

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

DANIEL FLORES CAMPOS, ROMAN HERNANDEZ AGUILAR, *Applicants*

vs.

**AMPCO, FV SALVAGE; CORVEL, STATE COMPENSATION INSURANCE FUND,
*Defendants***

**Adjudication Numbers: ADJ11934915 (MF), ADJ11733861
Van Nuys District Office**

**OPINION AND DECISION AFTER
RECONSIDERATION**

We previously granted reconsideration in order to allow us time to further study the factual and legal issues in this case. We now issue our Opinion and Decision After Reconsideration.

We have considered the allegations of the Petition for Reconsideration and the contents of the Report and Recommendation on Petition for Reconsideration of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the Joint Opinion on Decision and the WCJ's Report and Recommendation, both of which we adopt and incorporate, we will affirm the Joint Finding of Fact issued by the WCJ on July 7, 2021.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Joint Finding of Fact issued by the workers' compensation administrative law judge on July 7, 2021 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ MARGUERITE SWEENEY, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MARCH 15, 2022

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

**DANIEL FLORES CAMPOS
ROMAN HERNANDEZ AGUILAR
MICHAEL BURGIS & ASSOCIATES
PEARL LEGAL, APC
STATE COMPENSATION INSURANCE FUND
FRIEDMAN & BARTOUMIAN
NEWHOUSE & CREAGER**

AS/ara

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

JOINT OPINION ON DECISION

The sole question in ADJ11934915 asked is who was the employer of the injured workers on the date of injury 09/28/2018. Another included question referenced Labor Code §2750.5. Defense counsel for AMPCO asks, separately from this issue, as to:

“Whether an adverse inference on the issue of employment should be drawn against CalMar for failure to comply with the subpoena duces tecum and order compelling compliance with subpoena duces tecum; and against SCIF for also failing to comply with subpoena duces tecum dated February 25, 2020.”¹

In ADJ11733861 defense counsel for AMPCO required a statement be read into the record by the court:

“Defendants defer coverage questions to arbitration: If AMPCO is determined to be an employer, whether BBSI as a leasing company for AMPCO is an employer and provides workers compensation coverage; whether AMPCO is an additional insured of CalMar, State Compensation Fund and Rockhill.”²

The sole question asked by parties was then who was the employer on the date of injury in this case. Other issues remarked upon also include whether AMPCO was the employer of the applicant, Labor Code §2750.5, penalties interest, unreasonable delay.

Again in this case remarks made that are not the stipulations of the parties but pertain to a theory of the case, insurance coverage which is deferred to arbitration by virtue of defense counsels statement memorialized earlier in the Minutes of proceedings.

Defense counsel for AMPCO again asks for the following verbatim statement to be read into the record by the court:

“Whether an adverse inference on the issue of employment should be drawn against CalMar for failure to comply with the subpoena duces tecum and order compelling compliance with subpoena duces tecum; and against SCIF for also failing to comply with subpoena duces tecum dated February 25, 2020.”³

At this point in proceedings counsel for State Compensation Fund raises a point of fact that no subpoena was served on State Compensation Insurance Fund, for CalMar Construction, in the matter of Roman Aguilar ADJ11733861.⁴ Subsequently upon review of evidence, this is confirmed.

¹ Minutes of Hearing and Summary of Evidence dated 08/31/2020, page 3, lines 16-19.

² Minutes of Hearing and Summary of Evidence dated 08/31/2020, page 4, lines 2-5.

³ Minutes of Hearing and Summary of Evidence dated 08/31/2020, page 4, lines 15-18.

⁴ Minutes of Hearing and Summary of Evidence dated 08/31/2020, page 4, lines 19-21.

Based on all the evidence and testimony entered into the record there are certain undisputed facts that emerge.

