WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

EFRAIN PENALOZA, ***Applicant***

vs.

MODERN HR, INC. FOR ONE STOP PARTS SOURCE, LLC., ***Defendants***

Adjudication Number: ADJ9383866
Santa Ana District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant Zurich seeks reconsideration of the June 11, 2021 Findings and Order. After an insurance coverage arbitration concerning whether a policy issued by Zurich is "other insurance" and the California Insurance Guarantee Association (CIGA) is released from lability, the workers' compensation arbitrator found that, at the time of applicant's injury on September 20, 2013, "applicant was employed by Service Staffing, LLC/CPE HR as the general employer and One Stop Parts Source, LLC as the special employer." The arbitrator found that the workers' compensation insurance policy issued to Service Staffing LLC by Lumberman's covered Service Staffing on applicant's date of injury. The arbitrator also found that applicant's special employer entered into a valid and enforceable Labor Code section 3602(d) agreement with general employer and that Zurich's workers' compensation insurance policy was not limited and restricted to exclude coverage for temporary or leased employees provided to One Stop Parts Source, LLC by any staffing agency. Further, the arbitrator found that the limiting and restricting endorsement WC 04 03 15 was not approved by the insurance commissioner, and even if it was approved, the endorsement would only apply to exclude employees of One Stop Brake Supply. The arbitrator also found that applicant was employed as a driver on September 20, 2013 and that drivers were not excluded from the Zurich policy. The arbitrator found that the insurance policy issued by Zurich is "other insurance" and dismissed CIGA as a party defendant.

Zurich contends that its policy is not "other insurance" because endorsement WC 04 03 15 limits the policy to exclude employees such as the applicant. Zurich also contends that the policy

covered CPE HR and CPE HR was not applicant's employer because applicant did not complete a new hire packet prior to his industrial injury.

Labor Code section 5909 provides that a petition for reconsideration is deemed denied unless the Appeals Board acts on the petition within 60 days of filing. (Lab. Code, § 5909.) However, "it is a fundamental principle of due process that a party may not be deprived of a substantial right without notice…." (*Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493].) In Shipley, the Appeals Board denied applicant's petition for reconsideration because the Appeals Board had not acted on the petition within the statutory time limits of section 5909. The Appeals Board did not act on applicant's petition because it had misplaced the file, through no fault of the parties. The Court of Appeal reversed the Appeals Board's decision holding that the time to act on applicant's petition was tolled during the period that the file was misplaced. (*Id*.) Considering that Zurich timely sought reconsideration, we find that our time to act is tolled.

We have reviewed the record in this matter. CIGA filed an Answer. Zurich filed a Request to File a Supplemental Petition for Reconsideration. We have accepted the Supplemental Petition and considered it. The arbitrator prepared a Report and Recommendation on Petition for Reconsideration (Report) recommending that reconsideration be denied. For the reasons discussed below, we will grant reconsideration, rescind the June 11, 2021 Findings and Order, and return this matter to the arbitrator for further proceedings and a new decision.

FACTS

CIGA petitioned to be relieved from administering benefits and sought reimbursement for benefits paid to the applicant as a result of an injury sustained on September 20, 2013, alleging that Zurich issued a policy to CPE HR that is other insurance for applicant's special employer One Stop Parts Source.

On April 23, 2021, an arbitration was held by videoconference. Defendants Zurich North America and CIGA stipulated that "Service Staffing, LLC, was the general employer and One Stop Parts Source, LLC was the special employer of the applicant on the date of injury [September 20, 2013]." (April 23, 2021, Minutes of Hearing and Summary of Evidence[1] (MOH/SOE), p. 4.) Lumberman's Underwriting Alliance insured Service Staffing, LLC on applicant's date of injury

[1] This document begins at page 148 of the arbitrator's file.

and Lumberman's went into liquidation on May 23, 2016. The parties also stipulated that One Stop Parts source entered into a "staffing services agreement with Service Staffing, LLC, on August 1, 2013" and a "client services agreement with CPE HR, Inc., on August 7th, 2013." (MOH/SOE, pp. 4-5.)

At the Arbitration, the parties agreed to submit the following issues:

> THE ARBITRATOR: The issues are: Number 1, is there a general-special employment relationship between One Stop Parts Source, LLC and Service Staffing LLC?[2]
> Number 2, is there joint and several liability between One Stop Parts Source, LLC, and Service Staffing, LLC?
> Number 3 Issue: Is there a valid staffing services agreement in effect between Service Staffing and One Stop Parts Source that provided Service Staffing was the general employer and would supply employees to One Stop Parts Source, the special employer, and that Service Staffing would provide workers' compensation coverage for the employees of Service Staffing working at One Stop Parts Source?
> Number 4, is the insurance policy issued by Zurich American Insurance, other insurance, under Insurance Code Section 1063.1?
> Issue Number 5: Did the insurance policy issued by Zurich North America contain a valid exclusion for leased employees of One Stop Parts Source, LLC?
> Issue Number 6: Did Service Staffing purchase workers' compensation insurance from Lumbermen's Underwriting Insurance to provide workers' compensation for the employees of Service Staffing working on the premises of One Stop Parts Source?
> Number 7, did Zurich provide workers' compensation insurance to the special employer on the date of injury?
> Number 8, was the applicant employed by Service Staffing and leased to One Stop Parts on the date of injury?
> Number 9, did One Stop Parts Source, LLC enter into a client services agreement with CPE HR, Inc., on August 7th, 2013, for the provision of workers' compensation insurance for its permanent employees as specified by the client services agreement dated August 7th, 2013?
> Number 10, did Zurich North American Insurance provide workers' compensation coverage for permanent employees of One Stop Parts Source, LLC, through the PEO, CPE HR, Inc., per the client services agreement?
> And Number 11, did the insurance policy issued by Zurich North America include an endorsement that limits and restricts its coverage, specifically did the endorsement exclude coverage for any temporary or leased employees provided to One Stop Parts Source, LLC, by any staffing agency? (MOH/SOE at p. 5-7.)

[2] As noted above, the parties stipulated that "Service Staffing, LLC, was the general employer and One Stop Parts Source, LLC was the special employer of the applicant on the date of injury." (Transcript at 4:20-22.) After some discussion issue number 13 was added, "whether Zurich can withdraw from stipulation Number 2."

After further discussion, the parties submitted an additional issue: "Does the service agreement between CPE HR and One Stop provide for an exclusion from workers' compensation for driving on the job?" (MOH/SOE, p. 10.)

The parties submitted documentary evidence.

Exhibit A is a "lease back agreement" between Service Staffing and One Stop Parts that the parties stipulated was signed on August 1, 2013.

Exhibit B is a copy of a workers' compensation policy issued to Service Staffing by Lumberman's Underwriting Alliance.

Exhibit C is a copy of a workers' compensation policy WC4051209-06 issued by Zurich to CPE HR "L/C/F ONE STOP BRAKE SUPPLY INC, ONE STOP BRAKE SUPPLY SANTA ANA INC." The policy includes a limiting and restricting endorsement that states that the policy does not insure any liability that the Labor Contractor or the Client may have for any employees other than those provided pursuant to an employee leasing agreement between the Labor Contractor and the Client.

Exhibit D is a "Client Services Agreement" between CPE HR and One Stop Parts Source, LLC.

Exhibit 1 is a print out of an insurance coverage search performed on WCIRB Connect. The printout identifies a workers' compensation policy WC547072700 as a policy issued by Zurich to "CPE HR INC L/C/F ONE STOP PARTS SOURCE LLC. Policy WC547072700 is not in evidence.

ANALYSIS

This is a complex insurance coverage dispute involving multiple potential employers, contracts between employers, and insurance policies. To resolve a dispute such as this one, an arbitrator may need to ascertain the state of three or more relationships on applicant's date of injury. If an applicant has a general and special employer when they are injured, a coverage determination may require identifying the employers, determining whether there was an employee leasing agreement between employers, and determining whether either or both employers were insured for employees like the applicant. Because all these people and entities are in relationships with each other, if one relationship changes, it may change every other relationship. Like a Russian novel, it is important to keep track of multiple characters with similar names.

In this case, the parties and the arbitrator framed numerous issues to provide a framework for the arbitrator to answer the ultimate question of whether the Zurich policy provided insurance coverage for applicant's injury. The issues were not framed well and the resulting Findings and Order reflects the poorly framed issues. While issues related to employment were raised, it is not clear that a key issue, whether applicant was employed by CPE HR, was directly raised.[3] The arbitrator found two unrelated entities (each with their own insurance policy) to be applicant's general employer. The Findings of Fact did not identify the named insured of the Zurich policy although, ultimately the arbitrator found that it provided coverage for employees of One Stop Parts Source (an entity that was not the named insured).

Arbitrators generally have the same duties and responsibilities as workers' compensation administrative law judges.[4] The arbitrator's decision "shall have the same force and effect as an award, order, or decision of a workers' compensation judge." (Lab. Code, § 5277(c).) Like a workers' compensation judge, an arbitrator is required to "make and file findings upon all facts involved in the controversy and an award, order, or decision stating the determination as to the rights of the parties. Here, the arbitrator made several findings of fact without explaining the basis for the findings. Therefore, we must return this matter to the arbitrator to frame new issues and issue a new decision. As discussed further below, whether the Zurich policy identified as Exhibit C or another Zurich policy is "other insurance" may require the arbitrator to determine whether a particular employer employed the applicant, whether two employers entered into an agreement to jointly employ applicant, and whether an insurance policy covers or excludes leased employees of particular employers.

The Employment Relationship

Labor Code section 3351 defines an "employee" as "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…" Section 3357 augments this definition in stating that: "[a]ny person rendering service for another, other than as an independent contractor,

[3] Unless the parties stipulate to submit the issue of employment to an arbitrator, the issue of employment is determined by a workers' compensation administrative law judge, while the issue of insurance coverage is subject to mandatory arbitration. (Lab. Code § 5275.)

[4] Unlike judges, arbitrators do not have the power of contempt and do not have the power "to order the injured worker to be evaluated by a qualified medical evaluator pursuant to Sections 5701 and 5703.5." (Lab. Code, § 5272(a).)

or unless expressly excluded herein, is presumed to be an employee." An employer is “every person including any public service corporation which has any natural person in service.” (Lab. Code, §3300(c).)

The Relationship Between Applicant and Employers (General/Special)

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.)

A Professional Employer Organization (PEO) acts as a general employer and typically is an entity that leases back employees to another employer, provides payroll services, and agrees to obtain workers’ compensation coverage for joint employees. If an employer leases all of its employees to the PEO and then leases all of those employees back, the special employer will have all of its liability insured through a “client policy” which is a policy issued to the PEO that insures leased back employees for that particular client. Pursuant to Labor Code section 3602(d), the PEO must be an employer to obtain workers’ compensation coverage for joint employees. Therefore, a key threshold question will be whether applicant has an employment relationship with a PEO that is a potential general employer.

In this case, the arbitrator incorrectly identified two different PEOs as applicant’s general employer. There is no dispute that CPE HR and Service Staffing are different entities with separate insurance policies. It appears that there were two contracts in effect between applicant’s special employer and potential general employers. Applicant’s injury may have occurred during a transition period between two PEOs. It is unlikely that One Stop Parts Source was paying two PEOs for the same services or that applicant was receiving paychecks from both employers. Because a PEO must be an employer to obtain workers’ compensation insurance, it is necessary to determine which PEO was applicant’s general employer before examining the language of the relevant insurance policies.

In this case, if CPE HR did not have an employment relationship with applicant, any workers' compensation insurance policy issued to CPE HR will not provide coverage for applicant's injuries. Only a policy issued to applicant's employer can provide coverage.

The Insurance Relationship

Liability for workers' compensation benefits exists "against an employer for any injury sustained out of and in the course of the employment." (Lab. Code, § 3600.) Every private employer in California is required to "secure the payment of compensation" by purchasing workers' compensation insurance or by securing a certificate of consent to self-insure[5] from the Director of Industrial Relations. (Lab. Code, § 3700.) "In California, workers' compensation insurance (or an adequate substitute) is mandatory, and the Insurance Commissioner is charged with closely scrutinizing insurance plans to protect both workers and their employers." (*Nielsen Contracting, Inc. v. Applied Underwriters, Inc.* (2018) 22 Cal.App.5th 1096, 1118.) All workers' compensation policies must "contain a clause to the effect that the insurer will be directly and primarily liable to any proper claimant for payment of…compensation subject to the provisions, conditions and limitations of the policy." (Ins. Code, § 11651.)

