WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

CLIFFORD TOMB, III, *Applicant*

vs.

BALBOA CITY SCHOOLS;
OAK RIVER INSURANCE COMPANY C/O BERKSHIRE HATHAWAY, *Defendants*

Adjudication Number: ADJ10812022
Anaheim District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration[1] in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration. Having completed our review, we now issue our Decision After Reconsideration.

Defendant Balboa City Schools, insured by Oak River Insurance Company, c/o Berkshire Hathaway (defendant) seeks reconsideration of the March 28, 2019 Findings and Order (F&O), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as an ESL teacher on March 19, 2016, claims to have sustained injury arising out and in the course of employment to the back and knee. The WCJ found, in relevant part, that the Workers' Compensation Appeals Board has subject matter jurisdiction over the claimed injury.

Defendant contends that because the contract for hire was formed outside California, there is no basis for California jurisdiction over the claimed injury.

We have received an Answer from applicant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will rescind the F&O, and return this matter to the trial level for development of the record.

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[1] Commissioner Lowe, who was on the panel that issued the grant for study, is no longer a member of the Workers' Compensation Appeals Board. Commissioner Dodd has been substituted in her place.

FACTS

Applicant claimed injury to the low back and right knee while employed as an ESL teacher by defendant on March 19, 2016. Defendant contends applicant's contract for hire was formed outside California, and thus there is no California jurisdiction over the dispute.

On January 9, 2016, applicant had a tele-meeting with Natalie Clark Addleson, Vice President and International Program Director for the Balboa City School (BCS) regarding a teaching position at the school's facilities in Quanzhou, China. (Ex. 1, email correspondence, dated January 9, 2016, p.13.) On January 15, 2016, Ms. Addleson emailed applicant, thanking him for his patience and indicating she would "like to send [applicant] a contract with details on Monday." (*Id*. at p.11.) On January 16, 2016, applicant responded to the email, indicating he had a good feeling regarding the "program, city, and fit," and that he looked forward to the receipt of contract details. (*Id*. at p.10.) On January 20, 2016, Ms. Addelson emailed a draft contract to applicant, including a term of hire, provision for housing, time off, and work visa requirements. *(Ibid.)* Later that same day, applicant responded via email, noting he was considering several employment opportunities, and asking for additional information. (*Id*. at p.7.) On January 21, 2016, Ms. Addleson responded with additional specifications regarding the proposed employment, including information on housing, a relocation bonus, and the school's curriculum.

On January 25, 2016, applicant emailed Ms. Addleson:

> Thank you so much for coordinating this and making our weekend decision very easy! Please find [attached] the accepted and signed agreement. We look forward in being a part of BCS for years to come. (Ex. 1, email correspondence, dated January 25, 2016, p.1.)

The email confirms applicant's travel arrangements, seeks contact information for applicant's landlord, inquires as to airport transportation, and confirms applicant will update his visa. On January 26, 2016, Ms. Addleson wrote back, "Welcome to the BCS team! We are excited to have you in Quanzhou in February!" (*Id*. at p.1.)

On February 23, 2017, applicant filed an Application for Adjudication, alleging injury to the back and right knee on March 19, 2016.

The parties proceeded to trial on February 11, 2019, framing issues of subject matter jurisdiction and "due process" for decision. (Minutes of Hearing and Summary of Evidence (Minutes), at 2:1.) Applicant testified that he was in China when he was first contacted by

defendant via Skype, e-mail and telephone, and that he dealt with different individuals before his terms were met and he signed. (*Id*. at 3:6.) Applicant communicated by e-mail to Natalie Clark Addleson. Ms. Clark Addleson worked in the San Diego offices of Balboa City Schools. The offer of work came from Ms. Clark Addleson in California who sent him an email. He was visiting his mother in Florida. (*Id*. at 3:19.) After receiving the contract, applicant did not recall any further negotiations. The negotiations were done before the terms of the contract were agreed upon. (*Id*. at 3:21.) The primary terms to be negotiated involved applicant's health care coverage and that applicant was going to be teaching at the Quanzhou school in China. Applicant was also concerned regarding the work visa requirements, which were negotiated prior to applicant accepting the terms of the contract. (*Id*. 4:24; 6:1.) Applicant agreed and accepted the terms of the contract that was offered from California. (*Id*. at 4:1.) Applicant received the contract, signed it and sent it back. At the time applicant signed the contract, he happened to be in Florida. (*Id*. at 4:15.) Applicant did not recall any e-mails after January 21, 2016 regarding the terms of the contract other than the January 25, 2016 email where he sent back the contract. (*Id*. at 4:19.) Once he returned the contract via email, applicant did not believe that verification by the employer was necessary. (*Id*. at 4:20.) After signing the agreement, applicant physically relocated to China without being aware that the contract was signed by defendant. (*Id*. at 5:6.)

