WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ALEX ROBLES, *Applicant*

vs.

SOUTHERN CALIFORNIA GAS COMPANY, permissibly self-insured; UTILITY WORKERS UNION OF AMERICA, LOCAL 132; STATE COMPENSATION INSURANCE FUND, *Defendants*

Adjudication Number: ADJ8075448
Marina Del Rey District Office

OPINION AND DECISION
AFTER RECONSIDERATION

We earlier granted reconsideration[1] of the July 16, 2018 Findings and Award (F&A) of the workers' compensation administrative law judge (WCJ) pursuant to the petition of Southern California Gas Company (SCGC) in order to further study the issues presented. The WCJ found that "Southern California Gas Company, permissibly self-insured, is responsible for applicant's workers' compensation benefits," and that "applicant was not an employee of [defendant] the Utility Workers Union of America, Local 132 [union]," insured by State Compensation Insurance Fund (SCIF). (F&A, July 16, 2018, p. 2.)

In its petition for reconsideration, SCGC contends that: (1) the WCJ failed to state the evidence relied upon and the reasons for determining that the union was not an employer of applicant at the time of injury; (2) the evidence shows that applicant was acting as an employee of the union at the time of injury; (3) the WCJ failed to determine whether the union is "deemed" applicant's employer for workers' compensation purposes pursuant to an agreement signed by the union and SCGC (Letter Agreement); (4) the WCJ failed to consider whether applicant may have had two employers at the time of injury; and (5) the WCJ violated SCGC's right to due process by finding SCGC responsible for applicant's workers' compensation benefits, as that issue was not properly before the WCJ. SCGC asks that the Appeals Board annul the F&A and issue findings that: (1) SCGC was not applicant's employer at the time of injury; (2) the union was applicant's employer at the time of injury; and (3) pursuant to the terms of the Letter Agreement, the union is "deemed" applicant's employer at the time of injury and is solely liable for applicant's workers'

[1] Deputy Commissioner Garcia, who was previously on the panel in this matter is unavailable to participate further in this decision. Another panel member was assigned in her place.

compensation benefits. (Petition, pp. 10 & 12.) We received answers from applicant and SCIF. We did not receive a Report and Recommendation on Petition for Reconsideration from the WCJ.

We have carefully reviewed SCGC's petition, applicant's and SCIF's answers, and the record in this case. For the reasons provided below, we will rescind the F&A issued on July 16, 2018 and substitute findings that applicant was employed by both the union and SCGC at the time of injury, and that the union and SCGC are jointly and severally liable for applicant's workers' compensation benefits.

BACKGROUND

We adopt and incorporate the facts set forth in a previous opinion issued by the Appeals Board in this case on March 12, 2018 in response to an earlier petition for reconsideration filed by SCGC. (SCGC Petition for Reconsideration, August 14, 2017.) That opinion provided the following factual background, as relevant:

> Applicant filed an Application for Adjudication of Claim on November 16, 2011 alleging that he sustained injury to multiple body parts in a motor-vehicle accident on October 17, 2011 while employed by defendant as a residential energy technician in Los Angeles, California. (See also Amended Application for Adjudication of Claim, May 6, 2013 [adding additional body parts].) Applicant was also a regional officer for the union and at the time of the injury, he had been driving with the union's secretary-treasurer, Nancy Logan, to the union office to participate in a study day in the midst of ongoing contract negotiations. (Transcript of Proceedings (Transcript), October 19, 2016, pp. 7:9-8:24, 10:11-16, 11:9-16.)
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> This case proceeded to trial on August 24, 2016 (Minutes of Hearing (MOH), August 24, 2016), October 19, 2016 (October Transcript), December 12, 2016 (December Transcript), March 28, 2017 (March Transcript); and May 10, 2017 (MOH, May 10, 2017). The parties stipulated that both defendant [SCGC] and the union maintained workers' compensation insurance for the date of injury. (August MOH, p. 2:7-18.) The issues identified for trial were:
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> 1. Employment: Southern California Gas Company or Utility Workers Union of America, Local 132, on date of injury.
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> 2. Injury arising out of and in the course of employment including the going and coming rule.
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> 3. Utility Workers Union of America, Local 132, as employer at the time of injury.

4. Utility Workers Union of America, Local 132, as employer responsible for workers' compensation per union contract.

5. Southern California Gas Company responsible for workers' compensation per contract as employer. (August MOH, pp. 2:19-3:3.)

