WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

GILBERTO VERGARA, ***Applicant***

vs.

BRADLEY J. BOVEE;
UNINSURED EMPLOYERS BENEFITS TRUST FUND, ***Defendants***

Adjudication Number: ADJ8023051
Van Nuys District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted defendant Bradley J. Bovee's petition for reconsideration on November 15, 2021 in order to further study the legal and factual issues raised by the petition, and to enable us to reach a just and reasoned decision. This is our Opinion and Decision after Reconsideration.

Defendant seeks reconsideration of the Findings and Order issued on August 24, 2021 by a workers' compensation administrative law judge (WCJ). The WCJ found and ordered that applicant's claim against Bovee is not barred by the doctrine of res judicata.

Defendant contends that the WCJ erred in concluding that his interests were not in privity with prior defendant Tracy McCandless, and therefore that he could not assert res judicata based on applicant's June 1, 2015 Compromise and Release (C&R)[1] with defendant Tracy McCandless.

There was no answer to the Petition for Reconsideration. The WCJ filed a Report and Recommendation on Defendant's Petition for Reconsideration (Report), wherein the WCJ recommends the Petition for Reconsideration be denied.

We reviewed the record in this matter, as well as the allegations of the Petition for Reconsideration and the contents of the Report. Based on our review of the record and the Report,

[1] The WCJ took judicial notice of the C&R at the time of trial, and it is in the record. (Minutes of Hearing and Summary of Evidence (MOH), July 27, 2021, p. 2.)

and for the reasons set forth below, it is our decision after reconsideration to affirm the F&O and return this matter to the trial level for further proceedings.

BACKGROUND

This claim was initially filed against Bovee, but McCandless was later joined as a potential employer.[2] (See Applications for Adjudication, October 12, 2011; July 8, 2013; and, February 11, 2019 (Applications).) On June 1, 2015, a C&R was approved between applicant and defendant McCandless. Bovee was not a party to the C&R. (C&R, p. 1.) The C&R states that the parties settled applicant's claim against McCandless in order to "avoid the costs, hazards and delays of further litigation, and agreed that "a serious dispute" existed as to all issues, including the threshold issue of whether applicant could be an employee of McCandless. (C&R, p. 7, ¶ 9, including Comments.)

> EMPLOYMENT PER LC 3352[(a)(8)] IS DISPUTED. DEFENDANT CONTENDS THAT APPLICANT WORKED INSUFFICIENT HOURS TO QUALIFY AS A RESIDENTIAL EMPLOYEE. THE PARTIES WISH TO AVOID THE HAZARDS OF FURTHER LITIGATION AND RESOLVE THIS CLAIM FOR A SUM CERTAIN. (*Id.*, at Comments.)[3]

On February 11, 2019, the application was further amended to correct the address for Bovee, and on December 2, 2019, Bovee entered an appearance in the case (Answer, December 2, 2019).

Trial then proceeded on July 27, 2021 regarding the sole issue of "Res judicata based on the Compromise and Release and Order Approving of June 1, 2015." (Minutes of Hearing and Summary of Evidence (MOH), July 27, 2021, p. 2.) Applicant testified that he was injured on May 11, 2011 while working on a roof for Bovee. (*Id.*, p. 3.) The roof was owned by a woman named McCandless. (*Ibid.*) He agreed to the C&R even though he did not think it was fair compensation because of legal advice that there was an issue related to the amount of hours he

[2] Also, applicant petitioned to join and the WCJ ordered joinder of the Uninsured Employer's Benefits Trust Fund (UEBTF), on March 12, 2020 based on the allegation that there was no evidence that Bovee had workers' compensation insurance on the date of injury per the WCIRB. (See Petition to Join UEBTF, March 12, 2020; Order Joining UEBTF, March 12, 2020.) UEBTF should therefore be included in the caption/title of this case.

