U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 20-0061

JAMIE LYNN STEIN (successor in interest to MARTHA MIHALKO)	)	
Claimant-Petitioner	)	
v.	)	
	)	DATE ISSUED: 12/15/2020
THORPE INSULATION COMPANY	)	
and	)	
CALIFORNIA INSURANCE GUARANTEE ASSOCIATION	)	
Employer/Carrier-Respondents	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Granting Director's Motion for Summary Decision of Susan Hoffman, Administrative Law Judge, United States Department of Labor, and the Order Dismissing California Guarantee Association of William Dorsey, Administrative Law Judge, United States Department of Labor.

Alan R. Brayton and John R. Wallace (Brayton Purcell LLP), Novato, California, for Claimant.

John T. Marin (Laughlin, Falbo, Levy & Moresi, LLP), Sacramento, California, for California Insurance Guarantee Association.

Cynthia Liao (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and GRESH, Administrative Appeals Judges.

BOGGS, Chief Administrative Appeals Judge:

Claimant appeals Administrative Law Judge Susan Hoffman's Decision and Order Granting Director's Motion for Summary Decision and Administrative Law Judge William Dorsey's Order Dismissing California Guarantee Association (2016-LHC-01154) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (Act). We must affirm the administrative law judges' findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Martha Mihalko filed a claim for death benefits under the Act on November 20, 2012, alleging the death of her husband, James F. Mihalko (Decedent),[1] occurred as a result of his exposure to airborne toxins while working as an asbestos insulator at various California shipyards from 1963 until 1994. 33 U.S.C. §909. In 2013, Jamie Lynn Stein, Mrs. Mihalko's daughter, and heir and successor-in-interest to Decedent, filed two wrongful death suits in San Francisco Superior Court against numerous third-party manufacturers, distributors, and purchasers of asbestos products.

Ms. Stein executed, on behalf of herself, as well as the Decedent's heirs and estate, three third-party settlement agreements in the wrongful death lawsuits for a total of $20,996.39. She settled with: (1) Pfizer, Incorporated, on May 22, 2014 for $996.39 (MSD Ex. G); (2) Quintec Industries, Incorporated, on April 27, 2015, for $10,000 (MSD Ex. H); and (3) Stauffer Chemical Company, on December 15, 2015, for $10,000 (MSD Ex. I).

[1]Decedent died on August 17, 2012. His cause of death was listed as refractory septic shock, severe obstructive airway disease, aspiration pneumonia, and cardiopulmonary arrest due to tension pneumothorax. MSD Ex. C.

Mrs. Mihalko, who died intestate on February 1, 2015, did not sign the first settlement agreement and there is no evidence Ms. Stein notified any putative longshore employer and/or carrier or the Director, Office of Workers' Compensation Programs (the Director), of the third-party settlements.

As for the death benefits claim, in 2016 the California Insurance Guarantee Association (CIGA) filed a notice of controversion on behalf of Employer's insolvent carriers, Mission Insurance Company and Western Employers' Insurance Company, but thereafter sought to be dismissed from the case based upon California Insurance Code §1063.1.[2] On November 15, 2016, Judge Dorsey granted CIGA's motion. Following an appeal of Judge Dorsey's Order to the Benefits Review Board,[3] which was dismissed as interlocutory, the case was returned to the Office of Administrative Law Judges for resolution on the merits.

The case on the merits was assigned to Judge Hoffman (the administrative law judge) who, through a series of orders, substituted Ms. Stein (Claimant) as successor-in-interest to Mrs. Mihalko, granted CIGA's motion to be removed from the case caption based on Judge Dorsey's 2016 Order, and added the Director as a party-in-interest. The Director thereafter filed a Motion for Summary Decision, asserting 33 U.S.C. §933(g) bars recovery under the Act because Mrs. Mihalko entered into a third-party settlement relating to Decedent's death for an amount less than Employer's liability for compensation under the Act. Claimant, in response, asserted a genuine issue of material fact exists regarding whether Mrs. Mihalko "entered into" the settlement agreement within the meaning of Section 33 of the Act and thus requested a hearing on the merits. MSD Ex. E.

Finding no genuine issue of material fact, the administrative law judge addressed the legal issue of whether Mrs. Mihalko "entered into" any third-party settlement agreements within the meaning of Section 33(g). Based on the undisputed facts in this case and the Board's decision in *Hale v. BAE Systems San Francisco Ship Repair*, 52 BRBS 57

[2]CIGA argued the 1987 amendments to the California Insurance Code added §1063.1(c)(3)(F) which states "covered claims" do not include obligations arising from claims under the Longshore Act.

[3]The Board dismissed Claimants' consolidated appeals of Judge Dorsey's Order initially as premature under 20 C.F.R. §802.206(f), and then upon reconsideration as interlocutory. *McCue, et al. v. California Ins. Guarantee Assoc.*, BRB Nos. 17-0120 – 17-0129 (Jan. 6, 2017), *recon. denied on other grounds* (Sept. 7, 2017).

