WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ENRIQUE CASTILLO, *Applicant*

vs.

BARON HR, LIMITED LIABILITY COMPANY; TRION SOLUTIONS, INC. (BARON HR, LIMITED LIABILITY COMPANY, WEST, INC.) on behalf of UNITED WISCONSIN INSURANCE COMPANY, administered by NEXT LEVEL ADMINISTRATORS; SOURCE LOGISTICS, INC., NORGUARD INSURANCE COMPANY, administered by GUARD INSURANCE, *Defendants*

Adjudication Number: ADJ11714452
Long Beach District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, and for the reasons stated below, we will deny reconsideration.

Preliminary, we note that the WCJ's authority to adjudicate the issue of employment is well-settled. In addition to Labor Code[1] section 133 cited by the WCJ, WCAB rule 10330 states:

> In any case that has been regularly assigned to a workers' compensation judge, the workers' compensation judge shall have full power, jurisdiction and authority to hear and determine all issues of fact and law presented and to issue any interim, interlocutory and final orders, findings, decisions and awards as may be necessary to the full adjudication of the case, including the fixing of the amount of the bond required in Labor Code section 3715. Orders, findings, decisions and awards issued by a workers' compensation judge shall be the orders, findings, decisions and awards of the Workers' Compensation Appeals Board unless reconsideration is granted.
>
> (Cal. Code Regs., tit. 8, § 10330.)

[1] All further statutory references are to the Labor Code, unless otherwise noted.

We now turn to the issue of employment. Pursuant to section 3300, an "employer" includes, in relevant part, every "person ... which has any natural person in service." (Lab. Code, § 3300(c).) An "employee" is any person "in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed ..." (Lab. Code, § 3351.) Moreover, it is presumed that a person rendering service for another is an employee unless the alleged employer affirmatively proves otherwise. (Lab. Code, § 3357; *Yellow Cab v. Workers' Comp. Appeals Bd. (Edwinson)* (1991) 226 Cal.App.3d 1288 [56 Cal.Comp.Cases 34].)

An employee may have more than one employer. The characteristics of such dual employment are: 1) that the employee is sent by one employer (the general employer) to perform labor for another employer (the special employer); 2) rendition of the work yields a benefit to each employer; and 3) each employer has some direction and control over the details of the work. (See *Kowalski v. Shell Oil Co*. (1979) 23 Cal.3d 168 [44 Cal.Comp.Cases 134]; *Meloy v. Texas Co*. (1953) 121 Cal.App.2d 691 [18 Cal.Comp.Cases 313]; *Ridgeway v. Industrial Acc. Com*. (1955) 130 Cal.App.2d 841 [20 Cal.Comp.Cases 32]; *Doty v. Lacy* (1952) 114 Cal.App.2d 73 [17 Cal.Comp.Cases 316]; *Caso v. Nimrod Prods*. (2008) 163 Cal.App.4th 881.) The determination of whether a dual employment relationship exists is a question of fact. (*Kowalski, supra*, 23 Cal.3d at p. 176.)

As to the relevance of a contract, the *Kowalski* Court stated:

> 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.' (*Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 952 [88 Cal.Rptr. 175, 471 P.2d 975], citing *Bartels v. Birmingham* (1947) 332 U.S. 126 [91 L.Ed. 1947, 67 S.Ct. 1547, 172 A.L.R. 317]; accord *Mark Hopkins Inc. v. Cal. Emp. etc. Com.* (1948) 86 Cal.App.2d 15, 18 [193 P.2d 792]; *Stewart & Nuss v. Ind. Acc. Com.* (1942) 55 Cal.App.2d 501, 506 [130 P.2d 985]; *Luckie v. Diamond Coal Co.* (1919) 41 Cal.App. 468, 479 [183 P. 178].) 'The contract cannot affect the true relationship of the parties to it. Nor can it place an employee in a different position from that which he actually held." (*Martin v. Phillips Petroleum Co., supra*, 42 Cal.App.3d at p. 919.)
>
> Since a contract is not conclusive evidence of the existence of the right to control, the courts have looked to a number of factors as evidentiary indicia of the existence of a special employment relationship. 'The paramount

> consideration appears to be whether the alleged special employer exercises control over the details of [an employee's] work. Such control strongly supports the inference that a special employment exists.' (*McFarland v. Voorheis-Trindle Co., supra*, 52 Cal.2d at p. 705; *Oxford v. Signal Oil & Gas Co., supra,* 12 Cal.App.3d at p. 408; *Martin v. Phillips Petroleum Co., supra,* 42 Cal.App.3d at p. 922.)

