

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

EFRAIN NEVAREZ, *Applicant*

vs.

**AMERICAN CHOICE VAN LINES; GO EAST MOVERS; VLAD SOMOV;
EMPLOYERS' COMPENSATION INSURANCE COMPANY; VALLEY
FORGE INSURANCE COMPANY/CNA; and AMERICAN CASUALTY
INSURANCE, *Defendants***

**Adjudication Number: ADJ10407856
San Jose District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

On February 26, 2021, the Appeals Board granted reconsideration to further consider the factual and legal issues. This is our Decision After Reconsideration.

Defendant American Casualty Insurance Company (American) seeks reconsideration of the December 9, 2020 Findings and Order wherein the workers' compensation arbitrator found that applicant filed an Application for Adjudication of Claim alleging that he sustained an industrial injury while employed by American Choice Van Lines and/or Go East Movers. Although the arbitrator did not set forth a date of injury, the application alleges that applicant sustained a cumulative injury through August 30, 2015. As relevant to American's Petition for Reconsideration, the arbitrator found that Go East Movers was insured by American during the alleged cumulative trauma period.¹ In Findings of Fact 5, 6, and 7, the arbitrator found that the insurers denied coverage based on "limited endorsements," the policies contained "a limited endorsement" and "[n]one of the limiting endorsements" complied with the statutory and regulatory requirements. The arbitrator also found that there is insufficient evidence that the employer engaged in fraudulent misrepresentation during the application process and there is evidence that American and its agents did not do their due diligence regarding the nature of the business of the insured prior to issuing the policy. The arbitrator issued orders that the insurers

¹ The arbitrator made additional findings regarding coverage provided by other defendants. American is the only defendant who sought reconsideration.

shall be liable for the workers' compensation benefits that may be awarded to the applicant and that the order does not limit defendant's right to dispute the date of injury or the period of coverage for the injury. The arbitrator also dismissed the Uninsured Employers Benefit Trust Fund (UEBTF) as a party defendant.

American contends that the arbitrator erred in finding that there was insufficient evidence of fraud by the policy holder and due diligence by the insurer without considering all documents that defendant sought to introduce into evidence. Defendant also contends that the arbitrator should have rescinded American's insurance policy based on material misrepresentation. Finally, defendant contends that the arbitrator should find coverage even though the policy did not exclude non-clerical employees because the policy only covered clerical employees.

We have considered the Petition for Reconsideration, and we have reviewed the record in this matter. Applicant filed an Answer. The arbitrator has filed a Report and Recommendation on Petition for Reconsideration, recommending that the petition be denied. For the reasons discussed below, we will amend the Findings and Order to clarify that the sole issue determined by the arbitrator was insurance coverage and to remove extraneous findings and orders. We will otherwise affirm the arbitrator's decision.

The WCAB has the "full power, authority, and jurisdiction to try and determine "all workers' compensation claims and "any right or liability arising out of or incidental thereto." (Lab. Code, §§ 5300, 5301.) In addition, "proceedings shall be instituted before the appeals board and not elsewhere"...[f]or the enforcement against the employer or the insurer of any liability for compensation in favor of the injured employee..." (Lab. Code, § 5300.)

All employers in the state of California are required to either obtain workers' compensation insurance through an insurance company that is authorized to write compensation insurance in California or through a program of self-insurance approved by the Director of Industrial Relations. (Lab. Code, § 3700.) Where an employer is insured against liability for compensation, the insurer may be substituted as a party and the employer may be dismissed from the action. (Lab. Code, § 3755.) Where an employer fails to secure the payment of compensation, an employee has two remedies, which may be pursued concurrently. The employee may sue the employer in civil court and/or the employee may proceed to collect benefits through the Workers' Compensation Appeals Board. (Lab. Code, § 3715.) If the Board or the Director of Industrial Relations determines that an

employer is uninsured, the director issues a certificate that the employer is uninsured and the UEBTF will provide benefits. (Lab. Code, §§ 3716, 3720.)

Coverage disputes are subject to mandatory arbitration under Labor Code section 5275(a) and within the jurisdiction of the WCAB. (See e.g. *Florists Mutual Insurance Company v. Workers' Comp. Appeals Bd. (Bigby)* (2015) 80 Cal.Comp.Cases 582 (writ den.); *Monarch Consulting v. Workers' Comp. Appeals Bd. (Martinez)* (2014) 79 Cal.Comp.Cases 958 (writ den.).) When an arbitrator is asked to arbitrate the issue of insurance coverage, the arbitrator must determine whether an insurance policy or policies provide workers' compensation insurance coverage for an applicant's employer (or alleged employer) on applicant's date of injury (or alleged date of injury). Unless all parties consent, the arbitrator cannot determine issues of employment or applicant's date of injury. In this case, applicant's employment status and date of injury have not yet been determined. At this time, it cannot be determined which insurer or insurers will be liable for benefits. Therefore, we will excise the portions of the Order that address issues that are not subject to arbitration.

