WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

PATRICIA DURON, *Applicant*

vs.

BEST DELIVERY SERVICES, LLC; AMERICAN ALTERNATIVE INSURANCE CORPORATION, administered by AMERICAN CLAIMS MANAGEMENT; TRI-STATE EMPLOYMENT SERVICES; CIGA, by its servicing facility SEDGWICK CMS for LUMBERMEN'S UNDERWRITING ALLIANCE in liquidation, *Defendants*

Adjudication Number: ADJ9786832
Los Angeles District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated below, we will grant reconsideration for the sole purpose of amending the finding of injured body parts to conform to the parties' January 22, 2020 stipulation. We will otherwise affirm the WCJ's decision for the reasons stated in the Report, which we adopt and incorporate herein except as noted below.

We do not adopt or incorporate the WCJ's recommendation that we deny reconsideration. Rather, as stated above, we will grant reconsideration for the sole purpose of amending the finding of injured body parts to conform to the stipulation the parties entered into during trial on January 22, 2020.

As to the merits of the case, we agree with the WCJ that California Insurance Guarantee Association (CIGA) did not meet its burden to establish joint and several liability pursuant to a general and special employment relationship or the existence of "other insurance" pursuant to Insurance Code section 1063.1(9). (*Fireman's Fund Indem. Co. v. State Compensation Ins. Fund* (*Smith*) (1949) 93 Cal.App.2d. 408 [14 Cal.Comp.Cases 180] [The consequence of finding the

existence of a general and special employment relationship is joint and several liability on the part of the general and special employer].)

We recognize that the Workers' Compensation Appeals Board is not bound by statutory or common-law rules of evidence or procedure and that procedural rules and rules of evidence may often be relaxed in a workers' compensation proceeding. (See Lab. Code, §§ 5708–5709.) However, evidence "must have some degree of probative force" before it can support a decision. (*National Convenience Stores v. Workers' Comp. Appeals Bd.* (*Kesser*) (1981) 121 Cal.App.3d 420 [46 Cal.Comp.Cases 783]; *Simmons Co. v. Industrial Acc. Com*. (1945) 70 Cal.App.2d 664, 670.) Here, as noted by the WCJ, the documents offered as Joint Exhibit J-2 (a Workers' Compensation Claim Form (DWC1)) and Joint Exhibit J-3 (a confidential Employer's injury and Illness Report) lacked foundation, authentication, and corroboration and, ultimately, lacked probative force.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the May 3, 2021 Findings and Orders is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the May 3, 2021 Findings and Orders is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

1. Applicant, PATRICIA DURAN, who was 49 years old on the date of injury, while employed as a packer at Vernon, California by TRI-STATE EMPLOYMENT, sustained injury arising out of and in the course of said employment on November 18, 2014 to her left shoulder, back, arm, neck, head, left ear, elbow and injury in the form of GERD and irritable bowel syndrome.

* * *

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 26, 2021

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

PATRICIA DURON
GRAIWER & KAPLAN
GOLDMAN, MAGDALIN & KRIKES
HANNA, BROPHY, MACLEAN, MCALEER & JENSEN

PAG/ara

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I INTRODUCTION

The CALIFORNIA INSURANCE GUARANTEE ASSOCIATION (CIGA), by and through their attorneys of record, has filed a timely Petition for Reconsideration challenging the Findings and Order of 03 May 2021. In it CIGA argues that the undersigned failed to consider the testimony of the applicant and failed to infer that "BDS" means BEST DELIVERY SERVICES, LLC (BEST); in not finding that "other insurance" existed that might cover the above referenced claims based on the coverage provided by an alleged special employer.

To date, no Answer to the Petition has been received.

It is recommended that reconsideration be denied.

II FACTS

Applicant, who was 49 years old on the date of injury, while employed by the general employer CORPORATE RESOURCE SERVICES, which was insured by LUMBERMENS UNDERWRITING which is now in liquidation and administered by the CALIFORNIA INSURANCE GUARANTEE ASSOCIATION (CIGA.) The injury occurred arising out of and in the course of employment on 14 November 2014.

The general employer had a relationship with the applicant for some time and the documentary evidence shows that she had been sent to various locations during her employment with CORPORATE RESOURCE SERVICES. On 14 November 2014 she was to report to a new location for work. On her first day she sustained her injury which she reported to her general employer and which was admitted by the general employer and its carrier.

The carrier for the general employer was Lumbermen's Underwriters which has since gone into liquidation and the claim has been administered by CIGA. CIGA then sought to change administrators under Insurance Code § 1063.1, arguing that the carrier for the special employer should become responsible for this claim as "other insurance" under that statute. CIGA alleges that BEST DELIVERY SERVICES, LLC (BEST) was that special employer and they are insured by AMERICAN CLAIMS through its adjusting agency ATHENS ADMINISTRATORS. BEST denied employment.