AMPCO hired FV Salvage by a master subcontractor agreement dated 09/03/2018. This is followed by a Statement of Work (SOW) dated 09/04/2018 signed by Reginald Kama, AMPCO project manager for the location of injury, and Frederico Velarde.⁵

FV Salvage aka Frederico Velarde picked up Roman Hernandez Aguilar and Daniel Flores Campos in downtown Los Angeles where they waited at 7th street and Central Avenue waiting for a day labor pickup.⁶ The workers were transported by Frederico Velarde to the Arden Way Project being overseen by the general contractor, AMPCO.

On the date of injury 09/28/2018 Frederico Velarde picked the applicants up from 7th street and Central Avenue and drove, them to the Arden Way Demolition project run by AMPCO. The applicants began the rooftop demolition that morning and at approximately 11:00 a.m., a beam in the roof they were working upon broke and the two men fell approximately 30 feet to the floor below sustaining injuries.

At the time and date of injury Frederico Velarde, dba FV Salvage, was an unlicensed, uninsured subcontractor. The General Contractor was AMPCO who is a licensed and insured contractor in charge of the Arden Way Project where the accident occurred.

There is no monetary dispute as to the value of the contract exceeding \$500.00 dollars.⁷ There is no dispute that the demolition work being done at the Arden Way Project required a contractor's license.⁸

“License renting” allegations and conjecture is insufficient to establish a contractual or employment relationship between CalMar Construction and Frederico Velarde-FV Salvage. There is no evidence to support an employment relationship between BBSI, a PEO, and Frederico Velarde-FV Salvage or the applicants.

The owner of AMPCO was aware Frederico Velarde did not have any insurance on his own. Mr. Pennor's deposition also brought forth that BBSI had never provided any payroll services for either applicant.⁹

Defendant AMPCO clings to the unsupported belief that CalMar provided insurance to Frederico Velarde but this belief is not supported by any evidence.¹⁰ CalMar never did any work on the Arden Way project. The owner of CalMar, Omar Estrada, did not even know Frederico Velarde, he did not employ either injured worker and he had not heard of FV Salvage.¹¹

⁵ Exhibit 1.

⁶ Exhibit G.

⁷ Business & Professions Code §7048.

⁸ Labor Code §2750.5.

⁹ Exhibit 3.

¹⁰ Exhibit 2.

¹¹ Exhibit C.

Another employee of CalMar, Jasmine Estrada, in charge of assistance with project bidding, did not know Federico Velarde. She first heard the name from a family friend, Esequio Sierra, who sometimes works for Calmar, but this was after the news of the accidents. CalMar was considering bidding on the Arden Way Project.

Ms. Estrada is mystified as to why someone who never worked for them is making a claim on CalMar's insurance policy. Eventually, Calmar did not submit any bid on the Arden Way Project. She also recounts the brief email with the people at AMPCO who said that they had no idea who she was or why she was submitting any paperwork to them.¹²

Defendant AMPCO seeks adverse inferences of employment against CalMar Construction and State Compensation Insurance Fund for failure to comply with Subpoena Duces Tecum. Counsel for CalMar pointed out during trial that State Fund did not receive the alleged subpoena. Moreover, the testimony of Omar Estrada supports there was no contractual relationship between Federico Velarde dba FV Salvage and CalMar Construction. There is no factual or legal support presented for an adverse inference.

Labor Code §2750.5 has a rebuttable presumption that any company who hires a contractor for a job requiring a license is the statutory employer of any unlicensed subcontractor.¹³ This applies to AMPCO construction and the facts herein.

Although not specifically argued at trial, the post-trial briefing by applicant's counsel does bring out the relevance of the factors in *Borello*¹⁴ as applicable to the case herein and this provides additional support for the determination that the applicants were ultimately the employees of AMPCO construction for workers compensation purposes.

DATE: 07/05/2021

LYNN DEVINE
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

¹² Exhibit D.

