

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 **Case No. LAO 0722567**

5 **DANIEL MILBAUER,**

6 *Applicant,*

7 vs.

8 **EREZ BOOSTAN, an individual and dba**
9 **AMERICAN RUNNER ATTORNEY**
10 **SERVICE, uninsured; and UNINSURED**
11 **EMPLOYERS FUND,**

12 *Defendants.*

13 **OPINION AND DECISION**
14 **AFTER RECONSIDERATION**
15 **(EN BANC)**

16 On June 24, 2003, the Appeals Board granted reconsideration on its own motion pursuant
17 to Labor Code section 5900(b), with respect to the Supplemental Findings and Award of May 8,
18 2003.¹ In that decision, the workers' compensation administrative law judge (WCJ) found that the
19 applicant, while employed on October 17, 1994, by "Erez Boostan, an individual and dba
20 American Runner Attorney Service," uninsured for workers' compensation, sustained industrial
21 injuries to his back and upper and lower extremities, causing 66-1/4% permanent disability and a
22 need for further medical treatment.

23 The Uninsured Employers Fund (UEF), through its attorney of record,² filed an untimely
24 petition for reconsideration raising an important jurisdictional issue in challenging the WCJ's
25 decision. UEF contends that the WCJ incorrectly identified the employer, asserting that the
26 employer should have been identified as "American Runner Attorney Service, Inc., a corporation."
27 UEF argues that because the correctly named corporation was not properly served as required by

¹ We granted reconsideration on our own motion because the untimely petition for reconsideration of UEF presented important issues for which guidance is needed in the workers' compensation community.

² The Director of Industrial Relations enforces the provisions relating to UEF. (Lab. Code, §3710.) Attorneys with the Office of the Director, Legal Unit, represent the Director and UEF in proceedings before the Workers' Compensation Appeals Board ("WCAB"). (Lab. Code, §3716.1.) For convenience, we will refer to both UEF and the Office of the Director, Legal Unit, as "UEF."

1 Labor Code section 3716(d) and *Yant v. Snyder & Dickerson* (1982) 47 Cal. Comp. Cases 254
2 (Appeals Board en banc decision), there is no jurisdiction over the correct employer and no
3 jurisdiction over UEF.³

4 Because of the important legal issue presented, and in order to secure uniformity of
5 decision in the future, the Chairman of the Appeals Board, upon a majority vote of the members,
6 assigned this case to the Appeals Board as a whole for an en banc decision. (Lab. Code §115.)⁴

7 First, we conclude in this case that UEF’s petition for reconsideration regarding the correct
8 legal identity of the employer is without merit because the correct legal identity of the employer as
9 found by the WCJ in her decision served May 8, 2003, is supported by substantial evidence and
10 because UEF has offered no contrary evidence (either at trial or on reconsideration).

11 Second, we conclude that following the filing of an Application for Adjudication of Claim
12 (“application”), and as soon as an applicant determines that the employer is or may be uninsured
13 and has made a good faith effort to determine the correct legal identity of the employer, UEF may
14 be ordered to appear provisionally at proceedings and ordered to assist in determining the correct
15 legal identity of the employer pursuant to section 3716(d)(4). We announce several procedures
16 intended to obtain the early and active participation of UEF when either the employee has difficulty
17 in establishing the correct legal identity of the employer after good faith efforts, or when UEF
18 objects to the correct legal identity of the employer as asserted by the employee.

19 BACKGROUND

20 Sustaining an industrial injury can be a terrible experience, but discovering that the
21 employer is uninsured makes that situation worse. The employee’s problems ought not to be
22 compounded further when his or her numerous attempts to determine the correct legal identity of
23 the uninsured employer are merely challenged by UEF without any efforts by UEF to determine or
24 assist in determining the correct legal identity at the earliest opportunity. The reality of this

25 ³ All further statutory references are to the Labor Code.

26 ⁴ The Appeals Board’s en banc decisions are binding precedent on all Appeals Board panels and WCJs. (Cal. Code
27 Regs., tit. 8, §10341; *Gee v. Workers’ Comp. Appeals Board* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal. Comp.
Cases 236, 239, fn. 6].)

1 problem is plainly visible in the instant case by the eight and one-half years it has been pending on
2 the sole issue of the legal identity of the employer of applicant, who sustained a very serious
3 industrial injury on October 17, 1994. It appears no benefits have been paid to date.

