



WORKERS' COMPENSATION COMMENTARY



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WHEN A SETTLEMENT IS NO LONGER A SETTLEMENT? RECENT CONTRIBUTION DECISION MAY HAVE UNINTENDED CONSEQUENCES

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It has been some time since issuance of our last newsletter. We are pleased to welcome into our firm an absolutely outstanding, seasoned trial attorney, Lawrence Ivey. By way of introduction into the firm, we asked Larry to author this issue concerning a troubling trend in some recent case law. We are pleased with his effort that fits into the fine tradition of ascerbic commentary for which our newsletter is noted.

John Martin

A recent Writ denied case, *San Juan Unified School District vs. WCAB (Weiss) (2001) 66 CCC 1145* may facilitate contribution for some Defendants and complicate settlement for others. Whether you agree with this decision may depend upon which end of the fact pattern your current case lies.

Ms. Weiss was a teacher for the Los Angeles Unified School District (LAUSD). She filed a psyche claim and received a Findings and Award with future medical care payable by the district. Later, Ms. Weiss obtained employment, once again as a school teacher, with the San Juan Unified School District (SJUSD). There she filed a new claim of industrial injury involving her psyche. At the SJUSD, she claimed a specific injury on 4/2/93 and a continuous trauma claim ending on 10/28/96. Both claims were eventually settled by way of Compromise and Release with her employer.

Later, Ms. Weiss sought psychiatric services, seeking and receiving payment from the LAUSD under the continuing award of medical treatment on her original case. The LAUSD then filed a Petition for Contribution against SJUSD seeking reimbursement for a portion of those medical treatment costs. The Trial Judge found during the contribution hearing that the Compromise and Release agreements involving SJUSD did not end the LAUSD's claim of contribution. It was further found that applicant did not own an apportioned medical treatment award against LAUSD.

The court in *Weiss* cited both the *Lucky Stores, Inc. vs. WCAB (Ahern) (1995) 60 CCC 1119* and *Transportation Insurance Company vs. WCAB (Avery) (1997) 62 CCC 1469* decisions. *Ahern* involved a situation in which a Workers' Compensation Judge at the Oakland Workers' Compensation Appeals Board was reversed by the Workers' Compensation Appeals Board. The Board found jurisdiction under Labor Code §5300 to allow a second employer's Petition for Contribution from a first employer. The second employer was

forced to pay for the first employer's payment of vocational rehabilitation benefits, although there were two separate specific injuries, two separate employers and separate Compromise and Release Agreements. This also occurred despite the fact that the cases were never consolidated! The Board held that it had jurisdiction under Labor Code §5300 to "determine rights as among and between various carriers" and that Labor Code §5300(a) provides for proceedings before the Appeals Board concerning "any right or liability arising out of or incidental to the recovery of compensation" and that presumably the rights and liabilities of carriers are contained therein. See *Ahern*.

Labor Code §5300 describes what proceedings shall be held before the Appeals Board. This particular Labor Code Section describes jurisdiction of the Board and does not specifically describe contribution. However, it describes the Board's jurisdiction quite broadly. Its jurisdictional powers allow "for the recovery of compensation, or concerning any right or liability arising out of or incidental thereto". See Labor Code Section 5300(a).

The Trial Judge in *Ahern* indicated in his reversed decision that "contribution rights cannot be asserted by one defendant against another, except by filing a lien, when applicant's claim against each defendant is for a separate specific injury."

The same Trial Judge that decided *Avery* also decided *Weiss*. The Trial Judge in both *Avery* and *Weiss* decided that Labor Code §5300(a) authorizes a judge to decide a second employer's Petition for Contribution and Reimbursement from a first employer for vocational rehabilitation or medical treatment payments that a second employer made to applicant. The judge issued this decision despite the first employer's contention that the Workers' Compensation Appeals Board had no jurisdiction.

RAMIFICATIONS CONCERNING CONTRIBUTION:

Weiss will be extremely beneficial for employers who have outstanding lifetime future medical care awards or who are owed contribution for other benefits. Therefore, a defendant with an outstanding future medical care award should regularly re-index the Applicant to determine whether or not he filed any later workers' compensation claims.

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A further strategy on the part of any first employers who have cases with lifetime medical care awards would be to file liens in the new cases filed by the same Applicants. They should also file a preliminary Petition for Contribution as well and request that their case be consolidated with the case involving the later employer. This particular strategy is recommended in light of several of the defenses raised in *Weiss*. Although these defenses were deemed ineffective, this series of cases is still in its infancy and one never knows how the progeny of subsequent cases will develop. The SJUSD contended that the defendant LAUSD should have filed a lien claim in its case to assert its claim for contribution. Although the court found that this was unnecessary, later cases in this area of evolving case law may be to the contrary. A safe practice tip would be to file both the lien and a Petition for Contribution and intervene as early as possible in any case involving a subsequent employer/defendant.