The parties introduced six joint exhibits, including excerpts from the relevant CBA [Collective Bargaining Agreement] and the January 1, 2005 Letter Agreement (Letter Agreement). (See Exh. X1.) The Letter Agreement states, in pertinent part:

> Employees who are absent from work at the Union's request, under the provisions of Article 2, Section 2 (B) for short, intermittent periods of time of (10) ten days or less, shall be paid by the Company at their regular classification straight time rate for up to eight hours per day. Such payment shall be advanced as "Union wages", but will be considered as "Company wages paid" for the purpose of computing an employee's base earnings for employee benefits. However, during such time, each employee will be considered as employees of the Union for all employment purposes set forth in the Worker's Compensation and Insurance chapters of the California Labor Code.
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> In return, the Union agrees to provide the Company with 48 hours of written notice for the release of such employees in all but emergency circumstances... (Jnt. Exh. X1, p. 5, January 1, 2005 Letter Agreement.)

The Letter Agreement references Article 2, Section 2(B) of the CBA, which states as follows:

> **(B) Union leave of Absence:**
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> (1) Regular employees selected by the Union to do work for the Union which takes them from their employment with the Company, shall upon written request of the Union be authorized to absent themselves from their work with the Company for the period of their services for the Union; provided, however, that the number of employees on leave under the provisions of this Section shall not at any one time exceed five employees who are members of the ICWUC or eight employees who are members of the UWUA.
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> * * *

The parties also introduced and the WCJ admitted: union payment records to applicant between October 1, 2010 and November 19, 2012 indicating that the

union issued applicant a "Region Officer Payroll Check" for $100.00 per month from October 2010 to October 2012 (Exh. X2); a Report of Negotiations/First Day indicating that the CBA negotiations commenced July 27, 2011 (Exh. X3); a Negotiations Update dated Wednesday, October 19, 2011, indicating that a Federal mediator was involved and that the Joint Steering Committee had met on its own "through the weekend and yesterday" (Exh. X4); a December 1, 2011 Bargaining Unit Employees with Paycode Report stating that applicant was paid "UP" wages, i.e. "union pay," for October 3 to 7, 2011 and October 13, 2011 (Exh. X5); and an October 17, 2011 Joint Steering Committee Clearance Letter stating that applicant's "clearance" for October 17, 18, 19 and 21, 2011 would be "Company Pay Code" (Exh. X6). (August MOH, p. 3:4-13.)

Applicant introduced and the WCJ admitted an October 12, 2011 Joint Steering Committee Letter requesting that applicant's clearance for October 13, 2011 be changed to "union pay." (May MOH, p. 2:6-8, and App. Exh. 1.) Applicant also testified on his own behalf (see Transcripts, October 19, 2016, December 12, 2016 and May MOH), and called Nancy Logan, an employee of defendant who was in the vehicle when applicant was injured, and who served as the Secretary Treasurer of the union on the date of his injury (Transcript, March 28, 2017).

Defendant introduced and the WCJ admitted additional exhibits at the December 12, 2016 trial session consisting of denial notices, joinder pleadings and proofs of service. (See Transcript, December 12, 2016, pp. 2:14-24, 3:22-6:8 and Def. Exhs. A-I.) Defendant's Exhibit G is a January 17, 2012 Notice Regarding Workers' Compensation Benefit Denial wherein defendant denies applicant's claim because the union was deemed applicant's employer for purposes of workers' compensation pursuant to the January 1, 2005 Letter Agreement. (Def. Exh. G, Notice Regarding Workers' Compensation Benefit Denial; see also Jnt. Exh. 1, p. 5.)

Defendant also called Leonard Prymus, Labor Relations Manager for defendant. (See May MOH.) Mr. Prymus testified, in pertinent part, that although defendant may not "arbitrarily" or "unreasonably" decline to release employees to do union work, the release from regular duties to do union work is permitted "if the workload permits." (May MOH, p. 4:15-5:6; see also Jnt. Exh. 1, §(B)(2)(b)-(c) ["Where operating necessity permits..."].) Mr. Prymus testified that once defendant releases an employee to conduct union business, the employee is working for the union and defendant cannot exercise control over them. (*Id*., p. 10:14-19.)

* * *

On July 18, 2017, the WCJ issued the F&A finding that applicant "was employed by Southern California Gas Company" on the date of his injury, and that applicant sustained injury arising out of and in the course of his employment because the "going and coming rule does not apply to this case." (F&A,

Findings of Fact 2-3.) The WCJ deferred "all other issues." (*Id*., Finding of Fact 4.)