For the reasons stated by the WCJ in the Report, we agree that both Baron HR and Source Logistics had the right to control applicant and exercised that control and that they both benefited from the arrangement. Moreover, we have given the WCJ's credibility determinations great weight because the WCJ had the opportunity to observe the demeanor of the witnesses. (*Garza v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determinations. (*Id*.)

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

JOSÉ H. RAZO, COMMISSIONER
CONCUR NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MARCH 21, 2022

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

ENRIQUE CASTILLO
LAW OFFICE OF DENNIS R. FUSI
LAW OFFICES OF GIBBS & WHIT
DJG LAW GROUP
ALBERT & MACKENZIE

PAG/*pc*

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date.
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REPORT AND RECOMMENDATION OF WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE ON PETITION FOR RECONSIDERATION

I.
INTRODUCTION

Source Logistics, insured for workers' compensation by Norguard Insurance Company (hereafter Source or petitioner), has filed a timely petition for reconsideration of the Findings of Fact and Order dated December 22, 2021, determining that Baron HR (hereafter Baron) and Source are general and special employers, with respect to applicant, at the time of injury. It was further ordered that Baron and Trion Solutions (hereafter Trion) did not offer sufficient information relating to their professional employment agreement to determine whether Baron was entitled to insurance through Trion from its carrier United Wisconsin. Development of the record is necessary to determine liability between Baron, Trion and Source. Petitioner is seeking dismissal, contending that their contractual agreement with Baron relieves them of any liability as the special employer of the applicant.

Although it is not specifically stated, petitioner appears to contend that their grounds for reconsideration are:

1. That through the decision, order or award, made and filed by the appeals board or a workers compensation judge, the appeals board acted without or in excess of its authority;
2. That the evidence does not justify the findings of fact;
3. That the findings of fact do not support the decision, order or award.

Source claims to be aggrieved by Finding of Fact 2, and Finding of Fact 3, determining that applicant was employed by petitioner, and that Baron and Source were general and special employers of applicant. It is asserted that by making its findings of fact, that the court:

a. Lacked the authority to determine that Source was an employer;
b. Exceeded its authority by determining that Source is the special employer;
c. Exceeded its authority by invalidating a legal contract between Baron and Source.

II.
FACTS

Enrique Castillo (hereafter applicant) filled out an application for employment at Baron. Applicant believes he only had one employer, Baron, who sent him to Source where he worked (SOE April 15, 2021, Page 4, Lines, 22.5-25). He was directed what to do by a supervisor of the warehouse who he believes was an employee of Source (SOE April 15, 2021, Page 5, Lines, 1-2). He received his schedule from Source (SOE April 15, 2021, Page 5, Lines, 2.5-4.5). Applicant received his pay checks, with Baron's name on them, from a representative of Baron who would come to the workplace (SOE April 15, 2021, Page 6, Lines, 7.5-11). He was fired by Baron when he reported the injury (SOE April 15, 2021, Page 6, Lines, 18-21.5).

Jessica Perez, an employee of Novamex, who is assigned to Source as Human Resources Manager, testified that she signed an agreement, on behalf of Source, with Baron, and was provided with a certificate of insurance by them (SOE May 17, 2021, Page 3, Lines, 10-12). Baron provides staff-on-demand services for Source. Some Baron workers who fulfill certain criteria may eventually be offered a position at Source, but they go through the same hiring process as any other person applying for employment (SOE May 17, 2021, Page 2, Lines, 20-22.5). She testified that supervisors, who were employees of Source, could direct Baron workers at the job site (SOE May 17, 2021, Page 4, Lines, 23.5-24). Ms. Perez also testified that after reporting Mr. Castillo's injury, she was sent an email by Angelica from Baron, confirming that they would handle Mr. Castillo's workers compensation case because they employed him (SOE May 17, 2021, Page 3, Lines, 12.5-14).

Baron would hire workers to work at Source if there was an order placed by Source for additional workers (SOE September 9, 2021, Page 2, Lines 23-24). Disciplinary matters were handled by Baron for workers referred to Source by them (SOE September 9, 2021, Page 3, Line, 1). Injuries to temporary workers were referred to Baron who handled all of the paperwork (SOE September 9, 2021, Page 3, Lines, 1.5-4).

