WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

TILMON JOHNSON, *Applicant*

vs.

VENICE BAKING COMPANY; REPUBLIC INDEMNITY CO.;

BARONHR, LLC, *Defendants*

Adjudication Number: ADJ10179447
Los Angeles 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 arbitrator (WCA) with respect thereto. Based on our review of the record, and for the reasons stated in the WCA's report, which we adopt and incorporate, we will deny reconsideration.

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 WILLIAMS DODD, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 20, 2023

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

TILMON JOHNSON
GRAIWER & KAPLAN
TESTAN LAW
PEARLMAN, BROWN & WAX
GIBBS &WHITE, P.C.
BARONHR LEGAL
GILBERT KATEN, ARBITRAITOR

AS/mc

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

ARBITRATOR'S REPORT and RECOMMENDATION ON PETITION FOR RECONSIDERATION OF DEFENDANT BARON HR

Defendant Baron HR, LLC, has filed a timely and properly verified petition for reconsideration arbitrator's Findings and Order re Coverage dated March 28, 2023. The arbitrator offers the following Report and Recommendation in response thereto.

STATEMENT OF THE CASE

Tillman L Johnson born 8-23-1961, while employed as a machine operator on October 1, 2015, on the premise of Venice Baking Company (hereafter **VBC)** sustained injury arising out of and in the course of his employment and additionally claims to have sustained a cumulative injury from, 10-1-2011 through 10-1 2015. He filed an Application for Adjudication of claim with the Appeals Board, where issues regarding insurance coverage arose. Those issues were submitted to this arbitrator pursuant to an Arbitration Submittal Order dated 12/10/19. At that time, the Board had not ruled upon the employment issues also pending.

When injured, the applicant was believed by VBC to be its special employee, as he was placed there by defendant, Baron HR LLC (thereafter **BHR**), or one of its several affiliated entities, which all appear to be Professional Employer Organizations ("PEO"), **VBC** was insured by defendant, Republic Indemnity Company ("Republic"), but the policy excluded special employees of VBC.

BHR and several of its commonly owned affiliate entities, which included defendant, **Legendary Staffing Inc.**,[)] had entered into a staffing agreement (Arbitrator's Exhibit X -1) and with VBC to provide **BHR 's general** employees to VBC as the latter's **special** employees the staffing agreement is of the type described in Labor Code § 3602 (d)(1)[1], and applicant herein was one such employee, at the time of his injury. **BHR** paid some or all of the applicant's payroll and agreed to provide workers' compensation insurance coverage for its general employees working at **VBC.**

Thereafter, Republic received a purported certificate of insurance, "COI -Arbitrators Exhibit Y-1), which purported to certify that transportation insurance company provided

[1] All future statutory references herein are to the Labor Code, unless otherwise stated.

compensation coverage for **Bison Data Systems, Inc.** for at leased workers to BaronHR…" **under purported policy number 60118504**, on the date of applicant's injury. However credible witness testimony on the date of the arbitration March 23rd, 2023, never reported never rebutted, indicated that this COI was ingenuine, and prepared by someone who "no longer works" at **BHR** (Exhibit ZZ, p. 7). Cancel for BHR failed to produce the purported transportation policy at the arbitration trial (Exhibit Q)., despite this arbitrator's direction compelling him to do so by the March 3 arbitration, as set forth in his notice of arbitration dated January 16th, 2023. That resulted in the arbitrator drawing an inference that such a policy never issued.

At the time of the Board 's arbitration submittal order, **Bison Data Systems, Inc**. (hereafter **BDS)** had not been joined as a defendant by the Board, which justified an adjournment of the arbitration, when it first convened on January 9, 2021, in order for the counsel to secure **BDS**' joinder, along with several other potential employers and their carriers. That order issued on July 26, 2021. However, neither **BDS** nor any other parties joined by that order have appeared before the Board or this arbitrator, except for defendant, **Hartford Insurance Company**, on behalf of **BDS** (Hartford had appeared and was represented by Darren Meyer Esquire., on behalf of Hartford for a different alleged employer. **Legendary staffing, Inc.) BDS** appears to be another tier of PEO based upon **BHR's** PEO contract with **BDS** (Arbitrators Exhibit Y). By that contract, **BDS** appears to agree to service **BHR's** employees by agreeing to provide them workers' compensation coverage **BHR** was obliged to obtain for employees working at VBC, *inter alia*.

When the arbitration finally reconvened on March 3, 2023, attorney Michael Tom appeared on behalf of **Hartford, for BDS**. On March 3, a record was finally made, and a decision filed as to coverage of *all appearing employers and carriers*. That decision is the subject of the Petition for Reconsideration, filed by defendant, **BHR**.

Petitioner does not challenge Finding Number 1, that the **Hartford/Legendary Staffing policy** (**Exhibit Y-4**) did not afford coverage for applicant's claim. Nor does it challenge finding Number 2, that the purported **Transportation Insurance Company Policy number** 6011185404, does not exist to provide coverage of applicant's claim.