In its Petition, American contends, in essence, that it was not required to exclude non-clerical employees because the policy only covered clerical employees. Workers' compensation insurance policies in California are subject to regulation by the Department of Insurance. (Ins. Code, §§ 11651, 11657, 11658.) 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." (Ins. Code, § 11651.) Workers' compensation policies provide coverage to all employees of an employer unless employees are explicitly excluded in the insurance contract with a limiting and restricting endorsement in accordance with regulations adopted by the Insurance Commissioner. (Ins. Code, § 11660; in *Travelers Property Casualty Co. v. Workers' Comp. Appeals Bd. (Mastache)* 40 Cal.App.5th 728 [84 Cal.Comp.Cases 883], *Fyne v. Industrial Acci. Com.* (1956) 138 Cal.App.2d 467.) An employer's failure to report payroll to an insurer is not a basis for excluding employees from coverage. (*Bigby, supra.*) American could not enter into a workers' compensation insurance contract covering only some of an insured's employees without complying with the Insurance Commissioner's regulations. Therefore, American is incorrect that the policy could be construed to only cover clerical employees without an endorsement explicitly limiting the policy to those employees.

The arbitrator's findings regarding whether the policies were limited (Findings of Fact 5, 6, and 7), are unnecessarily complex. It appears the findings reference a potential limiting and restricting endorsement (or endorsements), but the arbitrator does not identify the endorsement or specify a particular policy or policies. If an insurer contends that it has issued a limited policy, the insurer must provide evidence in the form of policy documents. The arbitrator is tasked with determining whether the policy is limited or not. Accordingly, we will amend the findings to clarify that defendants did not provide sufficient evidence to find that the policies at issue are limited.

With respect to American's contention that the arbitrator erred in failing to admit and consider evidence of employer misrepresentation and insurer due diligence, as we will explain further below, the evidence would only be relevant if rescission of the insurance contract was at issue and it was not at issue.

A workers' compensation policy may be rescinded based on a material misrepresentation by the insured. (*Southern Ins. Co. v. Workers' Comp. Appeals Bd. (Berrios)* (2017) 11 Cal.App.5th 961.) Rescission is a contract remedy that requires the rescinding party to give notice and restore or offer to restore everything of value obtained under the contract in accordance with a statutory procedure set forth in Civil Code section 1691. When a defendant argues that its policy does not cover the employer because it has rescinded a workers' compensation insurance policy, the arbitrator has jurisdiction to determine whether the policy was validly rescinded. (*Bankers Indem. Ins. Co. v. Ind. Acc. Com. (Merzoian)* (1935) 4 Cal.2d 89; *Berrios, supra.*) However, in this case, American did not raise rescission as an issue and does not allege that it rescinded the insurance policy. An arbitrator is not required to address hypothetical questions and to the extent the arbitrator made findings regarding a potential rescission, those findings are unnecessary and may be misleading. Therefore, we will amend the Findings and Order to delete Finding of Fact No. 8.

Finally, as noted above, the identity of applicant's employer or employers will determine which insurer or insurers must provide benefits and that employment determination needs to be made by a workers' compensation administrative law judge. Applicant has filed a Declaration of Readiness to Proceed in the underlying workers' compensation case. We will return this matter to the trial level for the matter to be set for hearing.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the December 9, 2020 Findings and Order is **AFFIRMED**, **EXCEPT** Findings of Fact 5, 6, 7, 8 and the Order are **AMENDED** as follows:

FINDINGS OF FACTS

5. There is no evidence that a valid limiting and restricting endorsement was included in a policy covering American Choice Van Lines or Go East Movers during applicant's alleged cumulative trauma period.
6. [DELETED]
7. [DELETED]
8. [DELETED]

ORDER

IT IS ORDERED that the Uninsured Employers Benefits Trust Fund be dismissed as a party defendant.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 5, 2021

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

**EFRAIN NEVAREZ
LAW OFFICES OF GRETCHEN PETERSON
MULLEN & FILIPPI
RAYMOND E. FROST & ASSOCIATES
STANDER REUBENS
OFFICE OF THE DIRECTOR – LEGAL UNIT
WCJ LAUERMAN**

MWH/ara

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