(2018), she concluded Section 33(g) bars recovery of any benefits under the Act.[4] Accordingly, she granted the Director's Motion for Summary Decision based on the affirmative defense in Section 33(g).

On appeal, Claimant challenges the administrative law judge's finding that Section 33(g) bars the claim for death benefits, as well as Judge Dorsey's 2016 Order dismissing CIGA from the case. CIGA filed a response brief, urging affirmance of Judge Dorsey's 2016 decision dismissing it from the case and arguing, in the alternative, that it cannot be liable for benefits under the Act in light of Sections 1063.1(c)(3)(F) and/or 1063.1(a) of the California Insurance Code. Claimant also filed a Motion for Summary Reversal of the administrative law judge's decision in light of the subsequent conclusion the United States Court of Appeals for the Ninth Circuit reached in *Hale v. BAE Systems San Francisco Ship Repair, Inc., et al.*, 801 F. App'x 600 (9th Cir. 2020), which reversed the Board's decision in *Hale*. Claimant requests remand for a hearing on the merits. In response, CIGA asserts the Ninth Circuit's decision in *Hale* does not mandate reversal of the administrative law judge's decision because the material facts dictate Claimant is a "person entitled to compensation," thus requiring Employer's prior written approval of the settlement if it is for less than the amount Claimant could receive under the Act. The Director does not object to the Board's vacating the administrative law judge's summary decision on the Section 33(g) issue and remanding the case for further proceedings. She also maintains the Board should vacate Judge Dorsey's 2016 order dismissing CIGA and remand the case for the administrative law judge to determine pursuant to 1987 Cal. Stat. 2665, ch. 833, Sec. 3 what was the relevant "insured occurrence" and when did it occur. Claimant filed a reply brief to the Director's and CIGA's submissions again arguing Section 33(g) cannot bar the claim for death benefits and Judge Dorsey's dismissal of CIGA cannot stand. For the following reasons, we vacate the administrative law judge's application of the Section 33(g) bar, as well as her resulting grant of summary decision, and remand this case for further proceedings.

[4]In reaching this conclusion, the administrative law judge found: 1) Mrs. Mihalko's family member, Ms. Stein, signed agreements to settle and release any and all third-party actions, including for wrongful death and lack of consortium, arising out of Mr. Mihalko's work-related asbestos exposure; (2) although Mrs. Mihalko did not personally sign the first settlement agreement or receive any settlement proceeds, the clear intention and legal impact of the agreement was to bind all of Mr. Mihalko's heirs, including Mrs. Mihalko; (3) Employer, its carriers, and/or the Director were never notified of or approved the third-party agreements; and (4) the aggregate amount of the settlement agreements is less than Mrs. Mihalko's potential benefits under the Act.

Section 33(g) bar

A claimant may proceed with both a compensation claim under the Longshore Act against the employer and a tort suit against potentially liable third parties. 33 U.S.C. §933(a). To protect an employer's right to offset any third-party recovery against its liability for compensation under the Act, 33 U.S.C. §933(f), a claimant, under certain circumstances, either must give the employer notice of a settlement with a third party or a judgment in her favor, or she must obtain the prior written approval of the third-party settlement from the employer and its carrier. 33 U.S.C. §933(g);[5] *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49(CRT) (1992); *Bethlehem Steel Corp. v. Mobley*, 920 F.2d 558, 24 BRBS 49(CRT) (9th Cir. 1990), *aff'g* 20 BRBS 239 (1988). Pursuant to Section 33(g)(1), prior written approval of the settlement is necessary when the "person entitled to compensation" or "the person's representative" enters into a settlement with a third party for less than the amount to which she is entitled under the Act. 33 U.S.C. §933(g)(1); *Cowart*, 505 U.S. at 482, 26 BRBS at 53(CRT); *Honaker v. Mar Com, Inc.*, 44 BRBS 5 (2010); *Esposito v. Sea-Land Service, Inc.*, 36 BRBS 10 (2002); 20 C.F.R.

[5] Section 33(g)(1), (2) states:

> (1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) of this section for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.
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> (2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter.

§702.281. Failure to obtain prior written approval of a "less than" settlement results in the forfeiture of benefits under the Act. 33 U.S.C. §933(g)(2); *Esposito*, 36 BRBS 10; 20 C.F.R. §702.281(b). Relevant to a widow's claim for death benefits under the Act, Section 33(g) is potentially applicable to the widow's recovery from third-party settlements entered into after the employee's death. *Ingalls Shipbuilding, Inc. v. Director, OWCP* [*Yates*], 519 U.S. 248, 31 BRBS 5(CRT) (1997).

