comp and supported the WCAB's decisions ordering change of administrator and denying removal.

WRIT DENIED July 3, 2003.

COUNSEL: *Counsel:* For petitioner--Bradford & Barthel, by Gregory P. Fletcher
For respondent employer--McMurchie, Weill, Lenahan, Lee, Slater & Pearse, by Colin S. Connor