WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ANDRES GARCIA, *Applicant*

vs.

DIAMOND STAFFING SERVICES, INC.; NATIONAL RETAIL TRANSPORTATION; CALIFORNIA INSURANCE GUARANTEE ASSOCIATION For LUMBERMEN'S UNDERWRITING ALLIANCE, In Liquidation; THE HARTFORD COMPANY, Administered by TRISTAR RISK MANAGEMENT, *Defendants*

Adjudication Number: ADJ9017829
Los Angeles District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant California Insurance Guarantee Association (CIGA) seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Order of December 12, 2023, wherein it was found that "The Applicant was an employee of Diamond Staffing Services and not an employee of National Retail Transportation." In this matter, while employed by Diamond Staffing Services, insured by Lumbermen's, on June 16, 2013, applicant sustained industrial injury to his lumbar spine, cervical spine, and knees. In a Compromise and Release agreement approved on June 30, 2015, applicant settled his claims against Lumbermen's in exchange for $45,000.00. Subsequent to the Compromise and Release, while adjustment and litigation over medical treatment liens were still pending, Lumbermen's was placed in liquidation, and CIGA became responsible for its California claims, subject to statutory limitations. On August 29, 2019, CIGA filed to join National Retail Transportation (NRT) and its insurer The Hartford Company, alleging that applicant was a special employee of NRT, and that The Hartford therefore constituted "other insurance" pursuant to Insurance Code section 1063.1(c)(9)(A), rendering applicant's claim a non-covered claim for which CIGA had no liability, and which The Hartford had the responsibility to administer and indemnify.

CIGA contends that the WCJ erred in not finding applicant to be a special employee of NRT. We have received an Answer and the WCJ has filed a Report and Recommendation on Petition for Reconsideration.

As explained below the WCJ erred in finding that applicant was not an employee of NRT. We will therefore grant reconsideration, rescind the WCJ's decision and issue a new decision finding applicant to be a special employee of NRT and deferring all other issues. To the extent that The Hartford argues that its policy does not offer coverage of special employees, that issue is subject to mandatory arbitration pursuant to Labor Code section 5275(a)(1).

Applicant was first employed at the NRT job site about four years before his injury. (September 24, 2023 deposition at pp. 32-33; February 28, 2022 deposition at p. 10). He was first employed by the staffing agency Personnel Plus, but about two years before the injury, he was approached on the job site by a representative of Diamond Staffing and filled out paperwork to become a Diamond Staffing employee. (February 28, 2022 deposition at pp. 10-11.) Applicant continued to work at the same job site under the supervision of Javier Garcia, who applicant testified was an employee of NRT, and not an employee of Diamond Staffing. (February 28, 2022 deposition at p. 11.) Applicant's only work for Diamond Staffing was at the NRT job site. (February 28, 2022 deposition at p. 19.)

Under the Temporary Staffing Services Agreement between Diamond Staffing and NRT, Diamond Staffing was given the role of providing "administrative supervision" of the workers it provided to NRT for "job descriptions and assignments requested by" NRT (Agreement at p. 1). Applicant testified, and the agreement provided, that NRT provided the equipment used on the job by the applicant. (February 28, 2022 deposition at pp. 13-14; Agreement at p. 2). The agreement provided that NRT "may retain such sufficient direction and control over the temporary employees as is necessary to conduct [NRT's] business and without which the [NRT] would be unable to conduct its business" (Agreement at p. 2) and that "[NRT] shall have the right to accept of cancel the assignment of any temporary laborer" (Agreement at p. 3). Applicant testified that his NRT supervisor would set his schedule had the ability to terminate him from NRT. (February 28, 2022 deposition at pp. 12, 17.) However, wages were paid by Diamond Staffing pursuant to a schedule referenced by the Temporary Staffing Agreement (Agreement at p. 2). Applicant testified that NRT did not control his wages. (February 28, 2022 deposition at p. 19.)

In the seminal case of *Kowalski v. Shell Oil Company* (1979) 23 Cal.3d 168, 174-175 [44 Cal.Comp.Cases 134], the California Supreme Court explained the concept of "general" and "special" employment as follows:

> The possibility of dual employment is well recognized in the case law. "Where an employer sends an employee to do work for another person, and both have the right to exercise certain powers of control over the employee, that employee may be held to have two employers -- his original or 'general' employer and a second, the 'special' employer." [Citation.] In *Industrial Ind. Exch. v. Ind. Acc. Com.* (1945) 26 Cal.2d 130, 134-135 [156 P.2d 926], this court stated that "an employee may at the same time be under a general and a special employer, and where, either by the terms of a contract or during the course of its performance, the employee of an independent contractor comes under the control and direction of the other party to the contract, a dual employment relation is held to exist. [Citations.]"
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> If general and special employment exist, "the injured workman can look to both employers for [workers'] compensation benefits. [Citations.]"

