

79 Cal. Comp. Cases 439; 2014 Cal. Wrk. Comp. LEXIS 32

Court of Appeal, First Appellate District, Division Three

March 6, 2014 Writ of Review Denied; March 6, 2014

Civil No. A140765

Reporter

79 Cal. Comp. Cases 439; 2014 Cal. Wrk. Comp. LEXIS 32

Contra Costa County, PSI, Contra Costa County Risk Management, Petitioner v. Workers' Compensation Appeals Board, General Reinsurance Corp., Jeffrey Millman, Respondents

Prior History:

[**1]

W.C.A.B. Nos. ADJ1527853 [WCK 005092]—WCJ Deborah Ross (OAK); WCAB Panel: Chairwoman Caplane, Commissioner Sweeney, Deputy Commissioner Dietrich [see [Millman v. Contra Costa County, 2013 Cal. Wrk. Comp. P.D. LEXIS 615 \(Appeals Board noteworthy panel decision\)](#)]

Disposition: Petition for writ of review denied

Headnotes

CALIFORNIA COMPENSATION CASES HEADNOTES

Insurance Coverage—Excess Insurance Policies—

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 review 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' [*440] compensation coverage under [Labor Code § 3700](#) 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 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 may seek remedy in civil court in form of declaratory relief.

[See generally [Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 2.83.](#)]

CALIFORNIA COMPENSATION CASES SUMMARY

Applicant suffered an industrial injury on 3/22/90 while employed as a deputy sheriff by Defendant Contra Costa County. On 5/9/95, a Stipulated Award was approved in Applicant's case-in-chief, which provided Applicant with ongoing medical care.

The County was, at all relevant times, permissibly self-insured against workers' compensation claims, and also carried an excess insurance policy issued by General Reinsurance Corporation (GRC) for losses over \$500,000. Losses resulting from

Applicant's ongoing medical award surpassed the \$500,000 threshold, triggering GRC's liability for reimbursement to the County. GRC paid the County at least \$277,000 for medical expenses. However, a coverage dispute arose between the County and GRC over whether, pursuant to the terms of the excess insurance policy, GRC was liable for certain payments made by the County in Applicant's case relative to UR and certain medical bill review fees.

GRC alleged that the disputed costs were excluded "administrative costs" rather than claim expenses, pursuant to a clause in the excess insurance policy defining claim expenses:

Claim expenses of the insured mean its litigation costs, interest as required by law on awards or judgments, and its claim investigation or legal expenses which can be directly allocated to a specific claim. Claim expenses exclude: salaries and travel expenses of employees of the Insured, annual retainers, overhead and any fees it paid for claim administration.

The County disputed GRC's interpretation of this clause and sought proper construction from the WCAB, which the County claimed was uniquely qualified to construe provisions in workers' compensation policies.

The matter proceeded to trial on the sole issue of whether the WCAB had subject matter jurisdiction to interpret a clause in the excess insurance policy issued by GRC. The WCJ issued an F&O, in which she found in relevant portion that the WCAB had jurisdiction to interpret the excess insurance policy issued by [*441] GRC, and that the matter should be referred to mandatory arbitration to resolve the coverage dispute. GRC sought reconsideration/removal, contending in pertinent part that its dispute with the County involved breach of contract, for which the only remedy was an award of contract damages. The County claimed that it was error for the WCJ to refer the matter to arbitration, because jurisdiction over the contract dispute rested exclusively with the Superior Court. After consideration of GRC's contentions, the WCJ vacated the F&A.

The WCJ issued an Amended F&O, in which she determined that the WCAB did not have jurisdiction over the contract dispute between the County and GRC, since the dispute did not involve any continued obligation to pay compensation benefits to Applicant. On that basis, the WCJ dismissed GRC as a party defendant.

The County filed a Petition for Reconsideration, contending in pertinent portion that the WCJ erred in finding that the WCAB was without jurisdiction to consider the parties' dispute, that [Labor Code §§ 5275, 5300\(f\)](#), and [5803](#) provided the WCAB with jurisdiction over the matter, and that GRC was a properly joined insurer and should not have been dismissed. The WCJ recommended that the WCAB grant reconsideration and find that the WCAB had jurisdiction to resolve the dispute between GRC and the County. In recommending that the WCAB find jurisdiction, the WCJ opined that GRC's position advocating against jurisdiction flowed from its misconstruction of the nature of the parties' dispute as "a breach of contract case," when it was, in fact, a dispute over the interpretation of a policy clause involving payment of workers' compensation costs. The WCJ also stated that the WCAB was authorized to resolve the dispute pursuant to [Labor Code § 5300](#), which broadly permits the WCAB to resolve controversies arising from workers' compensation claims.

The WCAB declined to follow the WCJ's recommendation and, instead, affirmed the WCJ's Amended F&O that the WCAB was without jurisdiction over the coverage dispute between the County and GRC.

The WCAB noted that all employers are required under [Labor Code § 3700](#) to secure the payment of workers' compensation insurance, as defined in [Labor Code § 3207](#), and that self-insurance satisfies this requirement. The WCAB pointed out, however, that, while many self-insured employers purchase excess insurance for additional coverage, such excess insurance is not a method of securing compensation under [Labor Code § 3700](#). Additionally, the WCAB explained that, because excess insurance policies are not workers' compensation policies, they do not provide workers' compensation coverage:

... [T]he 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 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 [*442] 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.*) [WCAB's *footnote*: 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 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]*.)] If an employer's insurer agrees to pay any compensation due, the insurer is substituted for the employer in any proceedings. (*Lab. Code § 3755.*)

The WCAB specifically noted that, while excess insurance policies are subject to regulation, excess insurers are not bound by the same regulations applicable to workers' compensation policies and cannot be held solely liable for workers' compensation benefits:

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.).)

The WCAB recognized that *Labor Code § 5275* mandates that disputes involving insurance coverage be submitted to arbitration. However, the WCAB determined that *Labor Code § 5275* applies only to workers' compensation insurance, and that, because this case did not involve a dispute over workers' compensation coverage in that the County is self-insured, the dispute was not subject to mandatory arbitration:

Because GRC provided excess insurance rather than workers' compensation insurance, there can be no dispute between the County and GRC [*443] 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 the WCAB did not have jurisdiction over Applicant's claim, the WCAB observed that the parties could pursue a remedy in civil court by seeking declaratory relief.

The County filed a Petition for Writ of Review, contending in relevant respects that: (1) the WCAB has broad jurisdiction over disputes arising out of workers' compensation claims, which extends to the resolution of insurance coverage disputes; and (2) neither the legislature nor the courts should distinguish primary insurance policies from excess insurance policies when considering the scope of the WCAB's jurisdiction to resolve coverage disputes.

GRC filed an Answer, contending in substance that the WCAB lacks jurisdiction over claims for breach of contract, that *Labor Code § 5300* does not confer jurisdiction over contract disputes between the County and GRC, that the County did not secure payment of workers' compensation benefits by purchasing the excess insurance policy from GRC, and that the parties' dispute was not subject to arbitration under *Labor Code § 5275*.

WRIT DENIED March 6, 2014.

Counsel

For petitioner—D'Andre, Peterson, Bobus & Rosenberg, by Jeffrey E. D'Andre, Jason J. Knox

For respondent General Reinsurance Corp.—Barbanel & Treuer, by Alan H. Barbanel, Stephen D. Treuer, Nancy J.W. Brown, and Dietz, Gilmor & Chazen, by Robert H. Potter

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