4 In this case, applicant sustained a serious industrial injury to various parts of his body on
5 October 17, 1994, as a messenger/courier. He testified that he was riding a motorcycle, traveling
6 65 miles an hour, when a vehicle struck him. His employer was allegedly uninsured for workers'
7 compensation.

8 As acknowledged by UEF in its petition for reconsideration, from the commencement of
9 proceedings there has been confusion as to the correct legal identity of the applicant's employer at
10 the time of his injury. It appears that UEF has done little to alleviate that confusion, although UEF
11 has been an active participant in these proceedings since at least 1996.

12 In December of 1994, applicant filed an application in which he identified his employer as
13 "Erez Boostan, dba American Runner Attorney Service & Courier Network, Inc." An amended
14 application named "Erez Boostan as an individual and substantial shareholder of American Runner
15 Attorney Service & Courier Network." UEF was also named as a defendant in the amended
16 application.

17 On August 8, 1995, applicant served a Special Notice of Lawsuit on his alleged employer
18 identified as "Erez Boostan as an individual and substantial shareholder of American Runner
19 Attorney Service and Courier." In October of 1995, UEF was served with this Notice, together
20 with a Declaration of Readiness (DOR). The DOR stated that the "Board's assistance is required
21 to obtain jurisdiction over the uninsured employer and joinder of Uninsured Employers Fund."

22 On October 17, 1996, UEF appeared by counsel at a Mandatory Settlement Conference
23 (MSC), at which UEF was formally joined as a party defendant. At that MSC, applicant asserted
24 that "American Runner Attorney Service and Courier" was his employer. There is no indication in
25 the record that UEF then asserted that some other entity was the correct legal identity of the
26 employer.

1 On February 19, 1997, applicant prepared a new DOR, which was served on UEF, with a
2 caption and a proof of service indicating that “American Runner Messenger Service, Inc.,” was his
3 employer. Thereafter, MSCs were held on March 19, 1997, and April 9, 1997, at which UEF
4 appeared, but these hearings were continued so that “American Runner Messenger Service, Inc.,”
5 could be properly served.

6 On April 29, 1997, applicant served the amended application and a Special Notice of
7 Lawsuit on “American Runner Messenger Service, Inc., as successor in interest to American
8 Runner Attorney Service and Courier and Courier Network, Inc., Erez Boostan as substantial
9 shareholder of American Runner Messenger Service, Inc.”

10 Sometime during these proceedings, “American Runner Messenger Service, Inc.,” filed for
11 bankruptcy. Applicant obtained another attorney to seek relief from the automatic stay in
12 bankruptcy. An Order issued from the bankruptcy court in January 1998, giving relief to proceed
13 against “American Runner Messenger Service, Inc.”

14 On January 19, 1998, applicant prepared a new DOR, served on UEF, which captioned
15 “American Runner Messenger Service, Inc.” as the employer. Additional MSCs were held on
16 March 11, 1998, and December 23, 1999, at which UEF again appeared. At the latter MSC, the
17 question of employment was specifically placed in issue.

18 The matter went to trial both on February 13, 2000, and March 23, 2000, with UEF
19 appearing. The minutes of trial reflect that “identification of the employer” was specifically placed
20 in issue. At trial, applicant testified and documents were introduced in evidence. The
21 documentary evidence included pay stubs for the period of August 1994 through November 1994,
22 identifying the employer as “American Runner Attorney Service,” located at 11377 W. Olympic
23 Blvd., G100, Los Angeles, CA 90064. UEF offered no evidence that “American Runner Attorney
24 Service, Inc.,” (or any other entity) was the correct legal identity of the employer.

25 After clarification of relief from the automatic bankruptcy stay, the WCJ issued a Findings
26 and Order on May 18, 2000, in which she found that evidence did not justify a finding of
27 employment by “American Runner Messenger Service, Inc. or its predecessor in interest, American

1 Runner Service and Courier Network, Inc.” In the WCJ’s Opinion on Decision, she also stated that
2 applicant’s pay stubs identified his employer as “American Runner Attorney Service,” but that this
3 entity was not a properly served employer over which the WCAB had jurisdiction. Therefore, the
4 WCJ issued a finding of no employment by the only entity against which applicant proceeded.

5 By petition for reconsideration, applicant challenged the May 18, 2000 decision. UEF did
6 not petition for reconsideration or respond in any way. The Appeals Board denied reconsideration
7 based upon the Report and Recommendation of the WCJ, which was incorporated by reference. In
8 that Report, the WCJ indicated that the applicant was unsure of the name of the employer at trial
9 and submitted evidence of pay stubs that bore neither the name of a corporation nor Erez Boostan
10 as an individual. The WCJ stated that there was lack of evidence of employment by Erez Boostan
11 as an individual and a lack of jurisdiction over the employer (i.e., “American Runner Attorney
12 Service”) who appeared to have employed applicant at the time of his injury.

