

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

KEN STABLER, *Applicant*

vs.

**KS ADAMS, dba HOUSTON OILERS; NEW ORLEANS LOUISIANA SAINTS;
TRAVELERS INDEMNITY COMPANY, *Defendants***

**Adjudication Number: ADJ7762424
Santa Ana District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

The Appeals Board previously granted reconsideration to further consider the factual and legal issues in this case. This is our Decision After Reconsideration.

Defendants the New Orleans Saints (the "Saints") and Travelers Insurance Company (Travelers) each seek reconsideration of the February 22, 2018 Findings and Order wherein the workers' compensation administrative law judge (WCJ)¹ found that the Saints have not demonstrated by the preponderance of the evidence that they were covered by a workers' compensation policy issued by North West from September 17, 1983 through April 1, 1984. The WCJ found that the Saints did have workers compensation coverage, which included coverage in California with First Horizon Insurance Company from April 1, 1984 through September 17, 1984. Accordingly, the WCJ found that the Saints were not unlawfully uninsured during applicant's last year of injurious exposure.

The Saints contend that they provided sufficient evidence to support a finding that they were insured by North West Insurance Company during the relevant period.

Travelers contends that the First Horizon policy did not provide workers' compensation coverage because First Horizon was not licensed by the California Department of Insurance to issue policies. Travelers also argues that by the terms of the First Horizon policy, including the "All States Endorsement," the policy does not provide workers' compensation insurance in any state except Louisiana.

¹ The insurance coverage issues were determined by the WCJ rather than a workers' compensation arbitrator because applicant's date of injury predates the mandatory arbitration statute. (Lab. Code § 5275.)

In response to the Saints' petition, the WCJ prepared a Report and Recommendation on Petition for Reconsideration (Saints Report) recommending that reconsideration be denied. In response to Travelers' petition, the WCJ prepared a Report and Recommendation on Petition for Reconsideration (Travelers Report) recommending that the petition be granted and the Findings and Order amended to find that the First Horizon policy did not provide coverage. For the reasons discussed below, as our Decision After Reconsideration, we will find that the First Horizon policy did not provide coverage. We will rescind the February 22, 2018 Findings and Order and issue a new decision finding that the Saints were illegally uninsured and ordering the Saints to reimburse Travelers.

FACTS

The essential facts are not in dispute. Applicant sustained an industrial injury to multiple body parts while employed as a professional football player from approximately January 1, 1970 through September 1984. Applicant was employed by the Oakland Raiders, Houston Oilers, and New Orleans Saints during the cumulative trauma period. The New Orleans Saints were insured by Travelers from approximately August 25, 1982 through April 1, 1983. Pursuant to a May 13, 2015 Amended Findings and Award, benefits were awarded against the Saints and Travelers. After applicant passed away, Travelers and applicant's estate settled the previously awarded benefits on January 28, 2016.

During applicant's last year of injurious exposure from approximately September 17, 1983 through September 17, 1984, Travelers alleged that the Saints were unlawfully uninsured. The Saints allege that they were covered by North-West Insurance Company from September 17, 1983 through April 1, 1984 and by Horizon Insurance Company after April 1, 1984. The Saints were unable to locate the alleged North-West policy and there is no North-West policy in evidence. North-West Insurance Company was liquidated by the Oregon Insurance Guaranty Association effective November 23, 1999.

First Horizon Insurance Company issued Policy AE-1154-331644 which provided workers' compensation coverage for the Saints from April 1, 1984 through April 1, 1987. (Exh. O, April 1, 1984, Policy AE-1154-331644.) Pursuant to "Coverage A" under the policy, First Horizon agreed "To pay promptly when due all compensation and other benefits required of the

insured by the workmen's compensation law." Part III defines workmen's compensation law as follows:

(a) Workmen's Compensation Law. The unqualified term 'workmen's compensation law' means the workmen's compensation law or workers' compensation law and any occupational disease law of a state designated in Item 3 of the declarations, but does not include those provisions of any such law which provide non-occupational disability benefits.

Item 3 of the Declarations provides: "Coverage A of this policy applies to the workers' compensation law and any occupational disease law of each of the following states: Louisiana."

A Standard "All States Endorsement" was included in the First Horizon policy and states in relevant part:

A. In the event the insured undertakes operations in any states not designated in Item 3 of the declarations, other than Alaska, Nevada, North Dakota, Ohio, Washington, West Virginia, or Wyoming, the company agrees as follows:

1. To reimburse the insured for all compensation and other benefits required of the insured under the workmen's compensation or occupational disease law of such state.

On December 18, 1998, First Horizon was liquidated by the Indiana Insurance Guarantee Association.

As mentioned above, Travelers insured the Saints prior to applicant's last year of injurious exposure and they were held liable for applicant's benefits pursuant to Labor Code section 5500.5.

On April 8, 2016, Travelers filed a Petition for Reimbursement seeking reimbursement of \$87,083.53 for benefits paid from the Saints based on Labor Codes section 5500.5. After a trial primarily focused on the issue of whether the Saints were unlawfully uninsured, the WCJ issued the February 22, 2018 Findings and Order that is the subject of the current petitions for reconsideration.

ANALYSIS

In California, every employer is required 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 "being insured against liability to

pay compensation by one or more insurers duly authorized to write compensation insurance in this state” or by securing a certificate of consent to self-insure from the Director of Industrial Relations.² (*Ibid.*) The Insurance Code sets forth requirements for an insurer to be authorized to write policies in California, including certain deposit requirements in “order to provide protection to the workers’ of the state in the event the insurers issuing workers’ compensation insurance to employers fail to pay compensable workers’ compensation claims when due.” (Ins. Code, §11691.) Every insurer is required to be a member of a rating organization. (Ins. Code, §11751.4.)

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 of Regs., tit. 10, §§ 2261, 2262.)³ If an employer’s insurer agrees to pay any compensation due, the insurer is substituted for the employer in any proceedings. (Lab. Code § 3755.) Because an insurer writing workers’ compensation policies must comply with numerous statutory and regulatory requirements, the courts distinguish between workers’ compensation policies and other types of insurance. In the context of securing workers’ compensation liability, the most common type of insurance policy is an excess policy. An excess policy is unlike a workers’ compensation policy in certain significant ways.

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.)) In a recent California Court of Appeal decision, the court, citing Federal Courts’ interpretation of California law and considering an Appeals Board panel decision “for its

² Although not relevant in this case, certain government entities may also be lawfully uninsured.

³ 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 *Yamaha 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].)

persuasive value,” determined that an action for declaratory relief was not barred by the WCAB’s exclusive jurisdiction because an excess insurance policy is not a means of securing compensation pursuant to Section 3700. (*California Ins. Guarantee Assn. v. San Diego County Schools Risk Management etc. (Knowles)* (2019) 41 Cal.App.5th 640, 654 [84 Cal.Comp.Cases 957] citing *San Francisco BART Dist. v. General Reinsurance Corp.* (N.D.Cal. 2015) 111 F.Supp.3d 1055, 1074 (*BART I*), *affd.* (9th Cir. 2017) 726 Fed. Appx. 562 (*BART II*); *San Diego Cty. Schs. Risk Mgmt. Joint Powers Auth. v. Liberty Ins. Corp., et al. (Liberty)* (2018) 339 F.Supp.3d 1019, 1030, and considering *Millman v. Contra Costa County (Millman)* (2013) ADJ15278353 [2013 Cal.Wrk.Comp. P.D. Lexis 615].)

Section 5500.5(a) provides that liability for cumulative trauma injuries “shall be imposed on the last year of employment exposing the employee to the hazards of the occupational disease or cumulative injury for which an employer is insured for workers’ coverage or an approved alternative thereof.” Section 5500.5 further provides that: “Any employer held liable for workers’ compensation benefits as a result of another employer’s failure to secure compensation as required in this division shall be entitled to reimbursement from the employers who were unlawfully uninsured during the last year of the employee’s employment...” The WCAB has concurrent jurisdiction with civil courts to award reimbursement. *Graphic Arts Mut. Ins. Co. v. Time Travel Intern., Inc.* (2005) 126 Cal. App. 4th 405, 410-411 [70 Cal. Comp. Cases 184].) In determining whether an employer was unlawfully uninsured, an excess policy is not considered to be workers’ compensation insurance for purposes of the application of Section 5500.5. "An excess insurance policy, however, is not a workers' compensation policy and thus not subject to Division Four." (*See Bart II* at 1059, (citing *Millman*).)

Travelers argues that, because, at the time the First Horizon policy was written, First Horizon was not an admitted insurer licensed to write workers’ compensation insurance in California, the Saints did not fulfil their obligation to “secure the payment of compensation” pursuant to Labor Code section 3700 and, accordingly, the Saints were illegally uninsured despite the existence of the First Horizon policy.

Pursuant to the terms of Policy AE-1154-331644, First Horizon agreed to be directly and primarily responsible for providing benefits to applicants under the laws of the state of Louisiana. (“Coverage A”) Unlike “Coverage A,” the “All States Endorsement” is an agreement that Horizon will reimburse the employer for liability imposed on the employer under the workers’

compensation laws of states other than Louisiana. The Saints could obtain reimbursement from First Horizon for California claims but the insurance agreement does not require First Horizon to directly pay benefits to a California applicant. The coverage provided for California claims is similar to an excess policy--First Horizon promises reimbursement not payment. Thus, the Saints did not secure the payment of compensation as required by Section 3700 and they were illegally uninsured.

Finally, with respect to the petition for reconsideration filed by the Saints, we agree with the WCJ that there is insufficient evidence that there was a workers' compensation policy issued by North West. Without the insurance contract, we cannot find that North West provided coverage.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the February 22, 2018 Findings and Order is **RESCINDED** and the following is **SUBSTITUTED** in its place:

FINDINGS OF FACT

1. The Saints have not shown by the preponderance of the evidence that North West Insurance Company provided workers' compensation coverage from September 17, 1983 through April 1, 1984.

2. The Saints have not shown by the preponderance of the evidence that First Horizon Insurance Company provided workers' compensation coverage from April 1, 1984 through September 17, 1984.

3. The Saints failed to secure payment of compensation as required by Labor Code section 3700 and Division Four of the Labor Code from September 17, 1983 through September 17, 1984.

4. Travelers is entitled to reimbursement pursuant to Labor Code 5500.5.

ORDER

IT IS ORDERED that the Saints reimburse Travelers for any benefits paid by Travelers as a result of the Saints failure to secure the payment of compensation. Jurisdiction is reserved at the trial level in the event of a dispute.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 6, 2022

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

**BUCHALTER LAW FIRM
CHERNOW LIEB
COLANTONI COLLINS MARREN PHILLIPS & TULK
DIMACULANGAN & ASSOCIATES
NEW ORLEANS LOUISIANA SAINTS LLC**

MWH/oo

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. *abs*