* * *

> Defendant seeks reconsideration of the F&A contending that applicant's alleged injury could not have arisen out of or in the course of his employment with defendant because the union was applicant's employer at the time of his injury, and that regardless, applicant's claim is barred by the going and coming rule because it was the union that directed applicant to travel to the union office, and not defendant. In addition, defendant contends that the WCJ failed to consider two other issues raised at trial: whether the injury arose out of and occurred in the course of his employment for the Union; and whether provisions of the CBA deemed applicant an employee of the Union for purposes of workers' compensation at the time of his injury.
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> (Opinion and Decision After Reconsideration, March 12, 2018, pp. 2-6 & 8.)

Upon review of SCGC's arguments, we affirmed the WCJ's findings that SCGC was applicant's employer at the time of his claimed injury and that the going and coming rule did not bar compensability in the case. (Opinion and Decision After Reconsideration, March 12, 2018, pp. 2 & 16.) However, we found that, although the WCJ appeared to address the issue of whether the union was "deemed" applicant's employer pursuant to the terms of the Letter Agreement, the WCJ gave no clear basis for her apparent conclusion that it was not. (*Id.* at pp. 8-10; August MOH, pp. 2-3; Jnt. Exh. X1, p. 5.) We explained that we could not make an initial determination on this issue without running afoul of the parties' rights to due process, and therefore deferred the issue for the WCJ's determination upon return to the trial level. (*Id*. at pp. 9-10, citing *Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473 (Appeals Board en banc.) & *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584].) For the same reason, we declined to reach the question of whether applicant may have had two employers, i.e., the union and SCGC, under the circumstances of the case. (*Id.* at p. 10, fn. 2, citing *Caso v. Nimrod Productions, Inc.* (2008) 163 Cal.App.4th 881 (*Caso*) & *Kowalski v. Shell Oil Co.* (1979) 23 Cal.3d 168 [44 Cal.Comp.Cases 134] (*Kowalski*).)

On May 14, 2018, upon return to the trial level, the WCJ held an expedited hearing, during which she stated:

> LET THE MINUTES REFLECT that this matter was returned to the trial level on March 12, 2018, for Judge Rentzer to render an Opinion and Decision on the issue of whether the Utility Workers Union of America, Local 132, was or was

not Applicant's employer on October 17, 2011. Judge Rentzer does not need any further testimony as necessary to render a decision in this case.

(MOH, May 14, 2018, p. 2.)

On July 16, 2018, the WCJ issued the disputed F&A with the following Findings of Fact:

1. Alex Robles…allegedly employed on 10/17/2011 as a residential technician at Los Angeles, California, by Southern California Gas Company or Utility Workers Union of America, Local 132, claims to have sustained injury arising out of and in the course of employment to his lower and mid-back, legs, neck, shoulders, sleep, hypertension, and internal.

2. On the date of injury, it was previously found applicant was employed by Southern California Gas Company, permissibly self-insured.

3. It is found applicant was not an employee of the Utility Workers Union of America, Local 132.

4. It is found Southern California Gas Company, permissibly self-insured, is responsible for applicant's workers' compensation benefits.

5. All other issues are deferred and remain off calendar.

(F&A, July 16, 2018, p. 2.)

SCGC's petition for reconsideration followed.

DISCUSSION

I.

When a petition for reconsideration is filed, the Appeals Board has the power to reweigh the evidence, make an independent examination of the record, and reach a different conclusion than was reached by the WCJ. (Lab. Code, §§ 5907, 5315; *Buescher v. Workers' Comp. Appeals Bd.* (1968) 265 Cal.App.2d 520, 529 [33 Cal.Comp.Cases 537] (*Buescher*); *Allied Comp. Ins. v. I.A.C.* (1961) 57 Cal.2d 115 [26 Cal.Comp.Cases 241] (*Lintz*); *Garza v. Workers' Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]; *Mendoza v. Workers' Comp. Appeals Bd.* (1976) 54 Cal.App.3d 820 [41 Cal.Comp.Cases 71].) The Appeals Board can annul the findings of the trial-level WCJ judge and substitute its own findings and decision in light of all the evidence in the record. (*Buescher, supra*, 265 Cal.App.2d at p. 529; Lab. Code, §§ 5907, 5953.) It is also well established that the Appeals Board has the power to resolve conflicts in the record, to make

its own determinations of credibility and to reject the findings of the WCJ. (*Rubalcava v. Workers' Comp. Appeals Bd.* (1990) 220 Cal.App.3d 901, 908 [55 Cal.Comp.Cases 196].)