13 On October 11, 2001, applicant filed a new DOR, served on UEF, and attached a petition to
14 request an order for service by publication on the employer “Erez Boostan; American Runner
15 Attorney Service.” The petition demonstrated the multiple and sustained efforts exerted by
16 applicant in attempting to identify and locate the correct legal employer. Service by publication
17 was ordered by the WCJ on November 29, 2001, at a proceeding held that day, at which UEF
18 appeared. The matter was ordered off calendar. The record is silent to this point on what steps
19 UEF had taken, if any, to determine the correct legal identity of the employer.

20 On July 9, 2002, applicant filed another DOR, served on UEF. On August 8, 2002, an
21 MSC was held. At that time, UEF again appeared and the issues were framed, including the
22 correct legal identity of the employer. Applicant specifically contended that “Erez Boostan, an
23 individual, dba American Runner Attorney Service,” was the employer, but UEF made no
24 contention whatsoever about the correct name of the employer. Applicant also filed proof of
25 service by publication on “Erez Boostan, dba American Runner Attorney Service.” The matter was
26 set for trial but apparently taken off calendar inadvertently when the parties requested a
27 continuance. Therefore, applicant filed another DOR to put it back on calendar. At a conference

1 held on December 30, 2002, at which UEF appeared, the matter was set for a further trial for
2 February 25, 2003.

3 At the February 25, 2003, trial, applicant and UEF introduced documents to be admitted in
4 evidence and the parties submitted the matter for decision on the record, including the issue of the
5 correct legal identity of the employer. UEF, again, offered no evidence to show that “American
6 Runner Attorney Service, Inc.,” (or any other entity) was the correct legal identity.

7 On May 8, 2003, the WCJ issued a Supplemental Findings and Award. The WCJ found
8 that at the time of injury applicant was employed by “Erez Boostan, an individual and dba
9 American Runner Attorney Service, uninsured for workers’ compensation.” For this finding, the
10 WCJ indicates she relied on applicant’s previous credible testimony, pay records for “American
11 Runner Attorney Service,” and investigation reports. The WCJ awarded specified benefits to
12 applicant against “Erez Boostan, an individual, and dba American Runner Attorney Service,” and
13 found that this entity was “willfully uninsured.”

14 UEF filed its untimely petition for reconsideration in response to the WCJ’s award served
15 May 8, 2003.

16 In her June 6, 2003, Report and Recommendation on UEF’s petition, the WCJ notes that,
17 on August 8, 2002, UEF appeared and, with the applicant, prepared a pretrial conference statement.
18 This statement identified as evidence the documents showing valid service of the application,
19 Special Notice of Lawsuit, and the many fictitious names and corporations under which Erez
20 Boostan had done business. The WCJ states that at neither the MSC of August 8, 2002, nor at the
21 trial of February 25, 2003, did UEF submit evidence in support of its current position that
22 “American Runner Attorney Service, Inc.,” is the correct legal identity of the employer. At that
23 trial, both applicant and UEF asked that the issues be submitted for decision on the record without
24 further testimony. The WCJ further notes that UEF now contends that pay stubs exist which show
25 “American Runner Attorney Service, Inc.” (ARAS Inc) was the employer, not “American Runner
26 Attorney Service” (ARAS) as found by the WCJ. However, the WCJ states that the only pay stubs
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1 in evidence show ARAS. Under “DISCUSSION” the WCJ gives the following reasons in support
2 of the Findings and Order as to the identity of the employer:

3 “Petitioner’s [UEF’s] contentions rest on documents not filed, much less in
4 evidence. The pay stubs for applicant in evidence as Applicant’s #2 are from
5 ‘American Runner Attorney Service’ [ARAS]. There are no pay stubs from
6 ‘American Runner Attorney Service, Inc.’ [ARAS Inc.].

7 “Erez Boostan conducted business as American Runners Attorney Service &
8 Courier Network, American Legalnet, Inc., American Runner Messenger Service,
9 Inc., American Runner Attorney Service, Inc., and American Runner Attorney
10 Service (App.#3). He was served notice of application and special notice of
11 lawsuit by publication (App.#3).