The paramount consideration in determining whether a special employment relationship exists "is whether the special employer has 'the 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. [Citation.]" (*Kowalski*, 23 Cal.3d at p. 175.) Although the *Kowalski* case and a number of cases following it reiterate that the issue of control is the primary criterion in the determination of the existence of a special employment relationship, the following other relevant factors have also been enumerated:

> (1) whether the borrowing employer's control over the employee and the work he is performing extends beyond mere suggestion of details or cooperation; (2) whether the employee is performing the special employer's work; (3) whether there was an agreement, understanding, or meeting of the minds between the original and special employer; (4) whether the employee acquiesced in the new work situation; (5) whether the original employer terminated his 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 borrowing employer had the right to fire the employee and (9) whether the borrowing employer had the obligation to pay the employee.

(*Riley v. Southwest Marine, Inc.* (1988) 203 Cal.App.3d 1242, 1250.)

However, unlike the primary issue of control, none of the above factors is dispositive of the issue of special employment. For instance, in *Santa Cruz Poultry, Inc. v. Superior Court (Stier)* (1987) 194 Cal.App.3d 575, the Court of Appeal overturned the trial court and found that, as a matter of law, a special employment relationship existed when the worker was directly supervised and instructed by the special employer despite the fact that the worker was only assigned to the special employer for the duration of one day. In *Wedeck v. Unocal Corp.* (1997) 59 Cal.App.4th 848 [62 Cal.Comp.Cases 1567], a special employment relationship was found as a matter of law despite the fact that the injured worker was a highly trained laboratory chemist. In *Riley*, *Stier* and *Wedeck*, a special employment relationship was found despite the fact that the respective workers were paid by the respective general employers.

Moreover, case law has acknowledged where, as here, "the general employer is a temporary employment agency … and the business to which the employee is assigned has the right of supervision and direction of the employment duties, the typical result is to find the existence of a special employment relationship. '[Employers] obtaining workers from [temporary employment services] have usually, but not invariably, been held to assume the status of special employer.' (1C Larson, Workmen's Compensation Law, § 48.23, pp. 8-488 -- 8-489, fns. omitted.)." (*Stier*, *supra*, 194 Cal.App.3d at p. 579.) "When the general employer … merely arranges for labor and does not provide equipment, the majority of decisions hold the worker is a special employee." (*Id.* at p. 582.)

Applying the principles discussed above, it is clear to us that the applicant was a special employee of NRT. All of the cases discussing "special employment" make clear that the paramount consideration is control of applicant's work. The applicant testified that he was directly supervised by NRT employee Javier Garcia and the agreement itself between Diamond Staffing and NRT allowed NRT to exercise control over the applicant, including termination from the job site.

The WCJ found no special employment relationship existed because the applicant was directly paid by Diamond Staffing and after the injury, was directed by Diamond Staffing regarding where to receive medical treatment. However, the *Wedeck* court made clear that these factors lack probative force in the temporary employment agency context, stating that the fact that a general employer has directly paid a worker "is not particularly enlightening in determining whether a special employment relationship exists [citation], particularly in the labor brokerage

context where the general employer often handles administrative details, including payroll" (*Wedeck*, 59 Cal.App.4th at p. 861, fn. 8). Similarly, directing workers' compensation appears to be part of the "administrative details" that Diamond Staffing was contractor for. Additionally, while the WCJ appears to have interpreted the Agreement between Diamond Staffing and NRT as foreclosing the possibility of a special employment relationship between applicant and NRT, we find no such provision in the Agreement. We note that even if such a provision existed it would only encompass one of the *Riley* factors enumerated above.

The WCJ erred in giving too much weight to these factors, and too little weight to the paramount factor of supervision and control over the applicant. Nevertheless, it appears that even analysis of the minor factors militates in favor of finding a special employment relationship. Applicant was injured while doing NRT's work, his work was unskilled, he had worked full-time at NRT's premises for four years, even before his employment with Diamond Staffing, and had his equipment provided by NRT.

Accordingly, we find that the WCJ erred in finding that applicant was not a special employee of NRT. We will therefore grant reconsideration, rescind the Findings and Order of December 12, 2023, and issue a new decision finding that applicant was a special employee of NRT and deferring all other issues. As noted above, to the extent that NRT and/or its insurer allege that its policy does not cover the applicant's injury, that issue is subject to mandatory arbitration pursuant to Labor Code section 5275(a)(1). We express no opinion on that issue or any other outstanding issue in this case.

For the foregoing reasons,

IT IS ORDERED that CIGA's Petition for Reconsideration of the Findings and Order of December 12, 2023 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Order of December 12, 2023 is **RESCINDED** and that the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. ANDRES GARCIA, born on [], while employed on June 16, 2013 as a forklift operator at Fontana, California, by DIAMOND STAFFING SERVICES INC, whose workers' compensation insurance carrier was CALIFORNIA INSURANCE GUARANTEE ASSOCIATION FOR LUMBERMEN'S UNDERWRITING ALLIANCE IN LIQUIDATION, sustained injury arising out of and occurring in the course of employment to the lumbar spine, cervical spine, and bilateral knees.

2. The Applicant was a special employee of National Retail Transportation at the time of his June 16, 2013 injury.

3. All other issues are deferred, with jurisdiction reserved.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEBRUARY 26, 2024

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

ANDRES GARCIA
JCR LAW GROUP
ROSENBERG YUDIN
HERMANSON, GUZMAN & WANG

DW/*cs*

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