Petitioner, SJUSD contended that there was no standing on the part of LAUSD to be involved in its case. However, the Workers' Compensation Appeals Board should institute some procedure to allow the earlier employer with the outstanding Findings and Award to intervene in a currently pending case so as to file a lien and perhaps a preliminary Petition for Contribution. This would provide notice to the other employer and better afford it procedural due process of law. If the courts continue to allow an expansive interpretation of contribution pursuant to Labor Code Section 5300, then contribution should be granted to those Defendants that are active and diligent in pursuing their remedy. Those Defendants who lack the diligence to file a lien and/or file an early preliminary Petition for Contribution should have their contribution Petitions disallowed. If the LAUSD had filed a lien, then it could argue that it was a party to that action. Some individuals have contended in the past that lien claimants are not parties to actions, but that issue appears to have been laid to rest for the most part by *Beverly Hills MultiSpecialty Medical Group vs. WCAB (Pinkney) (1994) 26 CA4th 789, 59 CCC 461* and later related cases. Clearly lien claimants have procedural due process rights and are basically construed as parties by the *Beverly Hills MultiSpecialty Medical Group* decision. (See our earlier newsletter issue: *Lien Claimants are People Too! August 1994*)

It is not a difficult burden on any defendant seeking contribution in situations similar to the *Weiss* decision to file a lien and/or preliminary Petition for Contribution. Perhaps, the legislature might, at some time in the future, apply a one year or two year statute of limitations for filing such a lien or preliminary Petition for Contribution measured from the date of the new filing. That would certainly be fair to all parties in such circumstances. But then, again, when have such motives affected the decision making up in Sacramento?

UNINTENDED CONSEQUENCES OF THE WEISS DECISION :

The decisions in *Ahern*, *Avery*, and *Weiss* significantly expand the right to seek contribution by earlier defendants against later defendants involved in separate actions involving separate employers. Previously, contribution was

analyzed as being applicable relating solely to Labor Code §5500.5 and normally involving continuous trauma or occupational disease cases. Labor Code §5500.5(e) provides that any employee held liable under an occupational disease or cumulative injury case may, within one year from the issuance of the award, institute proceedings before the Appeals Board to apportion liability or the right of contribution under the award. As used in the statute, apportionment means sharing the loss of pro rating aggregate liability among a series of exposures producing the occupational disease or cumulative injury. It does not refer to an apportionment of benefits. (See *Hanna* revised second edition, section 31.13[2][a].)

Hanna interprets the right of contribution as ordered by Labor Code §5500.5 to be enforceable by an employer or insurer only against other insurers, permissibly self-insured employers or legally insured employers during the period of liability imposed by that section. (See *Hanna*, *ibid.*, section 31.13[2][D]).

Given the above interpretation by *Hanna*, and by courts in the past, prior to *Ahern*, the issue of contribution seemed limited to interpretation under Labor Code §5500.5. However, the Board now seems intent upon expanding the power of the Workers' Compensation Appeals Board to grant contribution in cases that normally would fall outside the auspices of Labor Code §5500.5. Although this is beneficial to some defendants seeking contribution, it may cause other unanticipated problems in the workers' compensation system. For example, it may affect the finality of Compromise and Release agreements as they relate to defendants. In *Weiss*, there was a Compromise and Release entered into between the applicant and defendant that was subsequently approved by the Workers' Compensation Appeals Board. It has been a long accepted belief that "a Compromise and Release of a compensation claim is intended to conclude finally and forever any and all claims arising by reason of the alleged or admitted injury". A Compromise and Release is considered a judgment having the same force and effect as an award made after a full hearing." (See *Hanna*, *ibid.*, Section 2902[2].)

The second employer in *Weiss* believed it was forever settling any and all issues concerning that case by way of Compromise and Release. One issue that it definitely believed was fully resolved was the issue of applicant's future medical care rights. Normally there is an amount included in any Compromise and Release that settles applicant's right to receive future medical care. The Workers' Compensation Appeals Board Judge who approved the Compromise and Release in *Weiss* had to review the settlement for adequacy before actually approving the settlement. Therefore the adequacy of the amount provided by Defendant to settle future medical care was reviewed and approved as reasonably adequate by the Workers' Compensation Appeals Board Judge when he signed the Order Approving Compromise and Release pertaining to Applicant's settlement involving SJUSD.

The court's allowance of contribution for LAUSD created a problem for the SJUSD and for any defendants in similar situations who are settling a case by way of Compromise and Release. This problem occurs when there is a prior

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Findings and Award of which the more recent defendant is unaware. A defendant who believes it may have finality as a result of pursuing a Compromise and Release of a case, may find the opposite is true. This situation occurred in the *Weiss* decision since the San Juan Unified School District had to pay twice for applicant's future medical treatment. It initially paid a "lump sum" amount when it compromised and released the case and settled future medical care. It paid another amount later toward the same future medical care benefit as a result of the Order of Contribution that issued from the Workers' Compensation Appeals Board Judge.

Most cases do not proceed to trial before the Workers' Compensation Appeals Board. Furthermore, because of the staggering number of workers' compensation cases in California, the Workers' Compensation Appeals Board both needs and desires settlements to be fostered rather than restricted. Unfortunately, if the law in *Weiss* remains in effect, and if later cases follow its precepts and reasoning, the finality of complete Compromise and Release settlements may be adversely impacted. If a settling Defendant is uncertain as to whether or not there is a current valid outstanding future medical care award from an earlier claim, then this may affect the Defendant's choice of whether to proceed with a Compromise and Release versus a Stipulation with Request for Award. There may be more Findings and Awards than Compromise and Release settlements in such cases. In any event, the *Weiss* decision may cause additional delay with a defendant when attempting to decide whether it should Compromise and Release a case as compared with settling it by Stipulation with Request for Award.

Some may argue that the defendant in *Weiss* who faced an order of contribution was "blindsided" by the Judge's Order. The defendant/employer SJUSD did not expect to pay additional money for future medical care whether it related to benefits to the claimant or a contribution to an earlier defendant for payments made for treatment. This decision creates uncertainty for defendants and also creates a double benefit for the applicant in such a situation.

It seem inequitable to allow an employer/Defendant, such as in the *Weiss* case to be "blindsided" by a Petition for Contribution for an old Findings and Award with a lifetime medical care award from a much earlier employer/Defendant. Oftentimes Defendants who are involved in defending newer claims find it difficult to obtain complete information concerning older claims. Furthermore, the rules concerning the length of time that old Workers' Compensation Appeals Board files must be kept in the archives are changing and the time is being shortened.

In terms of equity and fairness, one questions how the defendant could be forced to pay double compensation for medical treatment in *Weiss*. However the court in *Weiss* recognized that it is a long accepted tenet in California workers' compensation law that an Applicant's medical treatment cannot be apportioned. Conversely, applicant probably knew more about his prior Findings and Award in all likelihood than defendant. He also had the benefit of legal counsel who could advise him of the effects of the earlier Findings and Award. Therefore the question arises as to why the newer defendant/employer SJUSD was

forced to shoulder the additional burden of providing for payment of additional medical benefits that had already been paid for by way of its Compromise and Release settlement.

Another issue relates to procedural due process concerning these decisions. Although the contribution issue does allow for the two defendants to litigate these issues, one question is why the burden should not be placed upon the defending employer who is petitioning for contribution to confirm standing and also timely file an appropriate document in order to intervene in the litigated matter involving the current employer. Obviously, the petitioner for contribution may file a lien claim relating to the new employer and may also file a preliminary Petition for Contribution which could be amended at a later time. This would allow procedural due process and apprise all the parties about a pending Petition for Contribution filed by the older employer.

In *Weiss*, the SJUSD argued that the previous employer was not a party to the newer claim involving the applicant. By simply filing a lien, however, one could easily argue that the prior employer would become a party pursuant to Beverly Hills Multi-Specialty Medical Group.

CONCLUSION:

Currently the law is still developing regarding this expanded interpretation of contribution. All of the cases cited in this article, *Ahern, Avery, and Weiss*) are writ denied opinions. The law, however, seems to be moving in the direction of allowing Petitions for Contribution pursuant to Labor Code §5300 rather than restricting such activity.

With such a broadening of the Workers' Compensation Appeals Board's powers regarding Petitions for Contribution, the legislature or the WCAB should create procedures for contribution-intervention in such cases. Such intervention would afford the newer employer/Defendant an opportunity to appropriately respond to the prior employer that would be required to seek contribution/apportionment at an earlier stage. This probably would cause the newer employer to defend the case in a different manner and would better provide procedural due process to all parties.

In conclusion, the status of this particular area of the law is currently in flux and still evolving. It will be interesting to see whether or not future Workers' Compensation Appeals Board decisions and the appellate courts follow the opinions expressed in the *Ahern, Avery* and *Weiss* decisions. Even if the opinion and analysis from these decisions is accepted by future courts, there is definitely room for improvement with regard to certain procedures and issues of procedural due process so as to better protect the rights of all of the parties. Failure to take some effective steps may lead to significant additional problems concerning the role of lump sum settlements in our system.

This newsletter contains only personal opinions and suggestions by the writer which may be of general application in the subject area being discussed. This letter is not intended as specific legal advice as applied to any fact situation and it is recommended that if legal advice is desired concerning the application of any of the information contained herein to a particular factual situation that direct contact with an attorney be sought.