However the petitioner does challenge Finding Number 3, regarding the **Hartford/BDS** policy (**Exhibit Y-3**) as well, as well as Finding Number 4, and Conclusion A, that **BHR,** is uninsured for this workers' compensation claim.

PETITIONER'S CONTENTIONS

No other appearing party has filed a Petition for Reconsideration. **Petitioner, BHR**, makes two contentions in its Petition for Reconsideration.

First, Petitioner contends that the finding that it is uninsured is erroneous, because the **Hartford** policy (**Exhibit Y-3**), which names **BDS,** alone, as the uninsured, was not intended by **BHR**, to avoid the ultimate sentence of §3602(d)(1). That provision invalidates a PEO 's service agreement for purposes of coverage, if the contract is intended to avoid, " an employer's appropriate experience rating as defined in Insurance Code §1730(c)"

Second, Petitioner also contends that the alleged issue of coverage for yet another alleged PEO, Countrywide Payroll**,** was erroneously not addressed by this arbitrator.

ARBITRATOR'S REPORT AND RECOMMENDATION

1. BTR Has Failed to Meet its Burden of Proving that The Hartford/BDS Policy Affords it or BDS Coverage of Applicant's Claim.

It is obvious that Petitioner's July 2015,"service agreement" with VBC (Exhibit X-1), obligated it to secure compensation coverage, either directly itself, or through another tier of PEO, if Petitioner chose not to secure it directly itself. Therefore, if petitioner contends that the Hartford policy **for BDS** afforded it coverage for applicants claim, it had the burden of proving that Exhibit Y-3, the Hartford slash BDS policy, does so,*§5705*. It has failed to sustain that burden. There are two items of potential evidence in the record with regard thereto:

First, we have Exhibit Y-2, a purported Certificate of Insurance purportedly issued by Assurance Agency, Ltd., dated 10/19/15. That COI specifies a Hartford policy number 83 WEC CB 3144. Second, we have the endorsed policy bearing that number as Exhibit Y-3.

The COI that is Exhibit Y-2 names the insured as "Bison Data Systems, Inc. for leased workers to BaronHR, LLC," similarly, to the other purported COI for the

nonexistent Transportation Insurance Policy refer to in the COI received as Exhibit Y-1. Witness Jamie Glanz, credibly and without rebuttal testified that Exhibit Y-1 appeared to be a forgery, likely perpetrated by someone at BHR (see Summary of Evidence p. 6, *ad. Seq.*, and Exhibit ZZ), as corroborated by business-record emails. Therefore this arbitrator finds that Exhibit Y-2, standing alone, does not provide substantial evidence of coverage for applicant's claim, as its *bona fides*, is likewise suspect by reason of its similarity to Exhibit Y-1. That finding is corroborated, and the arbitrator's view, by the policy itself, Exhibit Y-3.

Whereas the COI reflects the insured to be "Bison Data Systems, Inc. for leased workers to BaronHR", the policy itself names the insured simply as "Bison Data Systems, Inc,". This along with Ms. Glanz 's testimony similarly cast serious doubt about the validity of Exhibit Y-2. Moreover, if the policy was intended to cover this applicant's employment at VBC as a machine operator, then it would have either matched the named insured as set forth in Exhibit Y-2 or included BHR as in "additional insured". But it couldn't do either, because the schedule of operations of BDS covers only "clerical office staff" employees. So the policy does neither, and does not cover the applicants claim. Petitioner has therefore failed to meet its burden proving coverage under the Hartford policy number 83 WEC CB3144.

2. Even If Hartford policy number 83 WEC CB3144 Otherwise Afforded Coverage Under the BHR/BDS Service Agreement, the Evidence Establishes that "an Employer", Whether BDS, Directly or BHR, Indirectly Intended to Avoid the Experience Rating of Insurance Code §11730 (c).

Petitioner argues that the arbitrator's conclusion is "untenable" and that the BHR BDS contract was intended to avoid compliance with insurance code section 11730(c). It argues at page 2, lines 16-18 that "this determination charges BaronHR with an intent to avoid compliance with the experience rating systemIt then attempts to support that argument by stating at one one. 22 dash 25 that there is no evidence that BHR received a copy of the Hartford policy during its term of coverage. The arbitrator views these arguments as irrelevant and disingenuous.

First its argument that there is "no evidence" ignores the fact that Hartford Policy 83 WFC CB 3144 was *received into evidence* as Exhibit Y-3. Second, the policy's Schedule of Operations for

BDS (Exhibit Y-3, p. 6), establishes that the policy covers only "clerical office employees" of **BDS**. Applicant, whether the employee of B**DS**, **BHR**, or both, was certainly not a "clerical office employee", but a machine operator, whose injury to his hand was sustained while operating a dough-making machine at **VBC**.

Third, whether or not Petitioner received a copy of that policy during its term is wholly irrelevant to the question of whether the BHR/BDS *agreement* was "made for the purpose of avoiding *an employer's* appropriate experience rating under" Insurance Code §11730 (c). Petitioner appears overly self-defensive when it argues that BHR is being "charged with the intent" to avoid the experience rating modification. The issue for this arbitrator to decide is whether or not Exhibit Y-3 affords coverage. He finds it does not do so, *regardless of whether the Board later finds BDS, BHR, or both to the employers*, because he finds that ***the agreement*** *between both of them*, that sought to avoid the experience rating modification for a machine operator, as opposed to a clerical office employee.