12 “The requirements of correct identification of the employer, ARAS, valid service
13 to obtain jurisdiction over the employer, ARAS, required by *Yant v Snyder &*
14 *Dickerson* (1982) 47 CCC 254 have been met. The requirements of *Yant* have not
15 been met as to ARAS Inc but that is a moot point, since there is neither evidence
16 nor any contention before the instant petition for reconsideration that ARAS Inc
17 was the employer at the time of injury.

18 “Applicant was unsure of the correct name of his employer as his employment
19 badge was a different name from his pay stubs. He referred to his employer as
20 ‘American Runner’ which is a shorthand name for either ARAS or ARAS Inc. His
21 testimony supports the evidence in the pay stubs that he was employed by,
22 because he was paid for his services by, ARAS.

23 “Either petitioner has pay stubs not yet filed with the WCAB, and not offered as
24 evidence or it has misread the evidence in Applicant’s #2: ARAS and only ARAS
25 name is on the pay stubs to applicant at the time of injury.”

26 On its merits, the WCJ recommends that the petition be denied.

27 DISCUSSION

I.

UEF’s Petition On Its Merits

UEF’s contention in its petition for reconsideration that “American Runner Attorney Service, Inc.,” is the correct legal identity of the employer is without merit.

First, the WCJ’s decision that “Erez Boostan, an individual and dba American Runner Attorney Service,” is the correct legal identity of the employer is supported by substantial evidence.

1 As stated in the WCJ's Report and Recommendation of June 6, 2003, Erez Boostan conducted
2 business under various names, including both "American Runner Attorney Service" and
3 "American Runner Attorney Service, Inc.," but applicant's pay stubs are captioned "American
4 Runner Attorney Service" (i.e., they are *not* captioned "American Runner Attorney Service, Inc.").

5 Second, UEF offered absolutely no evidence at either trial to establish that "American
6 Runner Attorney Service, Inc.," is the correct legal identity of the employer.

7 Third, in its petition for reconsideration, all UEF offers, in substance, is an *argument* that
8 "American Runner Attorney Service, Inc.," is the correct legal identity of the employer because
9 (a) applicant's pay stubs are captioned "American Runner Attorney Service" and (b) "American
10 Runner Attorney Service, Inc.," was in existence at the time of applicant's injury. As just
11 discussed, however, the fact that "American Runner Attorney Service, Inc.," may have been in
12 existence at the time of applicant's injury means little, since Erez Boostan was concurrently
13 conducting business under several different names, including "American Runner Attorney
14 Service." Moreover, the pay stubs did *not* recite "American Runner Attorney Service, Inc.," but
15 instead recited "American Runner Attorney Service."

16 Accordingly, the WCJ's determination that "Erez Boostan, an individual and dba American
17 Runner Attorney Service," is the correct legal identity of the employer is affirmed.

18 II.

19 *Determining The Correct Legal Identity of Employer and Ensuring Early and* 20 *Active Participation by UEF*

21 The record reflects that, since shortly after applicant's industrial injury, the law firm of
22 Fensten, Gelber, Reyna & Martinez, LLP, tirelessly and commendably made every possible effort
23 to determine the correct legal identity of the employer in this matter, and to serve the employer
24 with the application and the Special Notice of Lawsuit, as noted above. There are check stubs,
25 database searches, special notices, all of which have been served on UEF. For all of applicant's
26 counsel's efforts, UEF has done little, if anything, to identify the correct employer, and it has done
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1 nothing to submit evidence in support of its position. This has delayed an expeditious
2 determination of the correct legal identity of applicant's employer at the time of his injury.

3 This case has been going on for some eight and one-half years on the issue of the correct
4 legal identity of the employer. During this time, applicant filed numerous DORs, several MSCs
5 were held, there were trials in February 2000, March 2000, and February 2003, and decisions
6 issued on the disputed issues in May 2000 and May 2003. At the February and March 2000 trials,
7 UEF offered no evidence regarding the correct legal identity of the employer. In the May 18, 2000,
8 decision, the WCJ determined that "American Runner Messenger Service, Inc." was *not* the correct
9 legal identity of the employer. We denied applicant's petition for reconsideration. UEF did
10 nothing. Thereafter, applicant's attorney served the employer by publication. Copies of all
11 documents were served on UEF. UEF still did nothing. The case went to trial again on February
12 25, 2003. UEF again offered no evidence on the correct legal identity of the employer. Now, in its
13 instant petition for reconsideration UEF asserts for the first time that "American Runner Attorney
14 Service, Inc.," is the correct legal identity of the employer.