¹³ *Cedillo v. WCAB* (2003) 130 Cal Rptr.2d 581 check cite

¹⁴ *S. G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (1989) 48 Cal. 3d 341, 769 P.2d 399, 256 Cal. Rptr. 543, 54 Cal. Comp. Cases 80

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I.
INTRODUCTION

- | | |
|---------------------------------------|-----------------|
| 1. Findings and Award | 07/07/2021 |
| 2. Identity of Petitioner | Defendant AMPCO |
| 3. Verification | Yes 07/27/2021 |
| 4. Timeliness | Timely |
| 5. Petition for Reconsideration Filed | 07/28/2021 |
6. Petitioner seeks Reconsideration from the Finding of employment but alleging that 1) the undersigned improperly tried the issue of coverage; that the undersigned 2) erred by not finding an adverse inference as against Calmar Construction and SCIF for failure to respond to subpoenas; 3) that the undersigned "...failed to properly weigh, and failed to substantially discuss evidence providing suggestive proof of a nexus between Calmar and FV Salvage, as a licensed/insured contractor..."; 4) the undersigned "...failed to make a distinct finding of employment..." finding "...that petitioner was actually a joint employer, not the primary employer." The undersigned disagrees.

II.
FACTS

Litigation began in this case under ADJ11934915 an application was filed on 02/13/2019 wherein applicant Daniel Flores Campos alleged an injury on 09/28/2018 to his neck, back, upper extremities, shoulders and other parts of body as against the employer AMPCO Contracting Inc.

On 03/18/2019, the application was amended to include the insurance carrier Zurich Insurance.

On 03/19/2019, the application was again amended to include Liberty Mutual Insurance as a carrier.

On 03/18/2019 and MSC was held and the three defendants did not appear. Applicant's attorney requested off calendar.

03/27/2019 applicant's attorney filed another Declaration of Readiness to Proceed on the issue of multiple defendants' liability in an effort to resolve coverage questions.

04/22/2019 parties appeared at an MSC in front of Presiding Judge David Brotman. At that time parties jointly asked for and were granted a continuance for further discovery. The next MSC was set for 07/02/2019 before Judge Devine.

On 05/17/2019, applicant's attorney filed an amended application to include another employer FV Salvage and its insurance company identified as Corvel.

On 05/21/2019 attorneys for Corvel for Ace American Insurance Company and Barrett Business Services petitioned for dismissal due to lack of coverage as represented by attorneys Friedman & Bartoumian.

On 05/31/2019, applicant's attorney objected to the petition for dismissal.

On 06/27/2019 attorneys, Gilson Daub, for defendant AMPCO Contracting petitioned to join employer Calmar Construction Inc. and their carrier State Compensation Insurance Fund.

On 06/28/2019, Calmar Construction and State Compensation Insurance Fund were joined to this case as petitioned.

On 07/02/2019, an MSC was held in this matter parties were informed that the Joinder of Calmar Construction and State Compensation Insurance Fund had just issued and was served on 07/01/2019. The matter was then continued to 09/30/2019.

On 09/30/2019, the matter was heard by Judge Clint Feddersen who granted parties a continuance for further discovery and set this matter for an MSC see on 11/27/2019 before Judge Marrone.

On 11/27/2019 when the matter came before Judge Marrone he wrote in the comments section "please set with ADJ11733861 and set for next conference together" then in parentheses he wrote "(yes, 2 different injured workers-please set at same time)" It was approved by the Presiding Judge. It was then set for a joint MSC before Judge Cole.

On 02/13/2020, the matter came before Judge Michael Cole who stated in the comments section that: "Applicant's attorney wants trial setting on employment. SCIF ready. ** for AMPCO (general Counsel) wants out; AMPCO wants continuance for two ** set on 03/**/20 (E/Es of SCIF ** insured) re employment. Four SDTs out as went to brokers."¹

The matter was continued to 03/19/2020 on his own calendar.

On 04/27/2020 an MSC was held before Judge Cole in both ADJ11733861 (Roman Hernandez Aguilar) and ADJ11934915 (Daniel Flores Campos). Under comments, he wrote "Applicant's attorney wants trial on employment. Def has SDTs outstanding with possible petition to join another alleged employer. 2-applicant cases (same employer, carriers, DOI, facts/issues ordered consolidated. All parties present stipulated that FV Salvage was applicant's direct employer.² Calmar ordered to comply with previously issued SDT. Short cont to circulate/sign PTCS. OK to stay with Cole." This same date Judge Cole issued an Order compelling compliance with a subpoena issued to Calmar construction. Matter was reset to 06/04/2020.