Baron workers at Source operate forklifts. On the first day that a worker operates a forklift, he or she is assisted by the supervisor from Source who will make a determination concerning whether they are competent (SOE September 9, 2021, Page 4, Lines 7-8). Source may return workers to Baron who do not meet their requirements (SOE September 9, 2021, Page 4, Lines, 6.5- 9). Source provides a schedule to Baron (SOE May 17, 2021, Page 4, Lines, 10-12). Baron employees were required to wear a safety vest with a Baron insignia while working at Source (SOE September 9, 2021, Page 2, Lines 21-22).

Sergio Barciaga is the supervisor of operations at Source. He supervised both employees of Source and Baron. They are managed differently; temporary employees are handled through the agency, and Source employees are handled through human resources (SOE September 9, 2021, Page 3, Lines 21-25).

Mr. Barciaga recalls having spoken to applicant about how to do daily operations. He supervised all workers from both Source and Baron (SOE September 9, 2021, Page 3, Line 25 and Page 4, Lines 1-1.5). Source provides safety vests, glasses and gloves for all workers (SOE September 9, 2021, Page 4, Lines 2.5-3). The forklift operated by the applicant was either leased or purchased by Source (SOE May 17, 2021, Page 4, Lines, 2.5-3).

III.
JURISDICTION

Source argues that the court has either exceeded or acted without authority in this matter. The jurisdiction of the court is set forth in Labor Code Section 133 as follows:

> The Division of Workers' Compensation including the administrative director and the appeals board, shall have power and jurisdiction to do all things necessary or convenient in the exercise of any power or jurisdiction conferred upon it under this code.

There is nothing more fundamental to this authority than determining whether or not a person is an employee and, if necessary, characterizing the relationship as, joint, concurrent or independent contractor. The issue of employment was submitted without objection, and the decision was rendered based on the testimony, documents and well settled legal authority.

IV.
CONTRACT

Petitioner contends that, by its decision, the court has improperly invalidated the contract between Baron and Source. By describing applicant as an employee of Baron, Source cannot avoid the responsibility of an employer, where they have retained the right to control and accept the benefits of the agreement. Source has further confused the issue by arguing that they have no potential liability and should be dismissed.

Source relies on the case of Travelers Property and Casualty v. WCAB (2019) 84 CCC 883, in support of their argument that the contract with Baron renders the WCAB without the authority to determine that they are an employer. In that case, a contractual agreement, which had been in effect for six (6) years, was challenged by the California Insurance Guaranty Association (CIGA) on the grounds that an endorsement excluding special employees on the Travelers policy was not properly executed. CIGA argued that the Travelers policy held by the special employer was "other insurance" and should release CIGA from paying on behalf of the insolvent carrier for the general employer. The court reasoned that the intent of the parties was reflected by the duration of the agreement and compliance with the endorsement. The court concluded that it

would be inequitable to shift the liability for workers' compensation benefits because it was the intent of the parties to honor the endorsement.

Source argues that its agreement with Baron, and their compliance with it, shows the intention of the parties. We agree. As noted in the discussion of employment, petitioner retained the authority to supervise the borrowed servants, train them, provide safety equipment, and tools. The agreement also required Source to take the steps necessary to provide a safe place to work. Baron, for its part, promised to provide payroll, participate in supervision, handle discipline, and workers' compensation for a fee. The agreement supports the decision that it was the intention of the parties to, and did in fact, create a joint employment relationship.

V.
EMPLOYMENT

Source challenges the determination that applicant was employed by them pursuant to the agreement with Baron (Exhibit KK). They appear to believe that having reached an agreement with Baron, that they no longer have the responsibilities of an employer to provide workers' compensation. It is clear that the obligation for payroll, discipline and workers' compensation belonged to Baron by agreement. The agreement between Baron and Source is a creature of statute (Labor Code Section 3602 (d) (1)).

Labor Code Section 3602 (d) (1) provides in pertinent part as follows:

> ... an employer may secure the payment of compensation on employees provided to it by agreement with another employer by entering into a valid and enforceable agreement with that other employer under which the other employer agrees to obtain, and has, in fact, obtained workers' compensation coverage for those employees. In those cases, both employers shall be considered to have secured payment of compensation within the meaning of this section and Sections 3700 and 3706 if there is a valid and enforceable agreement between the employers to obtain that coverage, and that coverage, as specified in subdivision (a) and (b) of Section 3700, has been in fact obtained, and the coverage remains in effect for the duration of the employment providing legally sufficient coverage to the employee or employees who form the subject matter of the coverage...(Emphasis added)

The statute requires that the agreement needs to be valid and enforceable. Further, workers' compensation insurance that covers the claim has to be actually obtained. The failure to provide the agreed insurance is in question at this time.