15 UEF, of course, is "a 'purely statutory creature' whose liability depends on the strict
16 compliance with statutory conditions" and, "[i]n order to seek enforcement against ... UEF of any
17 award against [an uninsured employer], [an] applicant [is] required to strictly meet the statutory
18 conditions." (*Ortiz v. Workers' Comp. Appeals Bd.* (1992) 4 Cal.App.4th 392, 398 [57 Cal. Comp.
19 Cases 172, 174]; see also, *Aubry v. Workers' Comp. Appeals Bd. (Amores)* (1997) 56 Cal.App.4th
20 1032, 1034-1035 [62 Cal. Comp. Cases 870, 872-873]; *Symmar, Inc. v. Workers' Comp. Appeals
21 Bd. (Eckman)* (1982) 135 Cal.App.3d 65, 70-71 [47 Cal. Comp. Cases 847, 851].) Nevertheless,
22 the Legislature has declared that UEF's *primary and essential purpose* is "to ensure that workers
23 who happen to be employed by illegally uninsured employers *are not deprived of workers'*
24 *compensation benefits.*" (Lab. Code, §3716(b) (emphasis added); *DuBois v. Workers' Comp.
25 Appeals Bd.* (1993) 5 Cal.4th 382, 389 [58 Cal. Comp. Cases 286, 290]; *Smith v. Workers'
26 Compensation Appeals Bd. (Lee)* (2002) 96 Cal.App.4th 117, 121, fn. 2 [67 Cal. Comp. Cases 107,
27 108, fn. 2]; see also *Flores v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 171, 173 [39 Cal.

1 Comp. Cases 289, 290] (“[T]he California Legislature established [UEF] to serve as an immediate
2 source of funds for injured workmen whose employers have failed or refused either to obtain
3 workmen’s compensation insurance or to qualify as self-insurers”); *Aubry v. Workers’ Comp.*
4 *Appeals Bd. (Amores)*, *supra*, 56 Cal.App.4th at p. 1034 [62 Cal. Comp. Cases at p. 871] (“[UEF]
5 was created by the Legislature to ensure that employees who are injured in the course and scope
6 [sic] of their employment receive adequate compensation even if their employers are uninsured”).)
7 Consistent with its basic purpose, UEF has a statutory duty to furnish information to the WCAB
8 and the applicant as to the identities, legal capacities, and addresses of uninsured employers, as
9 more fully discussed below. (Lab. Code, §3716(d)(4).)

10 In our 1982 en banc decision of *Yant v. Snyder & Dickerson*, *supra*, 47 Cal. Comp. Cases
11 254, we stated, in pertinent part:

12 “Although we agree that the applicant must identify the uninsured employer and
13 effect proper service, the UEF should do what it can to facilitate the proceedings.
14 The workers’ compensation judge’s criticism of the UEF’s failure to appear and to
15 only raise objections by letter or by petition for reconsideration after a decision
16 has issued has some merit. UEF should, furthermore, ascertain before a noticed
17 hearing occurs whether or not there is a problem with identifying the proper
18 uninsured employer or with service and make known its position to the workers’
19 compensation judge and the applicant at the earliest opportunity. *We find nothing*
20 *inconsistent between UEF’s statutory obligations and offering aid to the court by*
21 *identifying the correct party defendant so a valid award may issue without*
22 *wasting valuable trial calendar time. Indeed, we find it consistent with UEF’s*
23 *counsel’s role as an ‘officer of the court’ to so aid the court. The legislative*
24 *objective in creating UEF is to facilitate the payment of compensation to the*
25 *injured worker who has the misfortune to be hired by an uninsured employer and*
26 *we do not expect UEF to conduct itself in any way that will frustrate its legislative*
27 *purpose.”* (47 Cal. Comp. Cases at pp. 260-261; emphasis added.)

22 In 1990, subsequent to our decision in *Yant*, *supra*, the Legislature amended section 3716 to
23 add subsection (d)(4):

24 “The director, on behalf of the Uninsured Employers Fund, shall furnish
25 information as to the identities, legal capacities, and addresses of uninsured
26 employers known to the director upon request of the board or upon a showing of
27 good cause by the employee or the employee’s representative. Good cause shall
include a declaration by the employee’s representative filed under penalty of

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perjury, that the information is necessary to represent the employee in proceedings under this division.” (Lab. Code, §3716(d)(4).)

