

[2013 Cal. Wrk. Comp. P.D. LEXIS 615](#)

Workers' Compensation Appeals Board (panel Decision),

Opinion Filed December 5, 2013 ; December 5, 2013

W.C.A.B. No. ADJ1527853 (WCK 0005092)—WCAB Panel: Chairwoman Caplane, Commissioner Sweeney, Deputy Commissioner Dietrich

Reporter

2013 Cal. Wrk. Comp. P.D. LEXIS 615

Jeff Millman, Applicant v. Contra Costa County, PSI, Defendant

Status:

CAUTION: This decision has not been designated a "significant panel decision" by the Workers' Compensation Appeals Board. Practitioners should proceed with caution when citing to this panel decision and should also verify the subsequent history of the decision. WCAB panel decisions are citeable authority, particularly on issues of contemporaneous administrative construction of statutory language [see [Griffith v. WCAB \(1989\) 209 Cal. App. 3d 1260, 1264, fn. 2, 54 Cal. Comp. Cases 145](#)]. However, WCAB panel decisions are not binding precedent, as are en banc decisions, on all other Appeals Board panels and workers' compensation judges [see [Gee v. Workers' Comp. Appeals Bd. \(2002\) 96 Cal. App. 4th 1418, 1425 fn. 6, 67 Cal. Comp. Cases 236](#)]. While WCAB panel decisions are not binding, the WCAB will consider these decisions to the extent that it finds their reasoning persuasive [see [Guitron v. Santa Fe Extruders \(2011\) 76 Cal. Comp. Cases 228, fn. 7 \(Appeals Board En Banc Opinion\)](#)]. LexisNexis editorial consultants have deemed this panel decision noteworthy because it does one or more of the following: (1) Establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in other decisions, or modifies, or criticizes with reasons given, an existing rule; (2) Resolves or creates an apparent conflict in the law; (3) Involves a legal issue of continuing public interest; (4) Makes a significant contribution to legal literature by reviewing either the development of workers' compensation law or the legislative, regulatory, or judicial history of a constitution, statute, regulation, or other written law; and/or (5) Makes a contribution to the body of law available to attorneys, claims personnel, judges, the Board, and others seeking to understand the workers' compensation law of California.

Disposition: [*1]

Reconsideration is *granted* and the WCAB's April 18, 2013 Findings and Order is *affirmed*.

Core Terms

workers' compensation, reconsider, insurance coverage, excess insurance, panel decision, self-insured, arbitrate

Headnotes

CALIFORNIA COMPENSATION CASES HEADNOTES

Insurance Coverage—Excess Coverage—WCAB affirmed WCJ's finding that WCAB did not have jurisdiction to determine contract dispute between defendant and its excess insurance carrier over whether certain utilization and bill review expenses were covered by excess insurance policy, when WCAB found that dispute was contract dispute between insurer and insured rather than workers' compensation coverage dispute subject to mandatory arbitration, that although many self-insured employers purchase excess insurance, excess insurance is not valid method of securing workers' compensation coverage under [Labor Code § 3700\(c\)](#) because excess policy is not workers' compensation policy as defined by Insurance Code and cannot, by itself, provide workers' compensation insurance

coverage, that while excess insurer may be joined as party by WCAB, excess carrier may not be substituted for self-insured employer as sole entity with potential liability under [Labor Code § 3755](#), that although [Labor Code § 5275](#) does not explicitly state that only workers' compensation coverage disputes [*2] **are subject to mandatory arbitration, based on provision's location in Division Four of Labor Code and congruence between workers' compensation liability and workers' compensation insurance policies, mandatory arbitration provision in [Labor Code § 5275](#)** applies only to workers' compensation insurance coverage disputes, and that parties can seek remedy in civil court in **form of declaratory relief**. [See generally [Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 2.83.](#)]

Opinion By: Chairwoman Ronnie G. Caplane

Opinion

OPINION AND DECISION AFTER RECONSIDERATION

On July 8, 2013, the Workers' Compensation Appeals Board (Appeals Board) granted reconsideration of the April 18, 2013 Findings and Order to further study the factual and legal issues. This is our Decision after Reconsideration.

In the April 18, 2013 Findings and Order, the workers' compensation administrative law judge (WCJ) found that the WCAB does not have jurisdiction to determine a contract dispute between Contra Costa County and its excess insurer General Reinsurance Corporation (GRC) and dismissed GRC as a party defendant. GRC and Contra Costa County dispute whether certain utilization and bill review expenses are covered by the excess insurance [*3] policy. (Petition for Reconsideration, p. 3, lines 20–21.)

Contra Costa County contends that the WCAB has jurisdiction, arguing that GRC is a properly joined insurer and [Labor Code sections 5275, 5300\(f\)](#) and [5803](#) provide the WCAB with jurisdiction over the dispute.

We have considered the Petition for Reconsideration, and we have reviewed the record in this matter. The WCJ prepared a Report and Recommendation on Petition for Reconsideration recommending that we grant reconsideration and find that the WCAB has jurisdiction to resolve the dispute between GRC and Contra Costa County. For the reasons discussed below, we will affirm the WCJ's April 18, 2013 decision that the WCAB does not have jurisdiction over this dispute.