In addressing the Director's motion for summary decision, the administrative law judge determined "[t]he sole disputed legal issue, whether Mrs. Mihalko 'entered into' the third-party settlement agreements, is directly controlled by the [Board's] reasoning in *Hale*," 52 BRBS at 57. Decision and Order at 10. In *Hale*, the Board held Section 33(g) barred a widow's claim for death benefits where her daughter, acting as successor-in-interest of the deceased employee's estate, executed settlements with several third party defendants on behalf of his heirs without the employer's approval. The administrative law judge found the facts in this case and the "sound legal analysis" the Board set forth in its decision in *Hale* "compel the conclusion that Section 33(g) bars Mrs. Mihalko and, derivatively, Ms. Stein from recovering benefits under the Act." *Id.* Consequently, she granted the Director's motion for summary decision and denied the claim for death benefits.

Subsequent to the administrative law judge's decision, however, the Ninth Circuit reversed the Board's decision in *Hale*. *Hale*, 801 F. App'x 600. In light of the Ninth Circuit's reversal of the Board's decision in *Hale*,[6] we vacate the administrative law judge's application of the Section 33(g) bar, as well as her resulting grant of summary decision, and remand this case for further proceedings. *See, e.g., Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944 (5th Cir. 1991) ("The Board does not have the authority to engage in a de novo review of the evidence…."); *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982) (administrative law judge must address evidence and make findings in the first instance). On remand, the administrative law judge must reconsider the Director's motion for summary decision and the applicability of the Section 33(g) bar in light of the Ninth Circuit's decision in *Hale*, as well as any contentions the parties may raise

[6]In *Hale v. BAE Systems San Francisco Ship Repair, Inc., et al.*, 801 F. App'x 600 (9th Cir. 2020), the panel majority reversed the Board on the basis that neither the "person entitled to compensation" nor that person's representative entered into any third-party settlements. The dissenting judge would have upheld the Board's decision, construing the settlements that the claimant's daughter entered into as binding on the claimant by application of California law.

because of its decision.[7] If, on remand, the administrative law judge determines the claim for death benefits is not barred by Section 33(g), she must then resolve the merits of the claim.

Judge Dorsey's dismissal of CIGA

The California Legislature created CIGA in 1969 as a mandatory association of insurers that would pay "covered claims" for "member insurers" who become insolvent.[8] 1969 Stat. 2698, ch. 1347 (AB 1310) (codified at Cal. Ins. Code § 1063.1); *In re Eldorado Ins. Co.*, 189 Cal. App. 3d 1149, 1153 (Cal. Ct. App. 1987). When initially enacted, California's Guarantee Act excluded claims "arising from a policy of ocean marine insurance," though it was unsettled whether that exclusion eliminated claims arising under the Longshore Act from the definition of "covered claims." In 1987, the Court of Appeal of California, Second District, Division Three, expressly held that claims under the Longshore Act were "covered claims" for which CIGA had liability. *Eldorado*, 189 Cal. App. 3d at 1153.[9] Subsequently, the California Legislature's adoption of the provision now contained in Insurance Code Section 1063.1(c)(3)(F) nullified the holding in *Eldorado* as it explicitly excludes Longshore Act claims from the definition of "covered claim." Section 1063.1(c)(3)(F) states:

> (3) "Covered claims" does not include obligations arising from the following:
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> (F) Ocean marine insurance or ocean marine coverage under an insurance policy including claims arising from the following: the Jones Act (46 U.S.C. Secs. 30104 and 30105), the Longshore and Harbor Workers' Compensation Act (33 U.S.C. Sec. 901 et seq.), or any other similar federal

[7]Contrary to CIGA's contention, the administrative law judge properly found Ms. Stein cannot be a "person entitled to compensation" in her own right as adult children are not entitled to death benefits under the Act unless they are disabled, incapable of self-support, and wholly dependent on the decedent. 33 U.S.C. §902(14).

[8]It is undisputed Employer and its carriers are insolvent.

[9]In *Eldorado*, CIGA, seeking a refund of payments made on claims under the Longshore Act, filed a motion for an order stating that such claims were not "covered claims." After considering the history of the statute, rules of statutory construction and the purpose of CIGA to protect the insured and injured party against loss arising from the failure of an insolvent insurer, the court held the definition of "covered claims" in Insurance Code Section 1063.1(c), as it existed at that time, included claims under the Longshore Act.

statutory enactment, or an endorsement or policy affording protection and indemnity coverage.

Addressing CIGA's motion to dismiss, Judge Dorsey found CIGA insures only "covered claims" as defined in California Insurance Code § 1063.1 and that California's Guarantee Act was amended in 1987 to exclude claims arising under the Longshore Act, effective January 1, 1988. In determining the date of the covered claims before him, including the Decedent's widow's claim,[10] Judge Dorsey stated a claim for death benefits under the Act "comes into being at the death of the worker, not before." Order Dismissing California Guarantee Association at 22. Because the deaths of the employees in the consolidated claims before him did not occur until after January 1, 1988, and thus did not "come into being" until after the effective date of their exclusion, California's Guarantee Act does not cover those claims. Accordingly, Judge Dorsey concluded CIGA could not be liable for benefits and dismissed it from those claims, including the Decedent's widow's claim.