¹ Sections marked by ** are not legible.

² It does not appear that this putative employer was present or represented at this proceeding.

On 04/28/2020, Judge Cole denied Joinder of Vintage Timberworks/ICW, without prejudice, as requested by AMPCO due to insufficient nexus to employment.

On 06/04/2020 these matters ADJ11733861 (Roman Hernandez Aguilar) and ADJ11934915 (Daniel Flores Campos) both came to MSC before Judge Cole and parties filed a 16 page Pre Trial Conference Statement.

On 08/31/2020, the record was opened in these matters and testimony was taken and continued due to insufficient time. Trial was then set for 10/28/2020 based on the availability of counsel.

On 08/31/2020 Applicant attorney appeared and had consent for all parties to another continuance to 12/09/2020.

On 12/09/2020, trial continued and applicant Aguilar resumed the stand for continued cross-examination. After cross-examination, parties rested with this witness and defense counsel for AMPCO called Tim Shank, the insurance broker for AMPCO.

After objections were heard from Mr. Burgis, and both SCIF attorneys regarding Mr. Shank being offered as an expert witness, not being a percipient witness, nor able to testify to the facts of employment.

AMPCO's attorney Mr. Ploozian stated this witness would testify to contract formation in this case. The court declined this witness as the next witness to testify was an executive with AMPCO, Tim Vitta³, who would provide testimony on contract formation in this case. An objection by Mr. Burgis to this witness was overruled and parties were to return at 13:30 for continuing testimony.

Mr. Injejikian, attorney for Calmar, requested his witnesses be excused for today's session, which was granted. The hearing was then adjourned, as there were technical problems at the time with the phone lines. The Minutes of Hearing with the new date indicated facts to that effect. The trial was continued to 02/17/2021 for additional testimony from defense witnesses.

On 01/04/2021 counsel for AMPCO filed its Petition for Removal on the grounds that the court had declined to hear the testimony of the insurance broker Tim Shank and as such that the decision will result in significant prejudice and irreparable harm to AMPCO and that Reconsideration will not be an adequate or practicable remedy after issuance of a final order, decision or award in this matter. Further that it constitutes a denial of AMPCO's constitutionally-guaranteed right to Due Process, as this witness would provide testimony that other parties, not AMPCO, were the employers of the applicant. He also related a marginal complaint of harm due to the complexity of proceedings because of the multi-party, multiple days of trial.

Petitioner then pleads facts beginning on page 3 thru 6 that have not come into evidence as yet and remain an issue yet to be proven.⁴ Attached to the Removal is a transcript of proceedings.

³ Ultimately Mr. Vitta did not testify.

⁴ Petition for Reconsideration dated January 4, 2021.

On 02/17/2021, trial continued and the testimony of insurance broker Tim Shank and matter was later submitted by the parties.

On 04/14/2021, the undersigned had to vacate submission, as defense counsel for AMPCO had not withdrawn his Petition for Removal.

On 06/29/2021, the Appeals Board dismissed the Petition for Removal and on 07/02/2021, the matter was resubmitted for decision.

On 07/07/2021, a Findings and Award issued served this same date.

On 07/14/2021, AMPCO substituted in new counsel, Pearl Legal on this case.

On 07/28/2021, defense firm Pearl Legal filed its Petition for Reconsideration on behalf of AMPCO construction, the petitioner.

III. **DISCUSSION**

1) That the undersigned improperly tried the issue of (insurance) coverage.

This is truly hard to imagine given the statement that AMPCO's attorney demanded be read into the MOH on 08/31/2020 regarding deferring issues of insurance to arbitration⁵ followed by the only question posed to the court was who was the employer on the date of injury for these two applicants.⁶

There was no determination made as to insurance coverage in these two cases. The alleged impropriety does not exist in the Opinion on Decision.