[3] Section 3352 was amended effective July 1, 2018, and subdivision (h) was replaced with subdivision (a)(8) (hereinafter section 3352(a)(8)).

worked for McCandless, and that he would be able to recover additional benefits from UEBTF and Bovee. (*Ibid.*)

The WCJ found that applicant's claim against Bovee is not barred by the doctrine of res judicata. (F&O, Findings of Fact no. 3.)

> Here, the issue for adjudication before the court is identical as it relates to litigation of the same workers' compensation case herein. The Order Approving C&R was a final judgment. A court approved settlement acts as a final judgment on the merits for the purposes of res judicata. *Id*. at 694. That leaves the court to address the issue of privity, as Bovee was not a party to the C&R. Res judicata applies when a party in the second action is in privity with a party to the first action. There is no prevailing definition of privity that automatically applies to all cases involving res judicata. Although "privity is a concept not readily susceptible of uniform definition, the concept has been expanded to refer to such an identification in interest of one person with another as to represent the same legal rights'..." *Rinaldi v. Workers' Comp. Appeals Bd*., 199 Cal. App. 3d 217, 224 (citing *Clemmer v. Hartford insurance Co*. (1978) 22 Cal.3d 865,875).
>
> Here, there is no evidence to support that Bovee, an alleged employer of the Applicant was in privity with McCandless the homeowner with whom he contracted to provide roofing services. The facts do not support that Bovee could have controlled the action herein. Moreover, his interests could not adequately be represented by McCandless, since it is axiomatic that the dispute of employment was uniquely different to both parties. Finally, there is no evidence that Bovee is a successor in interest to McCandless, the homeowner. Therefore, the doctrine of res judicata does not apply to Bovee who was not a patty to the C&R and is not in privity with McCandless.
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> In its trial brief, Defendant argues that Applicant is precluded from proceeding against Bovee since it is undisputed that there was the existence of a general and special employment situation as between the Applicant, McCandless, and Bovee.
> ...
>
> Here, however, there has been no finding of dual employment in the form of a general or special employment relationship nor has there been any evidence to support same. ... (F&O, Opinion on Decision, pp. 5-6.)[4]

[4] The WCJ is correct that there has been no finding of dual employment in this case. However, the WCJ also included his opinion that "the evidence supports that McCandless was not an employer" pursuant to section 3352(a)(8). (F&O, Opinion on Decision, p. 6.) However, the issue of whether McCandless was applicant's employer, *under any theory*, has never been adjudicated or determined. Should it be determined that the issue of whether McCandless was applicant's employer is relevant in this matter, that issue can then be adjudicated and determined.

Bovee seeks reconsideration on two fronts: first, that "Bovee was a party to the same workers' compensation case, and the C&R resolved all issues in dispute by the applicant;" and, second, that pursuant to *Castillo*, Bovee was in privity with McCandless. (Petition for Reconsideration, pp. 3-4.)

The WCJ filed a Report recommending that the Petition for Reconsideration be denied:

> The undersigned finds that *Castillo* is distinguishable from the instant matter... First, in *Castillo*, there was no dispute that the parties were joint employers. There has been no such finding in the instant case. ... Next, the undersigned does not interpret the subject matter of the litigation to be comparable with the cause of action or issued settled in the C&R. It is this court's opinion that an analysis of 'subject matter' as referred to by *Castillo* has to do practically with the interdependence of the relationship with respect to the subject matter. The *Castillo* court itself notes that the analysis must be practical. *Castillo supra* at 277.
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> In *Castillo*, the court notes that Glenair and GCA were in privity for present purposes based on "both their *interdependent relationship* with respect to payment of the Castillos' wages as well as on the fact that this litigation revolves around alleged errors in the payment of the Castillo's wages." *Id*. at 280 (emphasis is added). There is no evidence to support any such interdependence between McCandless and Bovee. Based on the facts, McCandless was a homeowner who hired Bovee to do roofing work on her home and subsequently found herself joined to the action after Mr. Bovee failed to enter an appearance in the case almost two years later. Applicant testified at trial that he was hired by Bovee and considered Bovee to be his employer.
>
> Defendant did not present any evidence or testimony to support any interdependence between McCandless and Bovee. As such, even under a subject matter analysis, the undersigned does not find the parties were in privity. Defendant cites to this WCJ's citing of an employment dispute as between the parties. This was but one factor supporting a lack of interdependence and that the parties' interests were at odds with one another. Moreover, if the parties were in privity as alleged, Defendant could have presented McCandless as a witness. Instead, the only argument presented to support the parties were privies is that the subject matter is the same. Moreover, the *Castillo* court also defined privity as "the sharing of 'an identity or community of interest,' with 'adequate representation' of that interest in the first suit, and circumstances such that the nonparty 'should reasonably have expected to be bound' by the first suit. *Castillo* supra at 277.
>
> The issue in question here is the settlement between McCandless and Bovee. These negotiations would not have included the interests of Bovee since he was not a party to the settlement nor would Bovee have anticipated 'to be bound' by