The agreement that petitioner relies on for its contention is a creature of statute. The statute requires, by its clear language, that the parties to the agreement be employers. Further, the agreement between Baron and Source requires, inter alia, that petitioner:

a. Notify Baron within 24 hours of any material changes in employment status or duties of their workers;
b. That Source comply with all applicable break and meal periods according to law;
c. That Source exercise good judgement and management relating to day-to-day supervision of Baron employees;
d. That Source will provide appropriate supervision and training, specifically tailored to job requirements of Baron employees assigned to the work site;
e. That Source will provide a safe place to work (Exhibit KK).

An "employer" is any person who has a natural person in service (Labor Code Section 3300). "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, whether lawfully or unlawfully employed (Labor Code Section 3351). Any person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee (Labor Code Section 3357).

The scope of the workers' compensation act is not determined by technical contractual or common law conceptions of employment, but is instead established by reference to the history and purposes underlying the workers' compensation act (Yellow Cab v. WCAB (Edwinson) (1991)56 CCC 34).

It is well established that liberal construction allows the definition of "service of an employer" and a general presumption of employment to be construed by the courts with the purpose of extending benefits for the protection of persons injured in the course of employment. Common law and contractual elements of the employment relationship are replaced in determining employment by right to control and benefit to the employer (Laeng v. WCAB (1972) 37 CCC 185, 193).

Applicant's credible testimony, as well as that of the witnesses, and the documents in the record, show that applicant was in service to Baron and Source at the time of injury. He was hired by Baron who sent him to Source to work. Baron retained control over payroll, discipline and workers' compensation and both Baron and Source supervised the work activities. Source managed the worksite, its supervisors directed the work and are responsible for safety, as well as, providing the forklifts and safety gear used by all employees.

Both Baron and Source had the right to control and exercised that right. They both benefitted from the arrangement in that Baron provided services for a fee, and Source had temporary employees on an as needed basis, without the necessity of handling payroll, discipline and workers' compensation insurance. Notwithstanding the arguments put forth by Source, applicant is an employee of Source by any measure. As explained below, applicant was also employed by Baron in a general/special employment relationship.

VI.
GENERAL/SPECIAL EMPLOYMENT

Applicant's credible testimony as well as that of the witnesses show that applicant was in service to Baron and Source at the time of injury. He was hired by Baron who sent him to Source to work. By doing so, they created a duel or joint employment relationship. As will be set forth below, they created a classic general special employment relationship.

An employee who is sent by the original employer to render service to another, under the joint control of both, has two employers. The characteristics of general and special employment are:

a. A loaned employee who is sent to perform labor for another;
b. Joint participation in the work to the benefit of both the general and special employer;
c. Some power, not necessarily complete or exercised, in each employer in the direction and control of the details of the work (Meloy v The Texas Company (1953) 18 CCC 313).

The exercise of control may be express or implied. In this instance, it is unrebutted that Baron retained authority to discipline employees, had personnel at the work site to participate in supervision, and that Baron fired applicant when he reported the injury. The elements of special employment are the following:

a. The employee either expressly or impliedly consents to the special employment relationship;
b. The parties believe they are creating a general special employment relationship;
c. The special employer has the power to discharge the worker;
d. The employer provides unskilled labor, and the work he performs is a part of the employer's regular business;
e. The employment includes provision of tools and equipment.

In this case, the supervisor of the warehouse, an employee of Source, supervised the special employees as well as the Source employees. All workers were provided safety equipment and operated forklifts leased or purchased by Source. When the Baron workers were referred to Source, they were paired with

a Source supervisor who would shadow them to determine whether they were competent to operate the forklift. If they were not they would be returned to Baron.

There were forklift operators who were regular employees of Source, and some who were borrowed servants, but the job duties were the same (Kowalski v. Schell Oil Company (1979) 44 CCC 134). Baron employees were provided a schedule by Source. Both the general and special employers exercised control over the employees and benefitted from this arrangement. Baron was in the business of referring employees and providing payroll and disciplinary services for a fee. Source received employees on an as needed basis.

The liability of general and special employers is joint and several for workers' compensation benefits (Doty v. Lacy (1952) 17 CCC 316). Therefore, both Baron and Source were employers of applicant on the date of injury.

VII.
RECOMMENDATION

It is recommended that the Petition for Reconsideration be denied.

DATE: January 27, 2022
Daniel Nachison
WORKERS' COMPENSATION ADMINISTRATIVE LAW