Moreover, under the California c Commercial Code §2210 (1), a party may perform his or her duty under a contract through delegation to another, by a contract with another party. That provision further states "No delegation of performance relieves the party delegating of any duty to perform or any liability or breach." This means that, if **BHR** delegated to **BDS** its obligation to secure coverage for applicant under BHR/VBC contract (Exhibit X-1) via the BHR/BDS contract (Exhibit Y). **BHR** nevertheless retains liability to VBC for any failure by **BDS** to secure coverage. Therefore, Petitioner retains liability for failing to secure coverage for this claim, whether or not it lacked the intent to avoid the experience rating modification.

Consequently, Petitioner's claimed lack of intent to avoid the experience rating under Insurance Code §11730 (c) is relevant. Nor is it relevant that BHR allegedly did not receive a copy of the Hartford/BDS, as it asserts in its Petition in the final paragraph of page 2. It is also irrelevant that **BHR** allegedly had no knowledge of the terms of that insurance policy, at any time, as **BHR** suggests in that same paragraph of its petition. Similarly, it is irrelevant that it *allegedly* "relied in good faith upon the representations of BDS that coverage extended to all classifications of workers", as asserted on Page 3, lines 3-4 of its Petition. Petitioner has offered no evidence of *any* representations made by **BDS** to **BHR**. Other allegations of its alleged "good faith" at page 3 of its Petition similarly ring hollow and irrelevant.

Petitioner, nevertheless, continues to assert its purported "good faith" reliance on unspecified representations by **BDS**, by claiming it paid over $ 5,000,000 to **BDS**. What "representations" did **BHR** produce evidence? One can only assume Petitioner is referring to the agreement of **BDS** set forth in the **BHR/ BDS agreement** (Exhibit Y). And that would mean **BHR** delegated to **BDS** its obligation to secure coverage[coverage] for **its** employees, such as applicant. So, California Commercial Code §2210 (1), *supra*, renders irrelevant Petitioner's arguments on page 3 of its Petition about claimed payments to **BDS**, and the admissibility of evidence thereof, as to the issue of Hartford coverage. [However, as to the admissibility of its Exhibit 13 contrary its assertion in the Petition that those alleged payment records we're *not* received into evidence, the Summary of Evidence and Transcript of March 3 clearly show that those records were received into evidence, despite their irrelevance and over Hartford's objection that they lacked foundation (which, indeed they did)].

Petitioner is not aggrieved by Findings 3 and 4, but by its own failure to properly secure direct coverage for its employees ,or indirect coverage through **BDS**, regardless of whether applicant was its employee, **BDS** employee, or their joint employee.

3. The issue of Coverage for Countrywide Payroll was Not Submitted to the Arbitrator like the Arbitration Submittal Order; That Entity was an Alleged Employer, Which has Made No Appearance Before the Board of Arbitrator, Nor Has Any Alleged Carrier Done So.

Countrywide Payroll is an alleged employer by virtue of yet another alleged Service Agreement with **BHR** (BHR Exhibit D). The alleged employer never appeared before the Board and neither it nor its alleged carrier were parties to the Arbitration Submittal Order. They were not even joined until the joinder order made on July 26, 2021, six months after this arbitration first convened on January 19, 2021. Neither Countrywide nor any alleged carrier of that PEO ever appeared at the Board or before this arbitrator, either before or after Countrywide's joinder. *The Arbitration Submittal Orders do not name Countrywide as a party of the arbitration.*

The purported Countrywide Payroll PEO agreement (BHR's Exhibit D) was apparently made in 2014. Applicant's injury occurred in 2015. *Petitioner has the burden of proving coverage for Countrywide Payroll*. As of the date of this Report and Recommendation, there have been 8 years to discover what carrier, if any, provides coverage. The time for such discovery ended when

with the convening of this arbitration on January 19, 2021. Yet, Petitioner asserts arbitrator error in failing to address Countrywide's coverage, challenging Finding Number 4 than it is uninsured for applicants claim. Petitioner argues that "it would be improper to decide that BaronHR was uninsured while the issue of coverage was not fully decided" (p. 4, 11, 26-27, Petition for Reconsideration).

It is not arbitrator's responsibility to prove coverage, but Petitioner's, under §5705. Petitioner has failed to locate and provide substantial evidence of such coverage in the 8 years applicant's claim has been pending. Petitioner has failed to provide any evidence of Countrywide coverage. As trier of fact, the arbitrator must address coverage for alleged employers, including Countrywide Payroll, but he cannot do so if no evidence he's presented to him, and they are not a party to the Arbitration Submittal Orders. The error was Petitioner's, in failing to discover and produce such evidence before this arbitration proceedings commenced with the execution of those Orders.

RECOMMENDATION

For the foregoing reasons, it is respectfully recommended that the petition for Reconsideration be denied.

Dated: May 12, 2023

GILBERT KATEN, Arbitrator