Pursuant to and consistent with our decision in *Yant* and section 3716(d)(4), we conclude that more active and early participation on UEF’s part is necessary to assure judicial efficiency and fairness to all parties concerned. This need is clearly evidenced by cases such as this where, in eight and one-half years, UEF has done essentially nothing to assist in identifying the correct legal identity of the employer, while the employee’s attorney has taken every step to identify and serve the correct legal employer, only to have UEF wait for a decision that it challenges at the last minute or, in this case, beyond the last minute.

Therefore, to encourage and provide for the active participation by UEF at an earlier point, we conclude that following the filing of an application, and as soon as applicant determines that the employer is or may be uninsured and the employee has made a good faith effort to determine the correct legal identity of the employer, including contacting UEF for assistance, UEF may be ordered to appear at proceedings and ordered to assist in determining the correct legal identify of the employer pursuant to section 3716(d)(4). This may come into play under one of the situations noted below.

The procedures we announce here will enable UEF to comply more promptly and fully with its legislative mandate “to serve as an immediate source of funds for injured workmen whose employers have failed or refused either to obtain workmen’s compensation insurance or to qualify as self-insurers.” (*Flores v. Workmen’s Comp. Appeals Bd.*, *supra*, 11 Cal.3d at p. 173 [39 Cal. Comp. Cases at p. 290].)

A. After Good Faith Efforts, Employee Unable to Determine Correct Legal Identity of Employer

UEF has access to numerous resources, including county databases recording fictitious business name statements, and the Secretary of State’s corporate database. Accordingly, UEF should be held responsible to use those resources to assist the WCAB and the employee in identifying the correct employer after good faith attempts by the employee have failed. (Lab. Code, §3716(d)(4).)

1 (1) Cases Where The Employee Is Represented

2 If a represented employee is unable to determine the correct legal identity of the uninsured
3 employer after good faith efforts, including contacting UEF for assistance, the employee may
4 request a priority conference. (Lab. Code §5502(c); Cal. Code Regs., tit. 8, §10555.) . When a
5 represented employee requests a priority conference on the issue of the correct legal identity of the
6 employer, UEF shall be added to the WCAB’s Official Address Record and ordered to appear
7 provisionally at that conference and to assist the employee and the WCAB in determining the
8 correct legal identity of the employer, in compliance with section 3716(d)(4).

9 At the priority conference, if the employee and UEF can agree on the correct legal identity
10 of the employer, the employee and UEF should submit a stipulation to the WCJ for formal
11 approval.

12 If the correct legal identity of the employer cannot be determined at the priority conference,
13 the employee and UEF shall provide a plan to complete discovery on the issue of the correct legal
14 identity of the employer. (Cal. Code Regs., tit. 8, §10555.) Then, the WCJ should continue the
15 matter for one or more status conferences, as needed (Cal. Code Regs., tit. 8, §10555), with UEF
16 again ordered to provisionally appear. Concurrently, pursuant to section 3716(d)(4), the WCJ
17 should order UEF to assist in identifying the correct legal entity within a reasonable period of time,
18 *normally within six months.*

19 At any subsequent status conference(s) (following assistance by UEF), the employee and
20 UEF may submit a stipulation regarding the employer’s correct legal identity to the WCJ for
21 formal approval. In the absence of a stipulation within a reasonable period of time (normally
22 within six months from the priority conference), the WCJ should either issue a notice of intention
23 to determine the correct legal identity of the employer based on documents offered and admitted
24 into evidence or set the matter for a trial on the disputed issue, and thereafter make a formal
25 finding. UEF, although not yet joined as a party, shall be served with any notice of intention or any
26 notice of trial, and it shall be afforded the same opportunity as the parties to present evidence on
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1 the issue of the correct legal identity of the employer. Also, UEF shall be served with any formal
2 finding by the WCJ regarding the correct legal identity of the employer.

3 Once a finding is made regarding the correct legal identity of the employer (either based on
4 a stipulation, a notice of intention, or a trial), UEF generally will be forever bound by that finding,
5 unless it timely seeks reconsideration. (Lab. Code, §§5900(a), 5902, 5903, 5904.) Section 5900(a)
6 provides that “[a]ny person aggrieved directly or indirectly by any final order, decision, or award”
7 may file a petition for reconsideration. (Emphasis added.) Thus, if UEF has been served with a
8 WCAB decision that directly or indirectly aggrieves it, UEF may file a petition for reconsideration
9 even if it has not yet been joined formally as a party. (See, *Arias v. Workers’ Comp. Appeals Bd.*
10 (*Aviles*) (1983) 146 Cal.App.3d 813, 819-820 [48 Cal. Comp. Cases 659, 664].) Moreover, if
11 under such circumstances UEF fails to timely file a petition for reconsideration, this failure will
12 result in a waiver of “all objections, irregularities, and illegalities.” (Lab. Code, §5904; see *Cedillo*
13 *v. Workmen’s Comp. Appeals Bd.* (1971) 5 Cal.3d 450, 455-456 [36 Cal. Comp. Cases 497, 501];
14 *U.S. Auto Stores v. Workmen’s Comp. Appeals Bd. (Brenner)* (1971) 4 Cal.3d 469, 476 [36 Cal.
15 Comp. Cases 173, 177-178].)⁵