Pursuant to Labor Code 3602(d), an employer may obtain workers' compensation coverage by entering into a valid and enforceable agreement with another employer to obtain coverage for employees provided by the other employer. (See e.g. *Fireman's Fund Ins. Co. v. Workers' Comp. Appeals Bd (Columaria)* (2010) 189 Cal.App. 4th 101.) The liability of general and special employers for compensation benefits is joint and several. (See *Fireman's Fund Indem. Co. v. State Compensation Ins. Fund (Smith)* (1949) 93 Cal.App.2d 408 [14 Cal.Comp.Cases 180].) The effect of a valid and enforceable agreement under Labor Code section 3602(d) is that "both employers shall be considered to have secured the payment of compensation." However, even after a general and special employer enter into an agreement under Section 3602(d), the employers remain jointly and severally liable.[6] (*Proulx Manufacturing Company v. Workers' Comp. Appeals Bd.* (*Bahney*) (2010) 75 Cal.Comp.Cases 782 [writ den.].)

[5] Pursuant to Labor Code section 3701.9, after January 1, 2013, entities engaged in providing employees as part of an agreement with another employer are prohibited from obtaining a certificate of self-insurance.

[6] Although the liability of general and special employers for compensation benefits is joint and several pursuant to Insurance Code section 11663, "[a]s between insurers of general and special employers, one which insures the liability

A PEO or similar entity engaging in employee leasing cannot be self-insured and is subject to specific rules promulgated by the Insurance Commissioner. (Lab. Code, § 3701.9; Ins. Code, §§ 11651, 11657, 11658.) "Every workers' compensation insurer shall adhere to a uniform experience rating plan filed with the commissioner by a rating organization[7] designated by the commissioner and subject to his or her disapproval." (Ins. Code, § 11734(a).) The Insurance Commissioner has adopted a Uniform Statistical Reporting Plan (USRP) and an Experience Rating Plan (ERP) to facilitate reporting of data and assignment of an experience modification to each employer that is experience rated.[8] (Ins. Code, §§ 11734, 11736; *Allied Interstate Inc. v. Sessions Payroll Management Inc.* (2012) 203 Cal.App.4th 808.) In order to prevent employers from avoiding an unfavorable experience modification or selling access to a favorable experience modification, the ERP includes rules delineating which entities are subject to a particular experience modification.[9] Insurance policies issued to employers engaged in an employee leasing arrangement[10] must comply with certain requirements found in the ERP, including a requirement that there be a separate policy written to cover the liability of the workers provided to a client by the labor contractor. To fulfill its part of the bargain under a Section 3602(d) agreement, the leasing employer must inform its insurance company that it is engaged in employee leasing and obtain a separate policy for workers provided to a client.

In this case, Exhibit C is a workers' compensation insurance policy that provides coverage for employees leased from CPE HR to One Stop Brake Supply. This is a PEO client policy written with the general employer as the named insured and a client who is applicant's special employer as essentially an additional insured. The policy is designed to provide coverage for both employers

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of the general employer is liable for the entire cost of compensation payable on account of injury occurring in the course of and arising out of general and special employments…" (Ins. Code, § 11663.)

[7] The Workers' Compensation Insurance Rating Bureau (WCIRB) is the rating agency designated by the Insurance Commissioner.

[8] The ERP and USRP are available at https://www.wcirb.com/filings-and-plans/california-regulations .

[9] An insurer "shall provide the WCIRB with all information relevant to a complete analysis of a risk's ownership and/or operations to ensure the proper application of an experience modification." (ERP, Section I, Rule 3.) A "risk" is defined as "[a]ll insured operations of any entity within California and, if two or more entities are combinable for experience rating purposes in accordance with Section IV, Rule 2, *Combination of Entities*, all operations of such entities within California, regardless of whether such operations or any part of them are insured by one or several insurers." (ERP, Section II, Rule 11.)

[10] The ERP defines "employee leasing arrangement" as "any arrangement, under contract or otherwise, and whether or not terminology such as 'lease' is used by the parties, whereby an entity utilizes the services of a third party to provide its workers for a fee or other compensation. The third party providing the workers shall be referred to as the 'labor contractor'. The entity to which the workers are provided shall be referred to as the 'client'." (ERP, Section V, Rule 4.)

in an employee leasing arrangement. As discussed above, applicant must be employed by CPE HR to potentially be covered by the Zurich policy identified as Exhibit C. If CPE HR was applicant's general employer, the special employer covered by the policy appears to be a different entity than One Stop Parts Source. The parties did not present evidence that One Stop Brake Supply was the same entity as One Stop Parts Source.

However, as noted above, CIGA's Exhibit 1 is some evidence that there was a policy issued to CPE HR for employees leased to One Stop Parts.[11] In evaluating the potential for coverage under the policy identified by the WCIRB coverage search, the key issue remains whether applicant's general employer was CPE HR or Service Staffing. If applicant's general employer was CPE HR, and the policy identified in the WCIRB report contained endorsement WC 04 03 15, the endorsement limits the policy to employees like the applicant who are leased from CPE HR to a particular special employer, One Stop Parts Source. The endorsement is intended to limit the policy to only leased employees rather than all employees of either CPE HR or One Stop Parts Source. If applicant was employed by CPE HR and leased to One Stop Parts Source, he would not be excluded from the policy by this endorsement.[12] If applicant was not employed by CPE HR, a policy issued to CPE HR could not provide coverage to a non-employee of the named insured.

Finally, we note that the issue of whether the CPE HR client services agreement excluded workers' compensation coverage for drivers was framed incorrectly. The terms of workers' compensation insurance policies issued in California are governed by statute, and each policy is conclusively presumed to contain all the provisions required by law. (Ins. Code, § 11650; *La Jolla Beach & Tennis Club v. Industrial Indem. Co*. (1994) 9 Cal.4th 27, 36.) All workers' compensation policies must "contain a clause to the effect that the insurer will be directly and primarily liable to any proper claimant for payment of…compensation subject to the provisions, conditions and limitations of the policy." (Ins. Code, § 11651.) A limited workers' compensation policy must be approved "as to substance and form, by the [Insurance] commissioner" before the policy is issued. (Ins. Code, § 11657.) "Failure to observe the requirements" of the Insurance Commissioner's rules or failure to obtain pre-approval of policy language limiting coverage "shall render a policy issued

[11] We decline to reach the issue of whether the information on coverage from the WCIRB website is sufficient, given that there was no evidence presented on efforts to locate this policy.

[12] The arbitrator would need to determine whether WC 04 03 15 was a valid limiting and restricting endorsement only if applicant was employed by CPE HR as a general employer and leased to a special employer where CPE HR did not have a client policy identifying "leased coverage for" the special employer or identifying the special employer as an additional insured.

under Section 11657, and not complying therewith, unlimited." (Ins. Code, § 11660; See also *Fyne v. Industrial Acci. Com.* (1956) 138 Cal.App.2d 467.) An agreement that alters a workers' compensation insurance policy that is not filed with and approved by the Insurance Commissioner is void as a matter of law. *(Luxor Cabs, Inc. v. Applied Underwriters Captive Risk Assurance Co.* (2018) 30 Cal.App.5th 970, 987.)

Because agreements to limit and restrict coverage are subject to prior approval by the Insurance Commissioner, an agreement between employers cannot limit coverage (*Luxor, supra.*) However, two employers can enter into an agreement to lease or lease back certain employees and not others. Viewed in this light, the agreement between CPE HR and One Stop Parts Source is evidence that may be weighed, together with other evidence, to assist the finder of fact in determining whether applicant was a leased employee of CPE HR or Service Staffing.

Upon return of this matter to the arbitrator, the parties should frame the issues to focus on those issues necessary to determine whether a Zurich policy provided coverage. If the parties agree to submit the issue of employment to the arbitrator, the arbitrator should determine if CPE HR was applicant's general employer before addressing related issues.[13]

[13] It may also be necessary to consider whether there is good cause to relieve the parties from their stipulation regarding the identity of the general employer. As noted above, that issue was submitted to the arbitrator but the arbitrator did not determine that issue.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the June 11, 2021 Findings and Order is **GRANTED.**

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the June 11, 2021 Findings and Order is **RESCINDED** and this matter is **RETURNED** to the trial level for further proceedings and a new decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 29, 2021

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

BRADFORD & BARTHEL
EFRAIN PENALOZA
FLOYD SKEREN
MARK KAHN, ARBITRATOR

MWH/oo

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