Natalie Clark Addleson testified to her position as Vice Principal of Independent Program Studies for BCS, and to her contract negotiations with applicant. (Minutes, at 5:21.) Ms. Clark Addleson acknowledged it was possible that she was in California when she negotiated the contract with applicant. (*Id*. at 6:11.) After receiving the contract, Ms. Clark Addleson signed it, by which time it was her understanding that applicant was already on the way to China. (*Id*. at 5:24.) Ms. Clark Addleson felt she did not need to sign the contract before the applicant could start teaching. In fact, applicant had started teaching before the contract was signed. (*Id*. at 6:24.) Ms. Clark Addleson was unaware of who would be liable in the event of breach of contract. (*Id*. at 7:14.) Applicant was paid by the "WOFE," a Wholly-Owned Foreign Entity, and not by BCS. (*Id*. at 7:12.) When asked what would happen in the event of an early termination of the employment agreement, Ms. Clark Addleson testified applicant would need to "look to" the WOFE. (*Id*.a at 7:15.) She further testified that the "Teaching Contract" was a formality, and that the terms were not binding. (7:17.)

The WCJ issued the F&O on March 28, 2019, finding in relevant part that "[t]his is a claimed workers' compensation injury and it was filed in the Workers' Compensation Appeals Board. The WCAB is authorized to hear this issue. Therefore, subject matter jurisdiction is met." (F&O, Findings of Fact No. 5.) The F&O further determined that "[b]ased on the contract and its forum selection clause, and California maintaining its interest in enforcing the terms of the contract, California is the proper forum for the applicant to bring this claim for benefits," and that "[t]his court has subject matter jurisdiction over the applicant's injuries and chooses to exercise that jurisdiction." (F&O, Findings of Fact Nos. 8, 12.)

Defendant's Petition contended that pursuant to sections 3600.5 and 5305, California jurisdiction over out-of-state injuries requires a contract of hire formed inside California. (Petition at 5:12.) Because the hiring took place while applicant was physically located in Florida, there was no California jurisdiction over the dispute.

Applicant's Answer asserted that various terms of the contract provided for dispute resolution within California. (Answer at 3:18.) Applicant further asserted that the contract emailed to applicant in Florida was a draft, and that the contract for hire was formed in California when defendant executed the contract. (*Id*. at 5:7.)

The WCJ's Report asserted various public policy considerations as supportive of the extension of California jurisdiction over the disputed injury:

> Here, there is an overwhelming state's interest in finding jurisdiction in California because if there is no California jurisdiction, the applicant, who was hired by a California Corporation, BCS, headquartered in Escondido, California would be left without a remedy for his injuries. Defendant states it does not matter that a California corporation hired the applicant, because the applicant did not execute the contract in California or live in California therefore there is no California jurisdiction and that this is "getting too bogged down in the minutiae." Page 4 lines 16-18. The applicant had no other legal remedy as discussed infra.
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> In *Alaska Packers Ass'n v. Industrial Accident Comm'n* 294 U.S. 532 (1935) the Supreme Court held that the California Workmen's Compensation Act provided in, then §27(a), "No contract, rule or regulation shall exempt the employer from liability for the compensation fixed by its act." It further went on to state that if the injured workers were not entitled to California workers' compensation benefits they would be "Without a remedy in California, they would be remediless, and there was a danger that they might become public charges, both matters of grave public concern. This case dealt with workers from Mexico who were flown to San Francisco, signed a contract and then were flown to Alaska

> to work. As discussed infra the contract really does not matter in this case because the applicant would be left without a remedy as no other benefits were available to him for his injuries. (Report, pp.3-4.)