The Appeals Board is, in fact, required to make an independent examination of the record when it rejects the findings of the WCJ. (*Lintz, supra*, 57 Cal.2d at pp. 119-120.) As a reviewing court, the Appeals Board may not disregard facts established by the evidence. (*West v. I.A.C.* (1947) 79 Cal.App.2d 711 [12 Cal.Comp.Cases 86].) A decision by the WCAB must be supported by substantial evidence in light of the entire record. (Lab. Code, § 5903; *Le Vesque v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) A finding by the WCJ will be rejected when it is not supported by substantial evidence. (*Lamb v. Workers' Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310] (*Lamb*); *Garza v. Workers' Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500].)

II.

The issues in this case are as follows: (1) whether SCGC's potential liability for applicant's workers' compensation benefits was properly before the WCJ for determination; (2) whether the WCJ erroneously determined that the union did not employ applicant at the time of injury; (3) whether applicant may have had two employers at the time of injury; and (4) whether, pursuant to the terms of the Letter Agreement, the union is "deemed" applicant's employer at the time of injury and is solely liable for applicant's workers' compensation benefits. Each issue will be addressed in turn.

a. Applicant was employed by SCGC at the time of injury.

As an initial mater, we note that SCGC's status as applicant's employer at the time of injury was decided by the WCJ in her July 18, 2017 F&A and affirmed in our March 12, 2018 Opinion and Decision After Reconsideration. At no point did SCGC seek judicial review of this determination. As a result, our finding that SCGC employed applicant at the time of injury became final on April 27, 2018[2] and is no longer subject to review by the Appeals Board or the courts. (See *State Farm General Ins. Co. v. Workers' Comp. Appeals Bd.* (2013) 218 Cal.App.4th 258, 268 [78 Cal.Comp.Cases 758] ["[t]he failure of an aggrieved party to seek judicial review of a

[2] Lab. Code, § 5950 (petition for writ of review must be filed no later than 45 days from the Appeals Board's final order, decision or award).

final order of the WCAB bars later challenge to the propriety of the order or decision before either the WCAB or the court."].)

SCGC claims, however, that the WCJ could not have found in her July 16, 2018 F&A that SCGC is responsible for applicant's workers' compensation benefits, as that issue was not identified during the May 14, 2018 expedited trial, during which, as noted above, the WCJ stated, in full:

> LET THE MINUTES REFLECT that this matter was returned to the trial level on March 12, 2018, for Judge Rentzer to render an Opinion and Decision on the issue of whether the Utility Workers Union of America, Local 132, was or was not Applicant's employer on October 17, 2011. Judge Rentzer does not need any further testimony as necessary to render a decision in this case.
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> (MOH, May 14, 2018, p. 2.)

SCGC claims that, because its potential liability for applicant's workers' compensation benefits was not explicitly discussed at the May 2018 hearing, it did not receive adequate notice and opportunity to address this issue in violation of its right to due process. (Petition, p. 3.) We disagree.

"The essence of due process is simply notice and opportunity to be heard." (*San Bernardino Community Hospital v. Workers' Comp. Appeals Bd.* (1999) 74 Cal.App.4th 936, 936 [64 Cal.Comp.Cases 986].) Review of the pertinent procedural history in this case shows that the WCJ did not violate SCGC's rights to due process in finding it responsible for applicant's workers' compensation benefits in her July 16, 2018 F&A.

On May 19, 2016, SCGC filed a declaration of readiness to proceed (DOR), stating:

> A trial is necessary for the resolution of the issues of: Injury AOE/COE; employment by [utility]; and, going and coming rule. The defendants disagree as to which is the employer for purposes of workers' compensation as to this injury.[3]

Subsequently, on June 6, 2016, SCGC requested that any hearing set by the WCJ be "limited only to issues raised" in its DOR, which, SCGC explained, included: "[W]hether applicant was an employee at the time of injury for the purposes of workers' compensation of SCGC or [union]…*and whether either Union or SCGC is responsible for workers' compensation benefits*…." (SCGC Objection to Applicant's DOR, June 6, 2016, p. 2 [italics added].) Later, at

[3] SCGC Objection to Applicant's DOR, June 6, 2016, Attachment A.

the start of trial on August 24, 2016, the WCJ identified this question as the fifth triable issue, asking whether "*Southern California Gas Company [is] responsible for workers' compensation* per contract as employer." (August MOH, p. 3:2-3 [italics added].) Subsequently, in a filing on May 2, 2018 – only twelve days before the expedited hearing – SCGC stated that there remained a dispute between the parties as to "whether the union or SCGC or both are responsible for workers' compensation benefits." (SCGC Objection to Applicant's DOR, May 2, 2018, p. 2.)