16 After a finding is made on the correct legal identity of the employer, the employee must
17 serve the application and the Special Notice of Lawsuit on that employer, in compliance with the
18 requirements of section 3716(d), if the employee has not already done so. Then, UEF may be
19 formally joined as a party defendant and its statutory liability will attach. (Lab. Code, §3716(d).)

20 (2) Cases Where The Employee Is Not Represented

21 If an unrepresented employee is unable to determine the correct legal identity of the
22 employer with the assistance of the Information & Assistance Officer or by any other means, the
23 employee may request a status conference on that issue. (Cal. Code Regs., tit. 8, §10301(s).) UEF

24 _____
25 ⁵ There may be limited circumstances under which UEF could petition to reopen a finding regarding the correct legal
26 identity of the employer (Lab. Code, §§5803, 5804), however, UEF would have to show “good cause” – which
27 necessarily would *not* include evidence on the issue that UEF could have discovered and presented earlier, had it
exercised due diligence. (*Merritt-Chapman & Scott Corp. v. Industrial Acc. Com. (Smith)* (1936) 6 Cal.2d 314, 322-
324 [1 Cal. Comp. Cases 144, 151]; *Nicky Blair’s Restaurant v. Workers’ Comp. Appeals Bd. (Macias)* (1980) 109
Cal.App.3d 941, 956-957 [45 Cal. Comp. Cases 876, 886].)

1 then shall be added to the WCAB's Official Address Record and ordered to appear provisionally at
2 that conference to assist the employee and the WCAB in determining the correct legal identity of
3 the employer, in compliance with section 3716(d)(4).

4 At the status conference, if the employee and UEF can agree on the correct legal identity of
5 the employer, the employee and UEF should submit a stipulation to the WCJ for formal approval.

6 If the correct legal identity of the employer cannot be determined at the status conference,
7 the WCJ should continue the matter for one or more status conferences, with UEF again ordered to
8 provisionally appear. Concurrently, pursuant to section 3716(d)(4), the WCJ should order UEF to
9 assist in identifying the correct legal entity within a reasonable period of time, *normally within six*
10 *months*. The matter would then proceed as outlined above, with UEF ordinarily being bound by
11 any stipulation or finding on the correct legal identity of the employer. Again, however, the
12 employee would have to serve the application and the Special Notice of Lawsuit on the employer,
13 if the employee had not done so previously, before UEF could be formally joined and before the
14 statutory requirements for UEF's liability are met.

15 B. UEF Disputes the Employer Asserted by the Employee

16 When the employee asserts that he/she has determined the correct legal identity of the
17 employer, the employee has served that employer pursuant to section 3716(d), and UEF has been
18 joined as a party defendant, but UEF disputes the employee's assertion, the represented employee
19 may request a priority conference on this issue. (Lab. Code §5502(c); Cal. Code Regs., tit. 8,
20 §10555.) The unrepresented employee may request a status conference. In either case, UEF shall
21 be ordered to appear at the conference.

22 At the conference, the parties may enter a stipulation as to the correct legal identity of the
23 employer to be formally approved by the WCJ. Absent a stipulation on that issue, the WCJ may
24 either issue a Notice of Intention based on admitted evidence or set the issue for trial and,
25 thereafter, issue a formal finding to be served on UEF. Whether the correct legal identity of the
26 employer is determined by way of stipulation, notice of intention, or trial, UEF ordinarily will be
27 forever bound by that determination, as discussed above.

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III.

Conclusion

In this case, we have set forth procedures designed to ensure UEF's early and active participation in situations where the injured employee has difficulty in determining the correct legal identity of the uninsured (or allegedly uninsured) employer after good faith efforts, or where UEF objects to the correct legal identity of the employer as asserted by the employee.