Citing to *Laeng v. Workmen's Comp. Appeals Bd.* (1972) 6 Cal.3d 771 [37 Cal.Comp.Cases 185], the WCJ observed that "an 'employment' relationship sufficient to bring the act into play cannot be determined simply from technical contractual or common law conceptions of employment but must instead be resolved by reference to the history and fundamental purposes underlying the Workmen's Compensation Act." (*Laeng*, *supra*, at 776.) The WCJ also noted that per *Arriaga v. County of Alameda* (1995) 9 Cal.4th 1055, 1058 [60 Cal.Comp.Cases 316], the applicant was otherwise without the remedy of a civil suit, due to the exclusive remedy rule. (Report at pp. 4-5.) The WCJ concluded:

> The Supreme Court has made it clear in both the *Arriaga* and *Laeng* cases supra that the purpose of the Workmen's Compensation Act was to protect employees from the special risks of employment. To allow the defendants to shirk their responsibilities under the code based on the place of signing of the contract flies in the face of the state's compelling interest to protect injured workers. (F&O, Opinion on Decision, p. 6, para. 3.)

DISCUSSION

Under California's workers' compensation law, benefits are to be provided for industrial injuries when the statutory conditions of compensation are met. (Cal. Const., art. XIV, § 4; Lab. Code, §§ 3600 et seq., 5300 and 5301.) The California Constitution confers on the Legislature "plenary power, unlimited by any provision of this Constitution," to establish a system of workers' compensation. (Cal. Const., art. XIV, § 4.) The California Workers' Compensation Act provides for a *compulsory* scheme of employer liability without fault for injuries arising out of and in the course of employment. (Cal. Const., art. XIV, § 4, *emphasis added*.) The purpose of the act is to furnish "'a complete system of [workers'] compensation, including full provision for such medical, surgical, hospital and other remedial treatment as is requisite to cure and relieve from the effects of such injury.'" (*Sea-Land Serv. v. Workers' Comp. Appeals Bd.* (1996) 14 Cal.4th 76, 85 [61 Cal.Comp.Cases 1360])

The workers' compensation laws codified in Labor Code section 3200 et seq. are intended to implement that objective and provide "a complete system of [workers'] compensation…" (Lab.

Code, § 3201.) (*Dep't of Corr. v. Workers' Comp. Appeals Bd. (Antrim)* (1979) 23 Cal.3d 197, 203 [77 Cal.Comp.Cases 114].)

The Labor Code 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. (Cal. Lab. Code § 3351.5.) An applicant is presumed to be an employee, and eligible for workers' compensation benefits, if he or she rendered service for the alleged employer. "Any person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee." (Cal. Lab. Code § 3357.)

The Labor Code further provides that "a person providing labor or services for remuneration shall be considered an employee rather than an independent contractor unless the hiring entity demonstrates that all of the following conditions are satisfied: (A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; (B) The person performs work that is outside the usual course of the hiring entity's business; (C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed." (Cal. Lab. Code § 2775.)

Pursuant to the compulsory system of workers' compensation, Labor Code section 3700 requires employers to "secure the payment of compensation" by obtaining workers' compensation insurance from an insurer duly authorized to write compensation insurance in California or through a self-insurance program approved by the Director of Industrial Relations. The securing of the payment of compensation in a way provided in this division is essential to the functioning of the expressly declared social public policy of this state in the matter of workers' compensation. The conduct or operation of any business or undertaking without full compensation security, in continuing violation of social policy, shall be subject to imposition of business strictures and monetary penalties by the director . . . . (Lab. Code, § 3712, subd. (a).) (*Starving Students, Inc. v. Department of Indus. Rels. (2005)* 125 Cal. App. 4th 1357, 1364 [70 Cal.Comp.Cases 30, 33-34].)

Here, the parties have framed the issue as whether there is California jurisdiction over applicant's alleged injuries. (Minutes, at 2:12.) The evidentiary record before us addresses the issue of jurisdiction exclusively with respect to BCS, which admits employment of applicant. (*Id*. at 2:2.)

