

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

CARMEN ORTIZ, *Applicant*

vs.

**ULTIMATE STAFFING SERVICE; CIGA, by TRISTAR for
COMMERCIAL COMPENSATION CASUALTY, in liquidation, *Defendants***

**Adjudication Number: ADJ3543062 (VEN 0121247)
Oxnard District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration to consider the factual and legal issues presented by this case. This is our Decision After Reconsideration.

Defendant Redlands Insurance Company (Redlands) seeks reconsideration of the August 15, 2019 Findings and Order wherein the workers' compensation arbitrator found that Redlands provided insurance coverage for all employees of Harbor Freight Tools and that, if there is a general/ special employment relationship between Harbor Freight Tools and Ultimate Staffing Service, the Redlands policy provided coverage for joint employees such as the applicant, Carmen Ortiz.

Redlands contends that CIGA did not meet its burden of showing that Redlands issued an unrestricted policy to Harbor Freight Tools. Redlands also contends that CIGA did not meet its burden of showing that applicant had an employment relationship with Harbor Freight Tools. Redlands also contends that CIGA should be barred by the doctrine of laches from pursuing its claim because Redlands was prejudiced in its defense of the claim by its inability to locate the policy.

CIGA filed an Answer. In the Answer, CIGA stated that the arbitrator was solely tasked with determining whether the Redlands policy provided coverage for special employees of Harbor Freight Tools. Applicant's potential employer, Harbor Freight Tools also filed an answer wherein it argues that the arbitration should not proceed until after the issue of applicant's employment is determined. In the alternative, they contend that if they are an employer, their insurer, Redlands, should pay any award.

We have considered the Petition for Reconsideration, and we have reviewed the record in this matter. 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 rescind the arbitrator's decision and return this matter to the arbitrator so that he may independently consider the evidence in this matter, render a decision, and document the proceedings as mandated by *Hamilton v. Lockheed Corp.* (2001) 66 Cal.Comp.Cases 473 (Appeals Bd. en banc).

Our review of this matter is complicated by the absence of a Minutes of Hearing identifying the issues in dispute and the fact that the exhibits were not adequately identified and admitted into evidence as required by *Hamilton, supra*. An arbitrator's decision must be based on admitted evidence and must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952 (d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd. (Garza)* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) A full and complete record allows for a meaningful right of reconsideration. (*Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal. 2d 753.) See also *Hernandez v. Staff Leasing* (2011) 76 Cal.Comp.Cases 343 (Appeals Board Significant Panel Decision).

We are unable to render a decision based on this record and must return the matter to the arbitrator to create an adequate record. Effective January 1, 2020, the Workers' Compensation Appeals Board Rules of Practice and Procedure include a new rule that sets forth a requirement that the arbitrator make and maintain a record of the arbitration proceeding and describes the content of that record. (Cal. Code Regs, tit. 8, §10914.) Because further proceedings will be conducted after January 1, 2020, the arbitrator and parties should consult WCAB Rules 10914 and 10995 for guidance on the requirements of an arbitration record and petitions for reconsideration from an arbitrator's decision. (Cal. Code Regs., tit. 8 §§10914, 10995.)

Although we cannot address the merits of the petition because of the lack of an adequate record, we will briefly address the relevant law so that the parties and the arbitrator may better focus their efforts.

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 the issue of employment.

Pursuant to Insurance Code section 11663, "[a]s between insurers of general and special employers, one which insures the liability 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.) CIGA, however, is not an insurer and not subject to Insurance Code section 11663.

The terms of workers' compensation 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.) 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.) Endorsements that limit or restrict coverage of workers' compensation policies are subject to prior approval by the Insurance Commissioner. (Ins. Code § 11657; Cal. Code of Regs., tit. 10, §§ 2261, 2262.) Workers' compensation policies may only be limited and restricted in accordance with regulations adopted by the Insurance Commissioner and failure to follow the regulations renders the policy unlimited. (Ins. Code, §§ 11659, 11660.) At the time the relevant policies were written, a policy could be limited and restricted using a California Approved Form Endorsement or a standard endorsement approved by the Insurance Commissioner.

If, because of the passage of time, the relevant insurance policies are not available, the arbitrator should consider other evidence of coverage and coverage exclusions.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the August 15, 2019 Findings and Order is **RESCINDED**, and that this matter is **RETURNED** to the arbitrator for further proceedings and decision consistent with the opinion herein.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 1, 2021

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

**CARMEN ORTIZ
DONALD A COCQUYT
DOMINGO ELIAS LAW FIRM
GUILFORD SARVAS
HOWARD WASSERMAN LAW FIRM
SION & ASSOCIATES**

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*