> the settlement agreement between McCandless and the Applicant. Had the parties intended to release liability for Bovee in this matter, they would have done so in the C&R. (Report, pp. 6-7.)

We agree with the finding of the WCJ that applicant's claim against Bovee is not barred by claim preclusion *or* issue preclusion.[5]

DISCUSSION

I.

Bovee's first contention is that the C&R released both McCandless and Bovee because they were both parties in the same workers' compensation claim, and therefore the C&R "resolved all issues in dispute." (Petition for Reconsideration, p. 3.)

> The settlement in this case finally adjudicated disputes related to: employment, injury AOE/COE, temporary disability, parts of body injured, the need for future medical care and entitlement to supplemental job displacement benefits, among others, these points of exposure were the same depending on who would have been finally adjudicate to be the applicant's employer. Instead of litigating this dispute, the applicant elected to " ... avoid the hazards of further litigation and resolve this claim for a sum certain". [*sic*] (*Id.*, p. 4.)

By this, Bovee could be arguing that the "primary rights" doctrine applies to prevent applicant from seeking workers' compensation benefits from multiple employers. (*DKN, supra,* 61 Cal.4th at p. 818 and fn. 1.) This would be a fundamental misunderstanding of how liability arises in workers' compensation cases, as well as a misapprehension of the doctrine of claim preclusion.

"[W]ether an employer is liable for a coemployer's violations depends on the scope of the employer's own duty under the relevant statutes, not 'principles of agency or joint and several liability.'" (*Serrano v. Aerotek, Inc.* (2018) 21 Cal.App.5th 773, 784 [2018 Cal.App. LEXIS 243], overruled in part on other grounds in *Donohue v. AMN Services, LLC* (2021) 11 Cal.5th 58, 77.)

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[5] "We have sometimes described 'res judicata' as synonymous with claim preclusion, while reserving the term 'collateral estoppel' for issue preclusion. (See *Mycogen Corp. v. Monsanto Co*. (2002) 28 Cal.4th 888, 896 [123 Cal. Rptr. 2d 432, 51 P.3d 297] (*Mycogen*).) ... **To avoid future confusion, we will follow the example of other courts and use the terms 'claim preclusion' to describe the primary aspect of the res judicata doctrine and 'issue preclusion' to encompass the notion of collateral estoppel...**" (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824 [2015 Cal. LEXIS 4652] (*DKN*), emphasis added.) We follow the Supreme Court's direction and hereafter refer to res judicata as claim preclusion and collateral estoppel as issue preclusion.