Claimant contends that, contrary to Judge Dorsey's finding, CIGA's liability is not precluded by this amendment to California's Guarantee Act because the event triggering the putative responsible carrier's liability is Decedent's last work-related exposure to asbestos in 1981, as opposed to his 2012 death. Claimant contends prevailing state and federal law supports application of the "continuous trigger" approach to determining insurance liability in this occupational disease case,[11] where the date of Decedent's work-related exposure to asbestos triggered the liability of Employer and its carriers for the covered claim,[12] a liability which continued through the date the exposure manifested itself

[10]We note Judge Dorsey's Order involved multiple employees and their consolidated claims, including Decedent's widow, Martha Mihalko.

[11]Under the "continuous trigger" theory, liability occurs during any of the following times: *exposure* to harmful conditions; *actual* injury or damage; or upon *manifestation* of the injury or damage. *See generally Montrose Chemical Corp. v. Admiral Ins. Co.*, 913 P.2d 878 (Cal. 1995). In this case, Claimant maintains liability attached at the time of Decedent's last exposure.

[12]From a policy standpoint, Claimant states dismissal of CIGA in this case circumvents Section 32 of the Longshore Act, 33 U.S.C. §932, which requires an employer to secure compensation. Additionally, Claimant states application of a manifestation trigger theory, as CIGA espouses, where claims are identified as to the policy in effect when the injury became reasonably apparent or known to the claimant, effectively means there can never be any case in which CIGA can be liable if the relevant death occurred after January 1, 1988, the effective date of the operative amendment implemented in 1987,

in Decedent's death. Claimant therefore avers that the outstanding obligations of Employer and its carriers became "covered claims" for purposes of California's Guarantee Act as of 1981, so the subsequent insolvency of those entities transferred liability to CIGA.

CIGA asserts Judge Dorsey properly dismissed it from this case because the claim for death benefits under the Longshore Act is not a "covered claim" under California Insurance Code § 1063.1, as it did not arise until Decedent died in 2012, and therefore is specifically excluded by the 1987 amendments to California's Guarantee Act. *See generally* California Insurance Code § 1063.1(c)(3)(F). It maintains the amendments simply clarified the definition of the terms "ocean marine insurance and ocean marine coverage" to include claims arising under the Longshore Act, and therefore the exclusion should be applied retroactively to all longshore claims. CIGA also asserts the "manifestation approach" that Judge Dorsey principally applied, rather than the "continuous trigger" approach Claimant advocates, is appropriate for determining when the "covered claim" came into existence and thus, for determining whether the post-1987 exclusion of claims arising under the Act is relevant.[13] CIGA further states equitable principles do not mandate a divergence from established law to find it liable in this case because, among other potential remedies, Claimant's benefits may be paid through the Special Fund. Moreover, CIGA asserts that because Employer's carriers, Mission Insurance Company and Western Employers' Insurance Company, were required to make

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even if the harm occurred before that date. Furthermore, Claimant asserts CIGA's dismissal prejudices her ability to possibly receive payment of benefits (for as a result of the insolvency of Employer and its carriers, payment of benefits by the Special Fund is left to the discretion of the Secretary of Labor, 33 U.S.C. §918(b)).

[13]Simply put, CIGA contends "controlling" federal law, rather than state law, establishes that the date of decedent's death is the date of injury for purposes of determining whether Section 1063.1(c)(3)(F) precludes its liability in this case. In support of its position, CIGA cites the following cases: *Ingalls Shipbuilding, Inc. v. Director, OWCP* [*Yates*], 519 U.S. 248, 31 BRBS 5(CRT) (1997) (the right of an employee's widow to recover death benefits does not arise until the date of the employee's death); *SAIF Corp./Oregon Ship v. Johnson,* 908 F.2d 1434, 23 BRBS 113(CRT) (9th Cir. 1990) (the Act's coverage provisions in effect at the time an occupational disease becomes manifest are applicable); *Todd Shipyards Corp. v. Witthuhn*, 596 F.2d 899, 10 BRBS 517 (9th Cir. 1979) (the death of the worker "gave rise to new claims for relief not in existence" during the worker's lifetime for "when they died….their survivors' rights to death benefits first vested").

payments into the Special Fund, they both would be excluded as "member" insurers under Section 1063.1(a) of the California Insurance Code.

The Director urges the Board to vacate Judge Dorsey's 2016 order dismissing CIGA because he applied an erroneous legal standard.[14] She maintains Judge Dorsey, in finding the widow's claim did not "come into being" until after the 1988 effective date for the 1987 amendments to California Insurance Code § 1063.1, "did not look closely enough" at the relevant statutory language regarding the amendments' effective date and applicability. She asserts the amended statute specifies that whether the "insured occurrence" happened before or after January 1, 1988, dictates if a claim arising under the Act is a "covered claim" for which CIGA may be liable. She additionally argues that the insured occurrence date is not necessarily the same as the "time of injury," or the date the claim arose, vested, or "came into being" as Judge Dorsey held in this case. She thus asserts CIGA's liability turns on when the insured occurrence in the claim for death benefits under the Act is considered to have occurred, a determination that has not yet been made. Moreover, the Director contends Judge Dorsey did not adequately consider what event constitutes the insured occurrence, as that requires consideration of the insurance policies in question. She notes there is nothing in Judge Dorsey's order suggesting he addressed the relevant provisions of the insurance policies, nor is it clear he had those before him to see how those policies defined "occurrence." She therefore urges the Board to vacate Judge Dorsey's order dismissing CIGA and instruct the administrative law judge to determine what the relevant insured occurrence was and when it occurred. The Director further urges the Board to reject CIGA's argument that the Act's Special Fund is an "insolvency program" within the meaning of California's Guarantee Act, Cal. Ins. Code § 1063.1(a). For the reasons discussed below, we vacate Judge Dorsey's dismissal of CIGA.

Under California's Guarantee Act, a "[m]ember insurer" is "an insurer required to be a member of the association in accordance with subdivision (a) of Section 1063, except and to the extent that the insurer is participating in an insolvency program adopted by the United States government." Cal. Ins. Code § 1063.1(a). CIGA's statutory obligation arises only if the claim is within the "coverage" of the policy and it meets the definition of a "covered claim" as Insurance Code Section 1063.1(c)(1) articulates. Pursuant to Section 1063.1(c)(1), "covered claims" include "the obligations of an insolvent insurer" that are "[i]mposed by law and within the coverage of an insurance policy of the insolvent insurer" and

[14]The Director acknowledges she previously took a different position on CIGA's dismissal, *see McCue v. Colberg*, BRB No. 15-0037, slip op. at 3 n.2 (July 23, 2015), but states that upon further consideration of the statute, case law, and the other parties' arguments, she is now persuaded that application of the 1987 amendments to Section 1063.1 of the California Insurance Code turns on the date of the "insured occurrence."

"[w]hich were unpaid by the insolvent insurer," subject to certain exclusions. Cal. Ins. Code § 1063.1(c)(1). An insolvent insurer is one that "was a member insurer of the association . . . either at the time the policy was issued or *when the insured event occurred*." Cal. Ins. Code § 1063(b) (emphasis added). California's Guarantee Act also identifies several obligations that are excluded from the definition of "covered claims," Cal. Ins. Code § 1063.1(c)(3), including the provision at issue in this case, Section 1063.1(c)(3)(F). The 1987 amendments to Section 1063.1, and in particular Section 1063.1(c)(3)(F), only "apply to claims resulting from *insured occurrences* that occur on or after January 1, 1988."[15] 1987 Cal. Stat. 2665, ch. 833, Sec. 3 (emphasis added).

The parties do not dispute that January 1, 1988, stands as the line of demarcation for when claims arising under the Longshore Act are no longer "covered claims" for purposes of CIGA coverage. The parties, however, dispute the standard, as well as the event and the corresponding date that it occurred, for determining what triggers CIGA liability. The parties agree that such a finding will enable the administrative law judge to conclude whether the 1987 amendments exclude this claim for death benefits under the Longshore Act from the definition of a "covered claim" under California's Guarantee Act, Cal. Ins. Code § 1063.1(c). In short, Claimant contends Decedent's last work-related exposure to asbestos in 1981 triggered CIGA coverage. The Director asserts the standard first requires identifying the "insured occurrence" and when it happened, but agrees it "likely refers to the date of last exposure in a [Longshore Act] occupational disease case." CIGA contends the definition of "covered claim" requires identifying the date the claim for death benefits under the Longshore Act came into existence for purposes of California's Guarantee Act, i.e., Decedent's death in 2012 when the right to death benefits accrued under the Longshore Act.

Application of the state statute mandates whether and to what extent CIGA must satisfy the insolvent carriers' obligations under the Longshore Act. *Zamora v. Friede Goldman Halter, Inc.*, 43 BRBS 160 (2009). As the Director notes, California's Guarantee Act explicitly states that the 1987 amendments to Section 1063.1(c), including Section 1063.1(c)(3)(F) – the exclusion provision at issue in this case, applies "to claims resulting from *insured occurrences* that occur on or after January 1, 1988." 1987 Cal. Stat. 2665, ch. 833, Sec. 3 (emphasis added). The starting point for determining whether the claim for death benefits under the Longshore Act in this case is a "covered claim" triggering CIGA's coverage, therefore, involves an inquiry into what constitutes the "insured occurrence" and

[15]The inclusion of this sentence in the 1987 amendments to the California Guarantee Act establishes the state legislature did not intend for the exclusion to be applied retroactively to all Longshore claims, as CIGA suggests. We therefore reject this contention.

the corresponding date that it occurred, rather than, as Judge Dorsey found, the date the widow's claim for death benefits under the Longshore Act "came into being."[16] 2016 Order at 22.