We have been compelled to adopt these procedures in order to prevent the kind of inaction UEF has demonstrated in this particular case. For more than eight years after applicant's October 1994 injury, UEF failed to offer any evidence on the issue of the correct legal identity of the employer and it failed to assist the WCAB and the applicant in determining the correct legal identity. Despite numerous opportunities over the years to specify the entity that UEF now contends to be the employer's correct legal identity, and to offer evidence in support of this contention, UEF offered absolutely no evidence at any of the trials to show that "American Runner Attorney Service, Inc.," (or any other entity) is the correct legal identity of the employer. Indeed, it was not until its June 2003 petition for reconsideration that UEF first asserted that "American Runner Attorney Service, Inc.," was the employer. Even now, UEF's petition for reconsideration only offers argument, and UEF fails to cite to any evidence that would specifically establish that "American Runner Attorney Service, Inc.," is the correct legal identity of the employer. (As discussed above, applicant's pay stubs are captioned "American Runner Attorney Service;" they are *not* captioned "American Runner Attorney Service, Inc.")

UEF's actions (or, more accurately, its *inactions*) in this case are in gross contravention of its duties under *Yant*, section 3716(d)(4), and section 3716(b), which expressly states that UEF was "created to ensure that workers who happen to be employed by illegally uninsured employers are not deprived of workers' compensation benefits." (Lab. Code, §3716(b); see also, *DuBois v. Workers' Comp. Appeals Bd.*, supra, 5 Cal.4th at p. 389 [58 Cal. Comp. Cases at p. 290]; *Flores v. Workmen's Comp. Appeals Bd.*, supra, 11 Cal.3d at p. 173 [39 Cal. Comp. Cases at p. 290] *Smith v. Workers' Compensation Appeals Bd. (Lee)*, supra, 96 Cal.App.4th at p. 121, fn. 2 [67 Cal.

1 Comp. Cases at p. 108, fn. 2]; *Aubry v. Workers' Comp. Appeals Bd. (Amores)*, *supra*, 56
2 Cal.App.4th at p. 1034 [62 Cal. Comp. Cases at p. 871].) UEF's behavior here has been so dilatory
3 and so inconsistent with its statutory responsibilities that (based on what appears to have been a
4 willful failure to comply with its statutory obligations, a willful intent to disrupt or delay the
5 proceedings of the WCAB, and/or a pattern of actions that are indisputably without merit) we
6 seriously considered imposing sanctions and attorney's fees against UEF and its counsel, jointly
7 and severally. (See, Lab. Code, §5813; Cal. Code Regs., tit. 8, §10561.)⁶ Because, however, we
8 only now announce appropriate procedures for UEF's early and active participation when the
9 employee has difficulty in establishing the correct legal identity of the employer after good faith
10 efforts or UEF objects to the correct legal identity of the employer as asserted by the employee, we
11 have decided not to impose sanctions and attorney's fees in this case.

12 If, in future cases, UEF and its counsel persist in this kind of behavior in the face of *Yant*,
13 section 3716(d)(4), section 3716(b), and our present decision, they are hereby expressly warned
14 that sanctions and attorney's fees under section 5813 and Rule 10563 may well be imposed against
15 them.

16 For the forgoing reasons,

17 **IT IS ORDERED** that as the Decision After Reconsideration of the Workers'

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26 ⁶ Although UEF is not liable for "any penalties" (Lab. Code, §3716.2; *DuBois v. Workers' Comp. Appeals Bd.*,
27 *supra*, 5 Cal.4th 382 [58 Cal. Comp. Cases 286]), no statutory provision insulates UEF from liability for sanctions and attorney's fees under section 5813 and Rule 10563.

1 Compensation Appeals Board, the May 8, 2003 Supplemental Findings and Award of the workers'
2 compensation administrative law judge be, and is hereby, **AFFIRMED**.

3 ***WORKERS' COMPENSATION APPEALS BOARD (EN BANC)***

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6 ***MERLE C. RABINE, Chairman***

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8 _____
9 ***WILLIAM K. O'BRIEN, Commissioner***

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11 _____
12 ***JAMES C. CUNEO, Commissioner***

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14 _____
15 ***JANICE JAMISON MURRAY, Commissioner***

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17 _____
18 ***FRANK M. BRASS, Commissioner***

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20 _____
21 ***A. JOHN SHIMMON, Commissioner***

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23 _____
24 ***RONNIE G. CAPLANE, Commissioner***

25 ***DATED AND FILED AT SAN FRANCISCO, CALIFORNIA***

26 ***December 18, 2003***

27 ***SERVICE BY MAIL ON SAID DATE TO ALL PARTIES AS SHOWN ON THE OFFICIAL ADDRESS
RECORD.
ed***