> Plaintiffs have identified no authority for the proposition that a joint employer may be held liable for Labor Code violations committed by a cojoint employer based on principles of agency or joint and several liability. **Rather, whether an employer is liable under the Labor Code depends on the duties imposed under the particular statute at issue. (***Noe v. Superior Court* (2015) 237 Cal.App.4th 316, 333-334 [80 Cal.Comp.Cases 534], emphasis added; accord, *Serrano, supra.*)

An employer's duty to provide workers' compensation benefits arises from Labor Code section 3600[6], which states that in cases where the "conditions of compensation" are present, "[l]iability for the compensation provided by this division...*shall*, without regard to negligence, exist against an employer for any injury sustained by his or her employees arising out of and in the course of the employment..." (Lab. Code, § 3600.) This duty to provide compensation applies to any and all employers of the injured worker, *and their liability is joint and several*.[7]

"[C]laim preclusion applies only to the relitigation of the same cause of action *between the same parties* or those in privity with them." (*DKN, supra,* 61 Cal.4th., at p. 825, emphasis in the original.) Bovee was not a party to the C&R, nor in privity with McCandless: "[j]oint and several liability alone does not create such a closely aligned interest between co-obligors [for privity]. The liability of each joint and several obligor is separate and independent, *not vicarious or derivative*." (*DKN, supra,* 61 Cal.4th at p. 826, emphasis added.) Therefore, and contrary to Bovee's apparent contention, whether applicant's claims "involve the same primary right is beside the point. (citation)" (*Ibid.*) "[J]oint and several liability does not implicate the "primary rights" doctrine." (*Id.*, at p. 818.) "This conclusion is entirely consistent with the settled rule that joint and several obligors may be sued in separate actions. (citation)." (*Ibid.*)

In other words, multiple employers may be named in the same claim without destroying their joint and several obligation to provide applicant with workers' compensation benefits. Thus, unless Bovee was a party or in privity with a party to the C&R, Bovee cannot assert the C&R to bar applicant's claim – even though the claim made against both employers is the same.

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[6] All further references are to the Labor Code unless otherwise noted.

[7] Liability between multiple employers in a workers' compensation claim is joint and several. In workers' compensation, "several liability...is a procedural right that promotes the public policy favoring expeditious and inexpensive resolution of workers' compensation claims by enabling a claimant to obtain compensation without having to join multiple co-obligors." (*California Ins. Guarantee Assn. v. Workers' Comp. Appeals Bd. (Lopez)* (2016) 245 Cal.App.4th 1021, 1029 [81 Cal.Comp.Cases 317].) Although co-obligors may seek to apportion liability between themselves, this "is of no moment to the worker...and can have no effect on obligations owed them." (*Ibid*.)

Bovee could also be arguing that the C&R should act to bar "relitigation" of those issues contemplated by the C&R. This would be a request to impose issue preclusion against Bovee for all issues contemplated in the C&R.

> In summary, issue preclusion applies (1) **after final adjudication** (2) **of an identical issue** (3) **actually litigated and necessarily decided in the first suit** and (4) **asserted against one who was a party in the first suit or one in privity** with that party. (citations)" (*Faerber, supra*, 61 Cal.4th at pp. 824-825, emphasis added.)

There are no grounds to impose issue preclusion as to any of the issues contemplated by the C&R. Although the C&R is a final adjudication of applicant's claim *against McCandless*, including common issues related to workers' compensation benefits, it was certainly not a final adjudication of issues "actually litigated and necessarily decided..." (*Ibid.*) "It is the opportunity to litigate that is important in these cases..." (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1179 [1989 Cal.App. LEXIS 663].)

Here, the C&R specifically states that the parties, i.e., applicant and McCandless, settled every issue in applicant's claim against McCandless in order to "avoid the costs, hazards and delays of further litigation, and agree that a serious dispute exists" as to various issues, including the threshold issue of employment itself. (C&R, p. 7, ¶ 9, including Comments.) Bovee admits this by stating that applicant chose to resolve his claim against McCandless, "[i]nstead of litigating this dispute..." (Petition for Reconsideration, p. 4.)

Thus, the C&R does not represent a final adjudication of any issue in this case, and cannot be used to bar litigation of any issue related to his claim against Bovee.

II.

Bovee contends that regardless, he was in privity with McCandless and therefore, the C&R acts to bar applicant's claim against him.