From this series of events, it is clear that SCGC had adequate notice that its potential responsibility for applicant's workers' compensation benefits was at issue prior to the May 14, 2018 expedited hearing, and, indeed, from the very outset of trial.

Additionally, upon review, SCGC had ample opportunity to address this issue, not only during the October 2016, December 2016, March 2017, and May 2017 trial sessions, but also in various filings made throughout the case. For instance, in a post-trial brief received on June 5, 2017, SCGC identified the "central issue" in the case as whether "the Union/SCIF *or SCGC [is] the employer for purposes of Applicant's entitlement to Workers' Compensation benefits*," and engaged in a detailed factual and legal analysis in support of its position. (SCGC Post-Trial Brief, June 5, 2017, pp. 1-2 [italics added].) SCGC did the same in its petition for reconsideration of the WCJ's July 18, 2017 F&A, arguing, in depth, the reasons why "SCIF, as carrier for the Union should have been responsible for payment of workers' compensation benefits to applicant rather than SCGC." (SCGC Petition for Reconsideration, August 14, 2017, pp. 2 & 7-12.)

Based on the foregoing, we conclude that the issue of whether SCGC, as applicant's established employer at the time of injury, was potentially liable for applicant's workers' compensation benefits was properly before the WCJ, and that SCGC received adequate due process on this issue.

b. Applicant was also employed by the union at the time of injury.

Upon review, we conclude that the union also employed applicant at the time of injury, and that the WCJ's finding to the contrary is not based upon substantial evidence, as required. (*Lamb, supra*, 11 Cal.3d at p. 281.) Labor Code section 3351[4] provides broadly that, for the purpose of the Workers' Compensation Act, "employee" means "every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written…."

[4] All statutory references hereinafter are to the Labor Code unless otherwise indicated.

Section 3357 states that "[a]ny person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee." Once a "service" is found, the burden of proof rests with the alleged employer to prove that the injured applicant is not an employee. (*Jones v. Workmen's Comp. Appeals Bd.* (1971) 20 Cal.App.3d 124 [36 Cal.Comp.Cases 563]; see also *Yellow Cab v. Workers' Comp. Appeals Bd.* (1991) 226 Cal.App.3d 1288 [56 Cal.Comp.Cases 34]; Lab. Code, § 5705(a).)

Here, we conclude that there is substantial evidence that applicant was providing services to the union on the date of injury. First, applicant was a regional officer for the union, and at the time of injury, he had been driving with the union's secretary-treasurer to the union office to participate in a union study day in the midst of ongoing contract negotiations. (October Transcript, pp. 3:23-25, 4:1-3; May MOH, p. 4:9-10; March Transcript, p. 2:12-19; December Transcript, p. 3:21-23.) It is difficult to dispute that applicant was engaged in services on the union's behalf while engaged in such an activity. Other evidence confirms that this is the case. For instance, as explained by SCGC witness Leonard Prymus, "any time a union representative goes to a union meeting, they are working for the union" and that, when SCGC employees "do work for the union negotiating a contract…they are working for the union and are a representative of the union…." (May MOH, pp. 8:22-24, 10:14-16.)

By performing these services for the union, applicant is presumed to be the union's employee under section 3357, and the burden shifted to the union to prove otherwise. (Lab. Code, § 5705(a).) Upon review, we are not convinced that the union satisfied this burden. Instead, as explained below, the evidence shows that applicant had two employers, i.e., the union and SCGC, at the time of injury.[5]

[5] We note that the dual employment issue was twice overlooked by the WCJ in her 2017 and 2018 F&As. (Petition, pp. 2-3 & 10.) However, the parties do not contend, nor do we believe, that they lacked the opportunity to present evidence and argument on this issue such that a determination by the Appeals Board in the first instance would be improper. In fact, in their answers to SCGC's petition for reconsideration discussing the issue, both SCIF and applicant specifically argued that the WCJ properly found that dual employment did not exist at the time of injury, with SCIF going so far as to ask: "How many times does the trial judge have to say that, 'the union was not applicant's employer' and how many interpretations of that definite statement can there be? … The statement that Applicant was not an employee of the Union is straightforward, affirmative, and stands for itself. The trial judge cited the evidence and testimony to support her position, she just did not interpret it like the Gas Company desires." (SCIF Answer to SCGC Petition, August 22, 2018, p. 6.) Applicant's answer to SCGC's petition stated that the Appeals Board "sent this back to see if there was dual employment with the union," and that, in her 2018 F&A, the WCJ "cited…the testimony of Mr. Robles, letters of agreement, Exhibit 1 and 6, which clearly show that Mr. Robles was not an employee of the union at the time of the meeting or during the travel." (Applicant Answer to SCGC's Petition, August 27, 2018, p. 2.) As a result, we will address this issue in the first instance.