However, under sections 3600.5 and 5705, jurisdiction flows from the formation of a contract of hire. "Where the duty to pay compensation is contractual, as under the optional acts, the rights of the injured party, wherever the injury is received, may, according to recognized principles, be controlled by the law of the place of contract. However, the California act is compulsory and it is now settled that the right to, and the liability for, compensation established by it are not founded upon contract but are statutory rights and duties arising from the employer-employee relationship and are imposed by the law as incidents to that status. (*Alaska Packers Assoc. v. Industrial Acci. Com. (Palma)* (1934) 1 Cal.2d 250, 256 [1934 Cal. LEXIS 358].) After a careful review of the evidence, we are not persuaded that the question of applicant's employment and, by extension, jurisdiction over the injuries alleged to have arisen out of and in the course of that employment, is adequately addressed in the record of proceedings.

Despite BCS admitting employment, defense witness and Vice Principal Natalie Clark Addleson has testified that BCS *did not pay applicant's salary*. (Minutes, at 7:13.) Neither applicant's paystubs nor his payroll history have been moved into evidence. Ms. Clark Addleson further testified that applicant was paid by a "Wholly Owned Foreign Entity" or "WOFE." (*Id*. at 7:15.) The identity of the "WOFE" is not clear from the record, nor is the relationship between BCS and the "WOFE." Additionally, the record does not establish that BCS exercised day-to-day control over applicant's work activities. When asked what would happen in the event of a dispute under the Teaching Contract, Clark Addleson was unaware of the grievance procedure, and in the event of a breach of contract, could not testify to the forum or arbiter of such a dispute. (*Id*. at 7:4.) She testified that in the event of a contractual dispute, applicant would need to "look to WOFE" in order to address it. (*Id.* at 7:15*.)*

Ms. Clark Addleson further testified that that Teaching Contract was merely a "formality" and that applicant was an employee irrespective of whether the contract was fully executed. (*Id*. at 7:22.)

The focus of the litigation thus far has centered on the Teaching Contract as between applicant and BCS, as relevant to the issue of California jurisdiction. However, it appears the threshold issue which must be amplified in the record is the nature of the relationship as between applicant and BCS, and as between BCS and the alleged "WOFE" that paid applicant's salary and may have exercised control over applicant's day-to-day job functions.

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." (*Miller v. Long Beach Oil Dev. Co.* (1959) 167 Cal.App.2d 546, 549 [334 P.2d 695].) 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. (*Industrial Ind. Exch. v. Ind. Acc. Com.* (1945) 26 Cal.2d 130, 134-135 [1945 Cal. LEXIS 139].) "If general and special employment exist, "the injured workman can look to both employers for [workers'] compensation benefits." (*Kowalski v. Shell Oil Co.* (1979) 23 Cal.3d 168, 174-175 [44 Cal.Comp.Cases 134].)

Here, we believe that the issue of the nature of applicant's employment relationship with BCS and/or any additional entities must be elucidated for a full and adequate evaluation of the issue of jurisdiction. Upon return to the trial level, the record should be developed to identify any and all additional parties to applicant's alleged employment, and to ascertain the exact nature of the relationship between those parties. To the extent that California law requires workers' compensation coverage be extended under section 3700, we further encourage the parties to elucidate the nature of the workers' compensation coverage afforded to BCS employees, whether within or without California. If there are agreements as between BCS, the WOFE, and any other employers, the record should reflect any arrangements made as between the employers for dispute resolution, control of applicant's job duties and functions, and/or agreements regarding the provision of workers' compensation benefits, if any. Finally, once the parties have fully determined the nature of applicant's employment, and concomitant coverages, the issue of California jurisdiction over injuries arising out of and in the course of that employment may be fully and adequately addressed. When the WCJ issues a decision, any party newly aggrieved may thereafter seek reconsideration.

For the foregoing reasons,

IT IS ORDERED, as the **DECISION AFTER RECONSIDERATION** of the Workers' Compensation Appeals Board, that the March 28, 2019 Findings and Order is **RESCINDED**, and the matter **RETURNED** to the trial level for further development of the record.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JULY 8, 2022

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

CLIFF TOMB
DIMARCO ARAUJO AND MONTEVIDEO
GALE SUTOW AND ASSOCIATES

SAR/abs

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