Identifying the "insured occurrence" in this instance is a matter of state law. *Zamora*, 43 BRBS 160. Thus, we reject Claimant's and CIGA's contention that federal law preempts state law in determining whether or not CIGA may be dismissed in this case. *See generally U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491, 500-501 (1993) (Supreme Court held federal law shall not preempt state law if the state law specifically relates to the business of insurance, the federal law does not specifically relate to the business of insurance, and application of the federal law would "invalidate, impair, or supersede" the state law); *Zamora*, 43 BRBS 160 (states regulate insurance matters, and as there is no conflict between the Longshore Act and the Texas insurance code, the administrative law judge erred in finding the Longshore Act preempts state law).

As a general matter, "occurrence" as it is commonly used in comprehensive general liability insurance policies, is an "accident" or "event," including "continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." *See generally Waller v. Truck Ins. Exchange, Inc.*, 900 P.2d 619, 928 (Cal. 1995); *City of South El Monte v. Southern Cal. Joint Powers Ins. Auth.*, 38 Cal. App. 4th 1629, 1637 (Cal. Ct. App. 1995). The use of "occurrence" in the insurance policy defines the extent of CIGA's obligations, since CIGA is responsible only for claims that are "within the coverage of an insurance policy of the insolvent insurer." *CD Inv. Co. v. CIGA*, 84 Cal. App. 4th 1410, 1424 (Cal. Ct. App. 2000), *as modified on denial of reh'g* (Dec. 27, 2000) (referencing Cal. Ins. Code § 1063.1(c)(1)); *Collin v. American Empire Ins. Co.*, 21 Cal. App. 4th 787, 803 (Cal. Ct. App. 1994) (for purposes of determining CIGA coverage, courts must consider both the "occurrence" language in the policy, and the endorsements broadening coverage, if any, included in the policy's terms). Thus, consideration of the coverage that Mission Insurance and Western Employers' Insurance provided to Employer through their Longshore policies is required.[17] As a finding regarding the "insured occurrence" requires review of the

[16]As the Director notes, the California statute does not use "claims filed on or after" January 1, 1988, as the exclusionary provision.

[17]The Director notes that although the specific policies involved in this case are not a part of the record, logic and experience dictate that the "insured occurrence" likely consists of Decedent's work-related exposure to asbestos, regardless of when the resulting disability or death transpired. Such a determination generally reflects traditional concepts for liability in occupational disease claims pursuant to both California's workers' compensation scheme and the Longshore Act. California Labor Code § 5500.6 states, in

policies involved in this case, and they were not submitted into the record for Judge Dorsey's consideration, we vacate CIGA's dismissal from the claim and remand the case to the administrative law judge for reconsideration of CIGA's liability under the specific terms of the California Insurance Code and Employer's Longshore insurance policies.

We also reject CIGA's contention it cannot be liable for benefits under the Longshore Act because the now-insolvent insurers participated in a federal "insolvency program" within the meaning of California's Guarantee Act. While insurers, generally speaking, can be said to "participate" in the Special Fund insofar as it is financed through annual assessments charged to employers and insurance carriers, 33 U.S.C. §944(c), CIGA provides no legal authority for its position that the reference to a federal "insolvency program" in Section 1063.1(a) of the California Insurance Code includes the discretionary payments from the Special Fund on claims where the employer and its carriers are defunct. *See* 33 U.S.C. §918(b). Neither the California Insurance Code nor the Longshore Act defines an "insolvency program adopted by the United States government," although, as the Director

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pertinent part, "[l]iability for occupational disease or cumulative injury which results from exposure solely during employment as an employee, . . . shall be limited to those employers in whose employment the employee was exposed to the hazards of the occupational disease or cumulative injury during the last day on which the employee was employed in an occupation exposing the employee to the hazards of the disease or injury." Similarly, California Labor Code §5500.5(a), which establishes the procedure to be followed in determining the liability of multiple employers for occupational disease and cumulative injuries, limits liability to those employers who employed the employee during a specific period "immediately preceding . . . the last date on which the employee was employed in an occupation exposing him to the hazards of such occupational disease or cumulative injury . . . ." *See also Industrial Indemnity Co. v. Workers' Comp. Appeals Bd.*, 145 Cal. App. 3d 480 (Ct. Ct. App. 1983); *Scott Co. v. Workers' Comp. Appeals Bd.*, 139 Cal. App. 3d 98, 106 (Ct. Ct. App. 1983) (an employer, however, is not liable under Section 5500.5(a) absent evidence that exposure during that employment was a contributing cause of the disease or injury, i.e., that the exposure was injurious); *City of Torrance v. Workers' Comp. Appeals Bd.*, 650 P.2d 1162 (Cal. 1982); *Colonial Ins. Co. v. Industrial ACC. Com.*, 172 P.2d 884 (Cal. 1946). In occupational disease cases arising under the Longshore Act, the responsible employer is the last employer to expose the employee to injurious stimuli prior to the employee's awareness of his work-related disease; the responsible carrier is the carrier on the risk at that time. *Albina Engine & Machine v. Director, OWCP*, 627 F.3d 1293, 44 BRBS 89(CRT) (9th Cir. 2010); *Lustig v. U.S. Dep't of Labor*, 881 F.2d 593, 22 BRBS 159(CRT) (9th Cir. 1989); *see also Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 16 BRBS 13(CRT) (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984).

argues, the statutory purpose of the Special Fund and the history behind enactment of Section 1063.1 of California's Guarantee Act support the position that the Special Fund was not meant to be included within that definition.

The largest expenditure and primary function of the Special Fund, to pay claimants where the responsible employer or its carrier has been granted relief under 33 U.S.C. §908(f), *see* 33 U.S.C. §944(i), bears no relationship to an "insolvency program." In this regard, payments the Special Fund makes under Section 18(b) differ from the insolvency program CIGA administers, because Special Fund payments are discretionary rather than mandated by law and are meant to protect claimants from an employer's inability to pay, rather than to protect employers from their insurer's insolvency.[18] Section 18(b) makes no mention of a carrier's insolvency, so if only the carrier becomes insolvent, the employer must still pay benefits. *B.S. Costello, Inc. v. Meagher*, 867 F.2d 722, 22 BRBS 24(CRT) (1st Cir. 1989) ("A legislative scheme requiring all participating insurers in the nation to contribute to a fund that would secure against the default of one or more of their number might be a good addition to the present statute. Be that as it may, the LHWCA simply is not structured in that way."); *Solis v. Home Ins. Co.*, 848 F. Supp. 2d 91, 106 (D.N.H. 2012) (The Special Fund "may, in the Secretary's discretion, apply broadly to all insolvent employers, but not at all to insolvent insurance carriers . . . .").

Moreover, as the Director asserts, the history of California's Guarantee Act indicates it was enacted in 1969 largely in response to concerns Congress might pass a bill pending at that time concerning insolvent carriers and unrelated to the Longshore Act.[19]

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[18]Section 18(b) states in pertinent part:

> In cases where judgment cannot be satisfied by reason of the employer's insolvency or other circumstances precluding payment, the Secretary of Labor *may, in his discretion and to the extent he shall determine advisable* after consideration of current commitments payable from the special fund established in section 944 of this title, make payment from such fund upon any award made under this chapter, and in addition, provide any necessary medical, surgical, and other treatment required by section 907 of this title in any case of disability where there has been a default in furnishing medical treatment by reason of the insolvency of the employer.

33 U.S.C. §918(b) (emphasis added); 20 C.F.R. §702.145(f).

[19]As the Director notes, it is unlikely that California's Insurance Department, in advocating for the enactment of the California Guarantee Act, was referring to discretionary payments made under Section 18(b) of the Longshore Act as the pending

Cal. Dep't of Ins., Enrolled Bill Report, AB 1310, Aug. 13, 1969 (California's Insurance Department asking Governor in 1969 to quickly sign the bill that would create CIGA "to retain California's jurisdiction" over insurers generally because there was "a pending similar federal bill"); *see also CIGA v. Azar*, 940 F.3d 1061, 1064 (9th Cir. 2019) (describing states enacting guaranty funds in the late 1960s under threat of federal regulation regarding carrier insolvencies, and Congress subsequently dropping plans to legislate in that area); Office of the Governor, Release No. 511, Sept. 4, 1969 (news release proclaiming CIGA "not only protects insured Californians against insolvent companies but it also demonstrates that the states can provide this protection without going to the Federal government for assistance."). Furthermore, if, as CIGA suggests, insurers could be excluded from CIGA coverage under California law by their required payment of an assessment to the Special Fund, i.e., the Special Fund constitutes a federal insolvency program as contemplated by Section 1063.1(a), there would be no need to otherwise exclude Longshore claims as was done with the passage of the 1987 amendments. For these reasons, we reject CIGA's contention that any payments Employer's carriers made to the Special Fund under Section 44 of the Longshore Act excluded them as "member" insurers under Section 1063.1(a) of the California Insurance Code.

In sum, we vacate the finding that Section 33(g) bars death benefits in this claim and also vacate the dismissal of CIGA from the claim. On remand, the administrative law judge must reconsider the Director's motion for summary decision in view of the Ninth Circuit's decision in *Hale*. If she determines Section 33(g) does not bar death benefits, the administrative law judge should address the merits of the claim. If the claim is compensable, the administrative law judge must reconsider CIGA's liability in accordance with the terms of the state statute, the relevant insurance policies, and this decision.