c. The dual employment doctrine.

California law recognizes the possibility that a worker may have two employers for workers' compensation purposes. (*Kowalski, supra*, 23 Cal.3d at p. 174; *Caso, supra*, 163 Cal.App.4th at pp. 888-889; *Riley v. Southwest Marine* (1988) 203 Cal.App.3d 1242, 1247-1248.) When an employer – the "general employer" – lends an employee to another employer and relinquishes all right of control over the employee's activities to the borrowing employer, a "special employment" relationship arises between the borrowing employer and the employee. (*Marsh v. Tilley Steel Co.* (1980) 26 Cal.3d 486, 492 [45 Cal.Comp.Cases 193] (*Marsh*).) "Once a special employment relationship is identified, two consequences ensue: (1) the special employer's liability for workers' compensation coverage to the employee, and (2) the employer's [and its other employees'] immunity from a common law tort action, the latter consequence flowing from the exclusivity of the compensation remedy embodied in Labor Code section 3601." (*Caso, supra*, 163 Cal.App.4th at p. 888.)

Alternatively, when the general employer retains some right of control over the employee, a "dual employment" relationship arises, with the result that the general employer remains concurrently and simultaneously, jointly and severally liable with the special employer for any injuries to the employee. (*Kowalski, supra*, 23 Cal.3d at pp. 174-175; *Caso, supra*, 163 Cal.App.4th at pp. 893-894; *Marsh, supra*, 26 Cal.3d at pp. 494-495.)

Here, we determine that, at the time of injury, a dual employment relationship existed between SCGC, as applicant's "general" employer, and the union, as applicant's "special" employer, such that these parties are jointly and severally liable for applicant's workers' compensation benefits.

i. SCGC was applicant's "general" employer at the time of injury.

As noted above, it was previously determined that SCGC employed applicant at the time of injury, and that this determination is final and no longer subject to challenge. Additionally, as the employer sending applicant to do work for the union on the date of injury, SCGC held the position of applicant's "general" employer under the dual employment doctrine.

ii. The union was applicant's "special" employer at the time of injury.

The evidence also shows that the union was applicant's "special" employer at the time of injury. The primary consideration in determining whether a "special" employment relationship

exists is "whether the special employer has '[t]he right to control and direct the activities of the alleged employee or the manner and method in which the work is performed, whether exercised or not….'" (*Caso, supra*, 163 Cal.App.4th at p. 888, quoting *Kowalski, supra*, 23 Cal.3d at p. 175; see also *Brassinga v. City of Mountain View* (1998) 66 Cal.App.4th 195, 215-216 [63 Cal.Comp.Cases 987] ["It is only where some measure of control over the employee is relinquished by the employee's general employer to another entity that the other entity may become the employee's special employer."].)

Additional factors relevant to determining whether a special employment relationship exists include: (1) whether the employee is performing the special employer's work; (2) whether there was an agreement, understanding, or meeting of the minds between the original and special employer; (3) whether the work performed by the employee was unskilled; (4) whether the employee acquiesced in the new work situation; (5) whether the original employer terminated its relationship with the employee; (6) whether the special employer furnished the tools and place for performance; (7) whether the new employment was over a considerable length of time; (8) whether the special employer had the right to discharge the employee; and (9) whether the special employer had the obligation to pay the employee. (*Kowalski, supra*, 23 Cal.3d at pp. 176-177; *Caso, supra*, 163 Cal.App.4th at p. 889; *Riley v. Southwest Marine* (1988) 203 Cal.App.3d 1242, 1250.) On the other hand, a special employment relationship may be negated by evidence that "[t]he employee is (1) not paid by and cannot be discharged by the borrower, (2) a skilled worker with substantial control over operational details, (3) not engaged in the borrower's usual business, (4) employed for only a brief period of time, and (5) using tools and equipment furnished by the lending employer." (*Marsh, supra*, 26 Cal.3d at p. 492.)