2) That the undersigned erred by not finding an adverse inference as against Calmar Construction and SCIF for failure to respond to subpoenas.

At the hearing on 08/31/2020 AMPCO, defense counsel wanted specific verbiage requesting an adverse inference against Calmar Construction and against SCIF for failing to comply with a subpoenaed records request dated 02/25/2020.⁷

There was no action on this request for an adverse findings of unknown factual parameters because there was no finding of Calmar as an employer of the two injured workers.

Regarding the companion case in ADJ11733861 when counsel for applicant brought forth the same request for adverse inference against Calmar and against SCIF,⁸ the attorney for SCIF pointed out

⁵ Minutes of Hearing and Summary of Evidence dated 08/31/2020 page 3, lines 3-5.

⁶ Minutes of Hearing and Summary of Evidence dated 08/31/2020 page 3, line 7.

⁷ Minutes of Hearing and Summary of Evidence dated 08/31/2020 page 3, lines 15-18.

⁸ Minutes of Hearing and Summary of Evidence dated 08/31/2020 page 4, lines 14-18.

in his objection that no subpoena had been served on SCIF rendering this request moot, as proof of service was not produced.⁹

The entire issue of adverse inference was not substantive based on the evidence and there was no specific finding of fact requested by counsel for AMPCO.

3) That the undersigned “...failed to properly weigh, and failed to substantially discuss evidence providing suggestive proof of a nexus between Calmar and FV Salvage, as a licensed/insured contractor...”

Evidence as to any relationship between Calmar Construction and FV Salvage was given by counsel for AMPCO in the form of the deposition transcript of Omar Estrada¹⁰ Yasmin Estrada,¹¹ a statement by Omar Estrada¹² and a statement by Esequio Sierra,¹³ an email string between Reggie Kama at AMPCO and Yasmin Estrada¹⁴ and finally the Calmar policy rider for additional insureds.¹⁵ All these documents and depositions only serve to prove there is no nexus between AMPCO and Calmar or for that matter between Calmar and FV Salvage or Federico Velarde.

The undersigned did indeed weigh the evidence and the scale came up empty on any “suggestion of proof of a nexus between FV Salvage or Federico Velarde and Calmar Construction. My guess is that the petitioner did not review these documents before the filing of this petition.

4) That the undersigned “...failed to make a distinct finding of employment...” finding “...that petitioner was actually a joint employer, not the primary employer.

If this were true, it is puzzling why petitioner would file this appeal. This a matter of a distinction without a difference. Regardless, the phrasing used by the petitioner was not consistent with questions posed to the undersigned at trial.

Counsel for applicant separately asked “Whether AMPCO was an employer of the applicant; Labor Code 2750.5...”¹⁶ Labor Code 2750.5 establishes employment by a licensed contractor, AMPCO, employing an unlicensed subcontractor, F V Salvage who employed the applicants.

Based on the discussion in the Opinion and the evidence submitted by parties to these claims, the Finding of Fact specifically found that AMPCO was the employer of the two seriously injured workers by virtue of AMPCO using an unlicensed contractor for demolition that does require both a license and insurance neither of which F V Salvage had and this was known to AMPCO before the accidents.

⁹ Minutes of Hearing and Summary of Evidence dated 08/31/2020 page 4, lines 19-21.

¹⁰ Exhibit C.

¹¹ Exhibit D.

¹² Exhibit J.

¹³ Exhibit I.

¹⁴ Exhibit P.

¹⁵ Exhibit N.

¹⁶ Minutes of Hearing and Summary of Evidence dated 08/31/2020 page 3, lines 11-12 regarding the conclusive presumption of employment.

IV.
JUDGES RECOMMENDATION ON PETITION FOR RECONSIDERATION

The undersigned finds that the Petition for Reconsideration is without merit and respectfully requests that the AMPCO Petition for Reconsideration be dismissed in its entirety.

DATE: 08/02/2021

Lynn Devine
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE