

INTER-OFFICE MEMORANDUM

TO: ALL ATTORNEYS
FROM: W. JOSEPH TRUCE
DATE: October 4, 2005
RE: TAKE THAT 4600 GROUP!

Although we do not have the full text of the decision yet, we have been advised by the California Insurance Guarantee Association (Attorney Richard E. Guilford) that CIGA has obtained an excellent panel decision by the Appeals Board holding that BlueCross was barred from pursuing a lien against CIGA as BlueCross was an insurance carrier and “constituted other insurance.”

Some time ago Mr. Richard Guilford, legal adviser to the California Insurance Guarantee Association, advised that we should resist liens filed by medical group insurance carriers such as BlueCross on the basis that these medical carriers are insurers and therefore “other insurance is available.” CIGA has now apparently received a panel decision in the case Tom Adams. In this case, BlueCross pursued a lien against CIGA for medical benefits provided to applicant before the insolvency of the Legion Insurance Company.

CIGA defended on the grounds that BlueCross was an insurer and therefore barred by Insurance Code 1063.1(c)(5); on the further ground that obligations arising from medical insurance are not “covered claims” under Insurance Code 1063.1(c)(3); and on the further ground that BlueCross was not the “original claimant” as required by §1063.1(c)(9)(ii).

The workers’ compensation judge was persuaded by the arguments advanced by CIGA and BlueCross filed a Petition for Reconsideration.

On September 13, 2005, the Board apparently issued a decision denying the lien claim of BlueCross and held that the BlueCross lien “did not rise to the level of a “covered claim” because of the exclusions of (c)(3).” The Commissioners made no comment with regards to CIGA’s (c)(9)(ii) defense.

We will circulate the case of Tom Adams as soon as it is received. Please note that we can cite a panel decision pursuant to the authority as contained in Labor Code §5703(g) which provides as follows: “the Appeals Board may receive as evidence. . .and use as proof of any fact in dispute, the following matters. . . prior decisions of the Appeals Board upon similar issues. . .”

Joe Truce

WJT/lb/ib

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3 **TOM ADAMS,**

Case No. **SRO 0113583**
SRO 0113584

4 *Applicant,*

5 *vs.*

6 **ICON HEALTH AND FITNESS, INC.; and**
7 **CALIFORNIA INSURANCE GUARANTEE**
8 **ASSOCIATION on behalf of LEGION**
9 **INSURANCE COMPANY, in liquidation,**

10 *Defendant(s).*

OPINION AND ORDERS
DISMISSING PETITION FOR
RECONSIDERATION OF FINDINGS
AND AWARD OF JUNE 24, 2005, AND
DENYING RECONSIDERATION OF
AMENDED (SIC) FINDINGS AND
AWARD OF JULY 15, 2005

11
12 Lien claimant Regence Blue Cross Blue Shield of Utah (Blue Cross) seeks
13 reconsideration of the Findings and Award of June 24, 2005¹, and of the Amended (sic)
14 Findings and Award of July 15, 2005, wherein the workers' compensation administrative
15 law judge (WCJ) found, in essence and in relevant part, that applicant sustained admitted
16 industrial injuries to his neck, back, spine, psyche, upper extremities, and lower
17 extremities on January 23, 2000 (case number SRO 0113583), and on November 25, 2000
18 (case number SRO 0113584), while employed as a manager/stock clerk by Icon Health &
19 Fitness, Inc., the insured of now-insolvent Legion Insurance Company for whose
20 "covered claims" California Insurance Guarantee Association (CIGA) is responsible, that
21 applicant is permanently and totally disabled as a result of these industrial injuries, that
22 applicant is in need of further medical treatment, that the lien claims of Dr. Ellis, Webster
23 Surgery Center, Working RX, and Marin Family Therapy are allowed, and that the lien
24 claim of Blue Cross in the amount of \$83,516.77 is not allowed, as Blue Cross provided

25 _____
26 ¹ The WCJ rescinded the Findings and Award of June 24, 2005, on July 15, 2005, pursuant to
27 Appeals Board Rule 10859 (Cal. Code Regs., tit. 8, §10859) and issued the Amended (sic)
Findings and Award of July 15, 2005. The lien claim of Blue Cross was disallowed in both
decisions.

1 "other insurance" and its lien claim is, therefore, not a "covered claim" for which CIGA is
2 responsible.

3 Blue Cross contends that its lien claim should have been allowed against CIGA,
4 arguing that Blue Cross was applicant's "private health insurance", that Blue Cross was
5 "not required to cover" applicant's workers' compensation claim, that, as such, Blue
6 Cross does not constitute "other insurance" pursuant to Insurance Code section
7 1063.1(c)(9), and that, therefore, its lien claim is a "covered claim" for which CIGA is
8 responsible. Blue Cross also argues that it "violates public policy" to consider private
9 health insurance "other insurance".

10 CIGA filed an answer.

11 I.

12 We have considered the contentions raised in the petition and answer.

13 Based upon our review of the record and for the reasons discussed below, we will
14 dismiss the petition for reconsideration of the now-rescinded Findings and Award of
15 June 24, 2005, as that petition is moot, and we will deny reconsideration of the Amended
16 (sic) Findings and Award of July 15, 2005.

17 II.

18 The relevant facts are not disputed.

19 Applicant sustained admitted industrial injuries to his neck, back, spine, psyche,
20 upper extremities, and lower extremities on January 23, 2000, and on November 25, 2000,
21 while employed as a manager/stock clerk by Icon Health & Fitness, Inc., the insured of
22 now-insolvent Legion Insurance Company for whose "covered claims" CIGA is
23 responsible, as the result of moving heavy exercise equipment at work. Applicant is
24 permanently and totally disabled as a result of these industrial injuries.

25 On or about March 17, 2001, applicant underwent a cervical spine fusion.

26 On or about June 20, 2001, applicant was admitted to Marin General Hospital
27 because of "debilitating back pain unresponsive to conservative measures." (See

1 Applicant's Exhibit 4, admitted into evidence on February 14, 2005.)

2 On or about June 29, 2001, applicant underwent a lumbar fusion at Marin General
3 Hospital.

4 On or about July 9, 9, 2001, applicant was discharged from Marin General
5 Hospital.

6 Defendants did not authorize the low back surgery and applicant used his private
7 health insurance, Blue Cross, to pay for, among other medical treatment, the
8 hospitalization and low back surgery at Marin General Hospital.

9 On November 26, 2003, Blue Cross filed its Notice and Request for Allowance of
10 Lien in which it requested that its lien claim in the amount of \$83,516.77 for medical
11 treatment provided to applicant be allowed. The itemized documentation attached to
12 Blue Cross' Notice and Request for Allowance of Lien lists multiple dates of services from
13 November 18, 2000, through February 3, 2002.

14 On February 14, 2005, the lien claim of Blue Cross, among other issues, was tried.
15 At trial, Blue Cross apparently offered no evidence in support of its lien claim. (See
16 Minutes of Hearing, February 25, 2005, 4:21-5:15.)

17 On June 24, 2005, the WCJ issued Findings and Award in which, in relevant part,
18 the lien claim of Blue Cross was disallowed.

19 On July 7, 2005, CIGA filed for reconsideration of the June 24, 2005, Findings and
20 Award, regarding an issue not material to the instant dispute.

21 On July 15, 2005, the WCJ issued Order Rescinding Award Pursuant to RRP 10859
22 in which, pursuant to Appeals Board Rule 10859 (Cal. Code Regs., tit. 8, §10859), she
23 rescinded the Findings and Award of June 24, 2005.

24 Also on July 15, 2005, Blue Cross filed for reconsideration of the Findings and
25 Award of June 24, 2005.

26 Also on July 15, 2005, the WCJ issued Amended (sic) Findings and Award in
27 which, in relevant part, the lien claim of Blue Cross was disallowed.

1 On July 22, 2005, Blue Cross filed for reconsideration of the Amended (sic)
2 Findings and Award of July 15, 2005. The contentions and arguments raised by Blue
3 Cross are, in essence, the same in both of its petitions.

4 III.

5 CIGA must pay and discharge the "covered claims" of an insolvent member
6 insurer. (Ins. Code, §1063.2) "Covered claims" generally means the "obligations of an
7 insolvent insurer . . . imposed by law and within the coverage of an insurance policy of
8 the insolvent insurer . . . for which the assets of the insolvent insurer are insufficient to
9 discharge in full [and] in the case of a policy of workers' compensation insurance, to
10 provide workers' compensation benefits under the workers' compensation law of this
11 state . . ." (Ins. Code, §1063.1, subd. (c)(1).) However, there are many express exclusions
12 from the statutory definition of "covered claims". (*American Nat. Ins. Co. v. Low* (2000) 84
13 Cal.App.4th 914; *Industrial Indemnity Co. v. Workers' Comp. Appeals Bd. (Garcia)* (1997) 60
14 Cal.App.4th 548 [62 Cal.Comp.Cases 1661]; *Cal. Ins. Guar. Ass'n v. Workers' Comp. Appeals*
15 *Bd. (Jenkins)* (1992) 10 Cal.App.4th 988 [57 Cal.Comp.Cases 660].)

16 One such exception is found in Insurance Code section 1063.1(c)(3)², which
17 provides in relevant part:

18 "Covered claims' does not include obligations arising from
19 the following:

20 "(i) Life, annuity, health, or disability insurance."

21 Another exception is found in section 1063.1(c)(5), which provides in relevant part:

22 "Covered claims' does not include any obligations to
23 insurers, insurance pools, or underwriting associations, nor
24 their claims for contribution, indemnity, or subrogation,
equitable or otherwise, except as otherwise provided in this
chapter."

25 Another exception is found in section 1063.1(c)(9), which provides in relevant part:
26

27 ² All further statutory references are to the Insurance Code.

1 “Covered claims’ does not include (i) any claim to the extent
2 it is covered by any other insurance of a class covered by this
3 article available to the claimant or insured”

4 In interpreting the meaning of a statute, we begin with the language of the statute
5 itself. (*DuBois v. Workers’ Comp. Appeals Bd.* (1993) 5 Cal.4th 382 [58 Cal.Comp.Cases 286];
6 *Nickelsburg v. Workers’ Comp. Appeals Bd.* (1991) 54 Cal.3d 288 [56 Cal.Comp.Cases 476];
7 *Moyer v. Workmen’s Comp. Appeals Bd.* (1973) 10 Cal.3d 222 [38 Cal.Comp.Cases 652].)
8 When the statutory language is clear and unambiguous, the plain meaning of the statute
9 controls, there is no room for interpretation, and we must simply enforce the statute
10 according to its plain terms. (*Dubois v. Workers’ Comp. Appeals Bd.*, *supra*, 5 Cal.4th at p.
11 387; *Atlantic Richfield Co. v. Workers’ Comp. Appeals Bd. (Arvizu)* (1982) 31 Cal.3d 715, 726
12 [47 Cal.Comp.Cases 500]; *Cal. Ins. Guar. Ass’n v. Workers’ Comp. Appeals Bd.*
13 (*Karaiskos*)(2004) 117 Cal.App.4th 350, 355 [69 Cal.Comp.Cases 183].) Here, we conclude
14 that the plain language of sections 1063.1(c)(3)(i) and 1063.1(c)(5) is clear, unambiguous,
15 and, therefore, controlling.

16 Section 1063.1(c)(3)(i) excludes from CIGA’s “covered claims”, obligations arising,
17 in part, from health insurance. Here, Blue Cross admits in its petition that it was
18 applicant’s “private health insurance” and, as such, it paid for some of applicant’s
19 medical treatment and thereafter filed its lien claim to recoup its expenditures. However,
20 as its lien claim arises from “health insurance”, it is excluded from CIGA’s “covered
21 claims.”

22 Likewise, section 1063.1 (c)(5) excludes from CIGA’s “covered claims”, obligations
23 to insurers and their claims for contribution, indemnity, or subrogation. Here, it is
24 undisputed that Blue Cross is an insurer. As such, its lien claim is not a “covered claim”
25 and CIGA may not, therefore, pay it.

26 Blue Cross’ reliance on section 1063.1(c)(9) and the decision in *Industrial Indemnity*
27 *Co. v. Workers’ Comp. Appeals Bd.*, *supra*, 60 Cal. App. 4th 548 [62 Cal.Comp.Cases 1661], is

1 misplaced. In that case, the Court of Appeal affirmed the Appeals Board's decision that,
2 as an exception to "covered claims" pursuant to the plain language of section 1063.1(c)(9),
3 CIGA was not responsible for a cumulatively injured employee's workers' compensation
4 benefits where solvent workers' compensation carriers were liable for the employee's
5 benefits, as the solvent carriers provided "other insurance of a class covered by this article
6 available to the claimant . . ." While Blue Cross may be correct in stating that it did not
7 provide insurance "of a class covered by this article", such that the exclusion of section
8 1063.1(c)(9) appears not to apply, that conclusion does not result in a different outcome
9 regarding Blue Cross' lien claim, as sections 1063.1(c)(3)(i) and 1063.1(c)(5) clearly do
10 apply and Blue Cross has failed to cite any authority to the contrary.

11 Therefore, as the lien claim of Blue Cross is excluded from CIGA's "covered
12 claims" pursuant to sections 1063.1(c)(3)(i) and 1063.1(c)(5), we will affirm the WCJ's
13 decision and deny reconsideration of the Amended (sic) Findings and Award of July 15,
14 2005.

15 Regarding the petition of Blue Cross in which it sought reconsideration of the
16 Findings and Award of June 24, 2005, that petition is moot as the Findings and Award of
17 June 24, 2005, was rescinded by the WCJ on July 15, 2005, pursuant to her authority under
18 Appeals Board Rule 10859 (Cal. Code Regs., tit. 8, §10859). Accordingly, we will dismiss
19 that petition.

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For the foregoing reasons,

IT IS ORDERED that Blue Cross' petition for reconsideration of the Findings and Award of June 24, 2005, be, and hereby is, DISMISSED.

IT IS FURTHER ORDERED that reconsideration of the Amended (sic) Findings and Award of July 15, 2005, be, and hereby is, DENIED.

WORKERS' COMPENSATION APPEALS BOARD

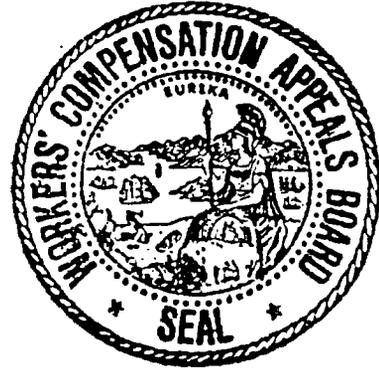
WILLIAM K. O'BRIEN

I CONCUR,

JAMES C. CUNEO

CONCURRING, BUT NOT SIGNING

JANICE JAMISON MURRAY



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA
SEP 13 2005

SERVICE BY MAIL ON SAID DATE TO:

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JSG/rrm

ADAMS, TOM