Although the terms of a contract may specify that a special employer retains the right to control the details of an individual's work or purports to establish an employment relationship, "the terminology used in an agreement is not conclusive…even in the absence of fraud or mistake." (*Kowalski, supra*, 23 Cal.3d at p. 176.) There still must be evidence to support the inference to be drawn from the contract's terms. (*Ibid.; Caso, supra*, 163 Cal.App.4th at p. 889.)

Special employment is most often resolved on the basis of "reasonable inferences to be drawn from the circumstances shown. [Citations.] And the existence or nonexistence of the special employment relationship…is generally a question reserved for the trier of fact." (*Kowalski, supra*, 23 Cal.3d at p. 175.)

(1) The union possessed the requisite amount of control over applicant's activities while engaged in union business.

Here, the primary right of control factor must be determined in favor of applicant. We first note that the Letter Agreement signed by SCGC and the union expressly states that SCGC employees "who are absent from work at the Union's request" are "employees of the Union for all employment purposes set forth in the Workers' Compensation and Insurance Chapters of the California Labor Code." (Jnt. Exh. X1, p. 5.) However, as noted above, the terms of such an agreement are not determinative, and there must be additional evidence demonstrating the union's ability to control applicant's activities while engaged in union business. (*Kowalski, supra,* 23 Cal.3d at p. 176; *Caso, supra*, 163 Cal.App.4th at p. 889.) Here, there is substantial evidence of such control.

First, the evidence shows that the union had the power to select the union representatives who it wished to participate in study days, and that applicant was one such individual. (Jnt. Exh. X1, p. 5; Jnt. Exh. X6, p. 1; MOH, May 10, 2017, p. 7:17-18.) Applicant also accepted the union's control by attending the study day on the date selected by the union, and applicant was subject to the union's authority to decide the length of each study day. (MOH, May 10, 2017, p. 6:1-2; March Transcript, p. 5:9-10.) Applicant was also subject to the union's informal confidentiality policies and "could not discuss the union's feelings with SCGC executives" while reviewing contract proposals with fellow union members. (December Transcript, p. 5:16-24; see also March Transcript, p. 4:18-20.) The union also appears to have had the capacity to discharge applicant from his position as a union regional officer, where, as explained during trial, after the accident on October 17, 2011, "the union told [applicant] he was no longer a regional officer, and he was removed in 2012." (December Transcript, p. 8:4-6.) Such evidence is substantial proof that applicant was subject to the union's control when he traveled to the study day at the union's request on October 17, 2011.

(2) The majority of the secondary factors also demonstrate special employment by the union.

Beyond the primary consideration of the right to control, the vast majority of secondary factors also favors the conclusion that the union was applicant's special employer at the time of injury. As a union regional officer traveling to a union study day on the date of injury, applicant

was clearly performing the union's work;[6] there was an understanding between SCGC and the union that applicant would attend the study day;[7] applicant acquiesced to the special employment by accepting the union regional officer position and by performing the duties associated with the position;[8] the union provided the place for the October 17, 2011 study day;[9] the union paid applicant a monthly stipend;[10] and applicant, while not required to do so, drove a union vehicle to the October 17, 2011 study day and on multiple other occasions while on "union business."[11] Additionally, at the time of his injury, applicant had worked for the union in various capacities for 15 years, including at least two years as a regional officer, so the duration of work was substantial.[12] All of these factors demonstrate a special employment relationship between applicant and the union.

With regard to the remaining secondary factors, there is no evidence to show whether, as a union regional officer, applicant engaged in highly skilled activities, and SCGC did not terminate its relationship with applicant while he worked for the union. However, it has long been established that the secondary employment factors cannot be applied mechanically or separately, and there is no requirement of unanimity in the factors. (See, e.g., *Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 351 [54 Cal.Comp.Cases 80]; *NLRB v. Friendly Cab Co.* (9th Cir. 2007) 512 F.3d 1090, 1097 ["We must assess and weigh all of the incidents of the relationship with the understanding that no one factor is decisive, and that it is the rare case where the various factors will point with unanimity in one direction or the other."].) Given the substantial evidence of the union's right to control applicant, along with the considerable number of secondary factors favoring a special employment relationship, we conclude that the union was applicant's special employer at the time of his injury.

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[6] October Transcript, pp. 3:23-25, 4:2-4; Jnt. Exh. X6, p. 1.

[7] Jnt. Exh. X6, p. 1.