The dispute between the County and GRC is whether, pursuant to the terms of an excess insurance policy, GRC is obligated to reimburse the County for certain bill review fees. (Petition, p., [3 In. 20–21](#); Answer, p. 2, In. 16–20.) For the reasons discussed below, this particular dispute is a contract dispute between an insurer and insured rather than a workers' compensation insurance coverage dispute subject to mandatory arbitration.

In California, every employer is required [*4] to "secure the payment of compensation." ([Lab. Code § 3700.](#)) [Labor Codes section 3207](#) defines "compensation" as "compensation under this division and includes every benefit of payment conferred by this division. . ." "This division" is Division Four of the Labor Code. This mandate is satisfied by either purchasing workers' compensation insurance, or self-insuring. (*Ibid.*) A county may secure payment of compensation "by securing from the Director of Industrial Relations a certificate of consent to self-insure against workers' compensation claims." ([Lab. Code § 3700\(c\).](#)) While many self-insured employers purchase excess insurance, excess insurance is not a method of securing compensation under [Labor Code section 3700.](#)

[Labor Code section 5275](#) provides that disputes involving insurance coverage shall be submitted to arbitration. ([Lab. Code § 5275.](#)) However, in this case, there is no dispute that the County is self-insured. Accordingly, there is no dispute involving insurance coverage.

Furthermore, the County's excess policy is not a workers' compensation policy as defined by the Insurance Code and accordingly it cannot, by itself, provide workers' compensation insurance coverage. The terms [*5] of workers' compensation policies issued in California are governed by statute, and each policy is conclusively presumed to contain all the provisions required by law. ([Ins. Code, § 11650.](#)) Workers' compensation insurance policies in California are subject

to regulation by the Department of Insurance. (*Ins. Code §§ 11651, 11657, 11658.*) All workers' compensation policies must "contain a clause to the effect that the insurer will be directly and primarily liable to any proper claimant for payment of . . . compensation." (*Ins. Code §11651.*) Endorsements that limit or restrict coverage of workers' compensation policies are subject to prior approval by the Insurance Commissioner. (*Cal. Code Regs. tit. 10, §§ 2261, 2262.*)¹ If an employer's insurer agrees to pay any compensation due, the insurer is substituted for the employer in any proceedings. (*Lab. Code § 3755.*)

Excess insurance policies, like workers' compensation insurance policies, are also subject to regulation by the Department of Insurance. However, the regulations affecting excess insurance are much less extensive than those affecting Worker's Compensation policies. (WCIRB Miscellaneous Regulations for the Recording and Reporting of Data - 1995, part 4 - Excess Insurance.) Excess insurance policies may be limited and restricted without compliance with the regulations applicable to worker's compensation policies. While an excess insurer may be joined as a party by the WCAB, the excess carrier may not be substituted for the self-insured employer as the sole entity that may be held liable under *Labor Code section 3755*. (*General Reinsurance Corporation v. Workers' Comp. Appeals Bd. (St. Jude Hospital) (2000) 65 Cal.Comp.Cases 1441* (writ den.).)

Because GRC provided excess insurance rather [*7] than workers' compensation insurance, there can be no dispute between the County and GRC over whether GRC provided workers' compensation coverage. While *Labor Code section 5275(a)* does not explicitly state that only workers' compensation coverage disputes are subject to mandatory arbitration, given its location in Division Four of the Labor Code, and the congruence between workers' compensation liability and workers' compensation insurance policies, we conclude that *Labor Code section 5275(a)* applies to workers' compensation insurance coverage disputes. Interpretation of policy provisions regarding reimbursement of certain expenses could be submitted to an arbitrator by agreement of the parties, but it is not an insurance coverage dispute subject to mandatory arbitration.

Although we do not have jurisdiction over this dispute because it does not involve a workers' compensation insurance coverage dispute, the parties are not without remedies. The parties can seek declaratory relief in civil court. (*General Reinsurance Corporation v. St. Jude Hospital (Ballard) 107 Cal.App.4th 1097 (68 Cal.Comp.Cases 591).*) An employer can recover against its workers' compensation insurer in civil court [*8] for breach of contract, bad faith, or breach of the implied covenant of good faith and fair dealing. (*State Comp. Ins. Fund v. Superior Court (2001) 24 Cal.4th 920 [66 Cal.Comp.Cases 16]*; *Lance Camper Manufacturing Corp. v. Republic Indemnity Co. (1996) 44 Cal.App.4th 194 [61 Cal.Comp.Cases 371]*.) *La Jolla Beach & Tennis Club v. Industrial Indem. Co. (1994) 9 Cal.4th 27 [59 Cal.Comp.Cases 1002]*.)

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeal Board that the April 18, 2013 Findings and Order is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

Chairwoman Ronnie G. Caplane

I concur,

Commissioner Marguerite Sweeney

Deputy Commissioner Rick Dietrich

¹ The Administrative Hearing Bureau (AHB) of the Department of Insurance conducts hearings regarding noncompliance with regulations and withdrawal of Insurance Commissioner approval of policy forms. The courts will defer to the Insurance Commissioner's interpretation of his own regulations because the agency is presumably familiar [*6] with the regulations and sensitive to the practical implications of one interpretation over another. (See *Yamba Corp. of America v. State Bd. Of Equalization (1998) 19 Cal.4th 1, 12-13 [78 Cal. Rptr. 2d 1, 960 P.2d, 1031]*; *Simi Corp. v. Garamendi (2003) 109 Cal APP. 4th 1496, 1504-1505 [1 Cal. Rptr. 3d 207]*.)

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