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federal legislation that prompted the creation of CIGA, because by then that provision of the Longshore Act had been in existence since 1956.

Accordingly, we vacate the administrative law judge's finding that Section 33(g) bars Claimant's claim for death benefits and also vacate Judge Dorsey's dismissal of CIGA from this case, and remand for further consideration of these issues consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, concurring:

I concur in the majority's decision to vacate the administrative law judge's determination that Mrs. Mihalko forfeited her claim for death benefits pursuant to Section 33(g) of the Act, 33 U.S.C. §933(g). *See Hale v. BAE Systems San Francisco Ship Repair, Inc., et al.*, 801 F. App'x 600 (9th Cir. 2020) (reversing Board's determination benefits were forfeited under circumstances similar to the present appeal).

I also concur in its holding that Judge Dorsey erred in finding the California Insurance Guarantee Association (CIGA), the guarantor of liabilities for Employer's insolvent insurance carriers, cannot be liable for this claim. That Mr. Mihalko's asbestos-related death occurred in 2012 is not determinative of CIGA's liability where his harmful exposure last occurred in 1981. *See* 1987 Cal. Stat. 2665, ch. 833, Sec. 3 (exclusion of CIGA guarantee for Longshore Act injuries "appl[ies] to claims resulting from *insured occurrences* that occur on or after January 1, 1988") (emphasis added). Nor is CIGA relieved of liability on the basis that the insolvent carriers participated in a federal "insolvency program." *See* Cal. Ins. Code § 1063.1(a) (CIGA does not guarantee claims for insurers "participating in an insolvency program adopted by the United States government"). For the reasons identified by the majority, the Longshore Act's Special Fund is not an insolvency program under federal or state law.

Finally, as the majority holds, CIGA guarantees Longshore Act claims only if the "insured occurrence" happened prior to January 1, 1988. *See* 1987 Cal. Stat. 2665, ch. 833, Sec. 3; *see CD Inv. Co. v. CIGA*, 84 Cal. App. 4th 1410, 1424 (Cal. Ct. App. 2000), *as modified on denial of reh'g* (Dec. 27, 2000) (CIGA is responsible for claims "within the coverage of an insurance policy of the insolvent insurer"). Based on this aspect of

California law, the majority accepts the Director's position that CIGA's liability for this claim hinges on how the underlying insurance contracts between Employer and its insolvent carriers define "insured occurrence." Director's Brief at 11-15. While I concur CIGA is liable for only pre-1988 "insured occurrences," the Director does not explain how Employer and its carriers could have lawfully structured their Longshore Act insurance policies in a manner that relieved the carriers (and thus CIGA) from liability for an otherwise compensable asbestosis claim.

Under the Longshore Act and its regulations, employers are required to "secure the payment of compensation" either through an insurance carrier or by becoming authorized to self-insure. 33 U.S.C. §§904(a), 932; 20 C.F.R. §703.3. Where, as here, the employer secures payment through an insurance carrier, "[e]very obligation and duty with respect of payment of compensation . . . imposed by said Act or the regulations . . . shall be discharged and carried out by the carrier[.]" 20 C.F.R. §703.115. Further, occupational diseases such as asbestosis are compensable "injuries" under the Act, *see* 33 U.S.C. §902(2), and liability attaches to the last employer (and its carrier on the risk at the time) to expose the employee to injurious stimuli prior to his awareness of his work-related disease. *Albina Engine & Machine v. Director, OWCP*, 627 F.3d 1293, (9th Cir. 2010); *Lustig v. U.S. Dep't of Labor*, 881 F.2d 593 (9th Cir. 1989); *see also Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 16 BRBS 13(CRT) (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984).

Despite what appears to be clear liability under the Longshore Act for the Employer and its carriers as of the time of Mr. Mihalko's last asbestos exposure in 1981, the Director's position implies that their underlying insurance contracts might define the term "insured occurrence" to either completely exclude his exposure or artificially shift the "occurrence" date to some point in the future, after January 1, 1988, when CIGA was no longer a guarantor for Longshore Act claims. The Director's own skepticism of this possibility is evident in her identification of the many reasons it is "likely" that the "insured occurrence" is the date Mr. Mihalko was last exposed to asbestos. Director's Brief at 2, 6-7, 15, 19.

The Board need not resolve at this time whether a Longshore Act carrier could lawfully exclude coverage of a claim under these circumstances, or shift liability to some point in the future. The administrative law judge's review of the insurance contracts, not currently in the record, may reveal that Mr. Mihalko's asbestos exposure is an "insured occurrence" by the terms of the agreements themselves, rendering this question moot. I therefore agree with the majority's decision to remand this claim for the administrative law

judge to consider how the insolvent insurance carriers' policies define the term "insured occurrence."

GREG J. BUZZARD
Administrative Appeals Judge