[8] October Transcript, p. 4:1-3; December Transcript, p. 5:6-18.

[9] October Transcript, p. 3:23-24; March Transcript, p. 2:12-15.

[10] Exh. X2; October Transcript, p. 4:7; December Transcript, p. 10:19-21.

[11] December Transcript, p. 4:1-4 & 10-12; October Transcript, p. 5:1-3.

[12] December Transcript, p. 5:4-9; October Transcript, p. 4:4-6.

ii. Dual employment existed between applicant, SCGC, and the union at the time of injury.

As explained above, when a general employer retains some right of control over the employee during the loan-out period to the special employer, a "dual employment" situation arises, where the general employer and the special employer are jointly and severally liable for any injuries to the employee. (*Kowalski, supra*, 23 Cal.3d at pp. 174-175; *Caso, supra*, 163 Cal.App.4th at pp. 893-894.)

Here, the evidence shows that SCGC retained the right to exercise certain powers of control over applicant during the loan-out period to the union so as to create a dual employment relationship between SCGC and the union. Specifically, the evidence shows that, in order to perform work for the union, applicant had to obtain permission from his SCGC supervisor or clearance from H.R.; applicant would need to be "released" by SCGC to participate in union activities; SCGC required advance written notice of a union request for applicant's participation in union activities; applicant was required to report his union work hours to SCGC; and, in the event that a union meeting lasted fewer than 8 hours, applicant was required to return to work for SCGC for the remainder of those hours. (December Transcript, pp. 6:12-13, 10:15-17; March Transcript, p. 5:17-19; MOH, May 10, 2017, p. 10:22-23.) Additionally, SCGC retained the power to determine whether an employee's "workload permit[ed]" his or her release to participate in union work, so long as this determination was not made "arbitrarily" or "unreasonably." (MOH, May 10, 2017, pp. 4:15-17, 5:3-5.) This evidence is substantial and demonstrates that SCGC retained a great deal of control over applicant's activities during the relevant time period. As a result, SCGC and the union were dual employers at the time of applicant's injury and are jointly and severally liable for applicant's workers' compensation benefits. Applicant can look to and is entitled to workers' compensation benefits from either or both employers. (*Kowalski, supra*, 23 Cal.3d at p. 175; Marsh, supra, 26 Cal.3d at pp. 494-495.)

d. The terms of the parties' letter agreement did not alter SCGC's and the union's statuses as dual employers at the time of applicant's injury.

SCGC argues that, pursuant to the terms of the Letter Agreement signed by the union and SCGC, the union was "deemed" applicant's employer at the time of injury and is solely responsible for applicant's workers' compensation benefits. (Petition, pp. 10 & 12.) SCGC correctly notes that this was an issue identified at trial, and that the WCJ failed to address this issue in her July 16,

2018 F&A, despite our directive to do so in our March 12, 2018 opinion. (Petition, pp. 2-3; Opinion and Decision After Reconsideration, March 12, 2018, pp. 9-10.) However, the WCJ's failure to address this issue in her July 2018 F&A has no impact on this case; once our determination that SCGC employed applicant at the time of injury was finalized on April 27, 2018, it was no longer possible for the union to be applicant's only employer at the time of injury, "deemed" or otherwise. From April 27, 2018 onward, the terms of the Letter Agreement became relevant only to resolving the remaining issue of whether the union also employed applicant at the time of applicant's injury, and, if so, whether the union, SCGC, or both employers were responsible for applicant's workers' compensation under *Kowalski, Caso*, and its progeny. (*Id.* at p. 10, fn. 2.) As discussed above, the evidence shows that applicant was employed by both SCGC and the union at the time of injury, and that these parties are jointly and severally liable for applicant's workers' compensation under the rules of dual employment.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the WCJ's July 16, 2018 Findings and Award is **RESCINDED** and the following **SUBSTITUTED** in its place:

FINDINGS OF FACT

1. Applicant, Alex Robles…was employed on October 17, 2011 as a residential energy technician at Los Angeles, California, by Southern California Gas Company.

2. Applicant was employed on October 17, 2011 by Utility Workers Union of America, Local 132, insured by State Compensation Insurance Fund.

3. The going and coming rule does not apply to bar compensability in this case.

4. All other issues are deferred and remain off calendar.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 7, 2022

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

ALEX ROBLES
LAW OFFICE OF BERKOWITZ & COHEN
STATE COMPENSATION INSURANCE FUND
SINGER & BENJUMEA

AH/*pc*

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