> Claim preclusion "prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them." (*Mycogen, supra*, 28 Cal.4th at p. 896.) Claim preclusion arises if a second suit involves (1) **the same cause of action** (2) **between the same parties** (3) **after a final judgment on the merits in the first suit.** (citations) If claim preclusion is established, it operates to bar relitigation of the claim altogether. (*DKN, supra,* 61 Cal.4th at p. 824, emphasis added.)

Both Bovee and McCandless were named as employers in the same workers' compensation claim, and the C&R does represent a final adjudication of applicant's claim against McCandless. However, the C&R was not between the "'same parties or parties in privity with them.'" (*Ibid.*)

> [P]rivity requires the sharing of "an identity or community of interest," with "adequate representation" of that interest in the first suit, and circumstances such that the nonparty "should reasonably have expected to be bound" by the first suit. (*Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 875 [151 Cal. Rptr. 285, 587 P.2d 1098].) A nonparty alleged to be in privity must have an interest so similar to the party's interest that the party acted as the nonparty's """virtual representative""" in the first action. (*Gottlieb v. Kest* (2006) 141 Cal.App.4th 110, 150 [46 Cal. Rptr. 3d 7].) (*DKN, supra,* 61 Cal.4th at p. 826.)

Bovee was not a party to the C&R, and is there is no evidence or contention that Bovee and McCandless are legally the "same party," eg., principal and agent, corporation and employee, etc. (See *DKN*, *supra,* 61 Cal.4th at pp. 827-828.) Bovee could therefore have no expectation to be bound by the C&R, and certainly, the C&R could never have been enforced by applicant against Bovee.

There is also no evidence that Bovee was in privity with McCandless. Although not yet determined in this case, it could be that Bovee, McCandless, or both Bovee and McCandless may be found to be employers. As already stated above, if both are found to be employers, their liability will be joint and several. Contrary to Bovee's argument below, "[j]oint and several liability alone does not create such a closely aligned interest between co-obligors [for privity]. The liability of each joint and several obligor is separate and independent, *not vicarious or derivative*." (*DKN, supra,* 61 Cal.4th at p. 826, emphasis added.)[8] This is consistent with the purpose of the workers' compensation system to ensure an injured worker receives "'full provision for such medical, surgical, hospital and other remedial treatment as is requisite to cure and relieve from the effects of such injury.' (*Fitzpatrick v. Fidelity & Casualty Co.* (1936) 7 Cal. 2d 230, 233 [60 P.2d 276].)" (*Sea-Land Serv. v. Workers' Comp. Appeals Bd.* (1996) 14 Cal.4th 76, 85 [61 Cal.Comp.Cases 1360]; see Cal Const, Art. XIV § 4.)

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[8] The only exception to this rule involves the statutory right of a special employer to exclude from its workers' compensation insurance coverage all special employees when there are assurances that the general employer has coverage for those employees. (See *Travelers Property Casualty Co. of America v. Workers' Comp. Appeals Bd.* (2019) 40 Cal.App.5th 728 [84 Cal.Comp.Cases 883].) The duty – or liability of the general employer for injuries to the special employees, and the lack of duty for the special employer to do so, arises from a statute, i.e., Insurance Code section 11663 and section 3602, subdivision (d).

Next, *each employer* has the burden of proof to establish its own defense to liability.[9] As a result, "[o]ne named employer could avoid liability for benefits by pursuing a factual defense even though that defense leaves the other named employer exposed to liability." (*Grande v. Eisenhower Medical* Center (2020) 44 Cal.App.5th 1147, 1160 [2020 Cal.App. LEXIS 96], review granted, *Grande v. Eisenhower Medical Center* (Nov. 24, 2020, No. S261247) ___Cal.5th___ [2020 Cal. LEXIS 8183], citing *Serrano, supra,* 21 Cal.App.5th 773.) In fact, this is what happened in this case. Applicant testified, and the C&R expressly states, that McCandless raised a defense to her liability based on section 3352(a)(8), which states in summary, that residential employees must work at least 52 hours in the 90 days preceding an injury. (Lab. Code, §§ 3351, 3352(a)(8); see Lab. Code, § 2750.5 and *Cedillo v. Workers' Comp. Appeals Bd.* (2003) 106 Cal.App.4th 227, 235 [68 Cal.Comp.Cases 140].) Applicant testified that one of the reasons he settled against McCandless was because he worked insufficient hours to qualify as her employee. (Lab. Code, § 3351, 3352, 2750.5.)[10]

However, this defense is arguably not available to Bovee, and the successful leverage of section 3352(a)(8) by McCandless leaves Bovee exposed to liability for the entire claim. (See *Cedillo, supra,* 106 Cal.App.4th at p. 236.) "The difference in incentives precludes finding the companies are adequate representatives for privity purposes." (*Grande, supra,* 44 Cal.App.5th at p. 1160.)

We therefore affirm the decision of the WCJ that applicant's claim against Bovee is not barred by claim preclusion based on the C&R.

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[9] "'[T]he fact that one is performing work and labor for another is prima facie evidence of employment and such person is presumed to be a servant in the absence of evidence to the contrary.'" (*Narayan v. EGL, Inc*. (9th Cir. 2010) 616 F.3d 895, 900 [75 Cal.Comp.Cases 724] quoting *Robinson v. George* (1940) 16 Cal.2d 238, 241 [5 Cal.Comp.Cases 233].) "Once the presumption of employment comes into play, the burden shifts to the employer to establish that the injured person was an independent contractor or otherwise excluded from protection under the Workers' Compensation Act. [citations omitted]" (*Barragan v. Workers' Comp. Appeals Bd*. (1987) 195 Cal.App.3d 637, 642 [52 Cal.Comp.Cases 467].)

[10] Please note that we are not commenting, or making any sort of finding that the defense raised by McCandless was ever adjudicated or determined. However, applicant's testimony and the statement made in the C&R related to section 3352(a)(8), are evidence that the C&R was reached in part because of the potential of that defense.

III.

Bovee cites to *Castillo v. Glenair, Inc.* (2018) 23 Cal.App.5th 262 [2018 Cal.App. LEXIS 459] to support his contention that he was in privity with McCandless.[11] However, *Castillo* is legally inapposite because the dispute involved liability between employers in a wage and hour claim, which is governed by Division 2 of the Labor Code (Employment Regulation and Supervision). (*Castillo, supra,* 23 Cal.App.5th at p. 266-267.) This is a workers' compensation case, where the definitions of employee and employer, and the determination of liability between employers is governed by Division 4 of the Labor Code. (Eg., see Lab. Code, § 3350; see also *Dynamex v. Operations W. Inc. v. Superior Court* (2018) 4 Cal.5th 903 [83 Cal. Comp. Cases 817].) Indeed, the Court in *Castillo* stated as much:

> To be clear, however, our conclusion does not necessarily place Glenair and GCA in privity for all purposes. By way of example only, **if the Castillos were to allege claims against Glenair based on injuries they sustained** or discrimination they experienced while working at Glenair, **it is by no means a foregone conclusion that GCA would be in privity with Glenair in that case. In such a case, it is not clear that Glenair and GCA would share the same relationship to the subject matter of the litigation.** In contrast here, because the subject matter of the litigation directly implicates the interdependent and close relationship of Glenair and GCA with respect to payment of wages, they are in privity for present purposes. (*Castillo, supra,* 23 Cal.App.5th at p. 280, emphasis added.)

In addition, we agree with the WCJ that *Castillo* is clearly distinguishable on its facts, and as such, is not relevant as precedent in this case.[12] *Castillo* involves a wage and hour claim brought by employees of a temporary staffing service and its client company. (*Id.*, at p. 266-267.) The

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[11] We note that *Castillo* has been directly questioned by at least one other District Court of Appeal for not applying the privity analysis required by the California Supreme Court's decision in *DKN*. (See *Grande, supra,* 44 Cal.App.5th at pp. 1162-1163 ["Respectfully, this is not the correct analysis. ... If the person or entity seeking preclusive effect was not a party to the first litigation, we must then focus on their relationship to the party and the subject matter of the litigation, asking whether their interests are so close to identical that the nonparty should have reasonably expected to be bound by the prior judgment even though not a party. By focusing overmuch on whether the subject matter of the litigation is the same, the Castillo court nearly collapses the second element (same parties) into the first (same claims). The court then justified finding a sufficiently close relationship on the fact that both companies were involved in paying the plaintiffs their wages. That's simply not a sufficient basis for finding a client and staffing agency to be in privity. As the court explained in *Serrano*, a staffing agency and a client may both be "involved in" the payment of wages, yet be independently liable for wage and hour violations. We therefore depart from the reasoning in Castillo, conclude FlexCare and Eisenhower were not in privity, and affirm the trial court."].)

[12] We remind the parties that when citing a case, they should explain the distinctions between the cited authority and the case at issue. (*Ayyad v. Sprint Spectrum, L.P.* (2012) 210 Cal.App.4th 851, 862, fn. 5.)

Castillos brought a complaint against the client company for the same wage and hour claims previously litigated in a class action against the temporary staffing service company, which was settled (the Castillos did *not* opt out of that settlement). (*Ibid.*) The terms of the settlement agreement released the temporary staffing service "and its agents." (*Id.*)

The Court found that the subsequent complaint against the client company was barred by claim preclusion because the temporary staffing service and the client company were in privity. (*Id.*, at p. 280.) Privity was found based on "their interdependent relationship with respect to payment of the Castillos' wages as well as on the fact that this litigation revolves around alleged errors in the payment of the Castillo's wages." (*Ibid.*) The Court *also* found that the subsequent suit was barred by claim preclusion because the client company was the agent of the temporary staffing service, and therefore an expressly "released party" under the settlement agreement. (*Id.*, at p. 281.)

Unlike the circumstances in *Castillo,* however, there is no evidence here that Bovee and McCandless are the same party, or that there is the integration of interests between Bovee and McCandless necessary for a finding of privity. Indeed, as previously discussed, their interests were in direct conflict. The only argument from Bovee on this point is that they were both named as employers in the same workers' compensation claim involving the same underlying issues. This is essentially a duplicative argument. As stated above in section I., it appears that Bovee misapprehends how employer liability is established in workers' compensation cases, and the elements required to establish claim preclusion. If both Bovee and McCandless are found to be employers in this case, their duty, or liability to provide benefits will be defined by statute. (Eg., Lab. Code, § 3600.)

There is also no evidence in the record to support a finding that either Bovee or McCandless was the agent of the other, or that there were any terms in the C&R releasing Bovee from liability as an employer in this case. (See *Castillo, supra*, 23 Cal.App.5th at pp. 277-278 [Agency requires evidence that authority has been expressly or impliedly granted to a party, the agent, to act for and in the place of the principal in legal relationship with third parties, i.e., not the agent or principal.].)

Accordingly, as there is no evidence in the record to support Bovee's contention that applicant's claim should be barred by claim preclusion or issue preclusion, it is our decision after reconsideration to affirm the F&O and return this matter to the trial level for further proceedings.

For the foregoing reasons,

IT IS ORDERED as the Decision after Reconsideration of the Workers' Compensation Appeals Board that the Findings and Order issued on August 24, 2021 by a workers' compensation administrative law judge is **AFFIRMED** and this matter is **RETURNED** to the trial level for further proceedings.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 22, 2021

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

GILBERTO VERGARA
LAW OFFICES OF WILLIAM HENDRICKS
GRIFFIN LOTZ & HOLZMAN
OFFICE OF THE DIRECTOR-LEGAL UNIT (LOS ANGELES)
UNINSURED EMPLOYERS BENEFITS TRUST FUND

AJF/abs

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