The evidence at the trial of this case was sparse. Only the applicant, PATRICIA DURON, provided verbal testimony. Her testimony, while credible, was unclear due to the fact that she did not remember the vital facts of this case with clarity including the name of the employer and the location where she worked. She appeared to be a truthful yet disinterested party who sustained an

admitted injury and had no interest in the debate over administration of her claim that later developed.

Her testimony at first indicated that her injury occurred at an address in Vernon, California. Later in her testimony she stated that the injury occurred in Downey. When confronted on cross-examination with the inconsistency she explained that Downey was near Vernon. The Court will take judicial notice that while Downey and Vernon are within ten miles of each other, they are not adjacent and these cities appear to be very different. Vernon is an industrial area with a sparse residential population while Downey is a quintessentially suburban area. It would be difficult to mistake the two. In northern California terms, it would be similar to the differences between East Oakland and San Leandro. In any event, she was not clear who the special employer was or where she worked.

CIGA introduced a document into evidence identified as exhibit J-3. This document was an injury report prepared by the general employer and signed by the applicant at the general employer's office. It appears to be in the handwriting of two different people using different pens. The applicant explained (through an interpreter) that she does not understand English and that the employee at CORPORATE RESOURCE SERVICES helped her fill out the form. The location on the form listed "BDS" as the location of the injury and gave an address in Vernon. However, this appears to be the part of the form filled out by the other person at the general employer's office.

Importantly, the applicant did not explain what "BDS" meant and no witness was provided who might explain this or the relationship between "BDS" and the general employer. No other documentation of any such relationship was introduced and no foundation was provided that would clarify whether "BDS" meant the same as "BEST DELIVERY SERVICES, LLC."

Initially, exhibit J-3 was a surprise to the attorneys for BEST and its carriers so they objected to its admissibility. The undersigned provided a chance for these parties to obtain rebuttal evidence but they chose not to provide any. Consequently, the undersigned admitted the document into evidence.

III
DISCUSSION

This case does not constitute an "appeal" of a legal issue but, instead calls upon the Appeals Board to exercise its authority to re-weigh the evidence, which it has the power to do under Labor Code § 5903 (c.) However, the Appeals Board must give "great weight" to the determinations of the trier of fact. See Garza vs. WCAB (Supreme Ct, 1970) 3 Cal.3d 312; 90 Cal.Rptr 355; 35 CCC 500. Importantly, this "great weight" has more importance in re-weighing testimonial evidence than it does over re-weighing documentary evidence. The Garza case is more concerned with overruling a trial judge's impression of live testimony than it is with re-weighing the probative value of documentary evidence.

Here, the undersigned believes that the applicant was truthful but has an imperfect memory regarding the facts of this case. Therefore, her testimony is most unhelpful in determining who might be the special employer. Her testimony does provide the foundation for the admission of

Exhibit J-3 into evidence, but it does not provide much else of probative value. With other evidence, it might have provided support for a conclusion but it taken alone, this document does not provide enough information to establish any fact at issue.

Thus, while the Garza case does require the Appeals Board to give "great weight to the trial judge's impression of Mr. DURON, it does not limit the Appeals Board in re- weighing the documentary evidence before it. Since the Applicant's testimony was of little value, the Appeals Board would appear to be free to examine the documentary evidence and come to its own conclusions.

The next step is to determine whether Exhibit J-3, or any other documentary evidence in this case provides enough probative evidence in this case such that a trier of fact may determine that BEST was the special employer. The undersigned believes that there is insufficient evidence to prove that point using the preponderance of the evidence standard required under Labor Code section 3202.5. Using this standard, CIGA has the burden of proof to establish this fact.

Here, CIGA argues that BEST has the burden due to the fact that CIGA introduced the injury report and BEST did not introduce anything in rebuttal. CIGA argues that because BEST failed to offer evidence in rebuttal, the burden shifts to BEST to deny employment.

This argument appears to confuse the burden of proof with the burden of production. Here, CIGA introduced surprise evidence so the undersigned gave BEST the opportunity to rebut it with other evidence. BEST chose not to do so.

However, just because BEST did not introduce further testimonial or documentary evidence does not mean that the undersigned takes an uncritical view of the evidence provided. Stated another way, unrebutted documentary evidence must be coherent to be reliable. It must support the fact in controversy. Here, the undersigned had a document signed by two persons, one from the general employer CORPORATE RESOURCE SERVICES and the injured worker Ms. DURON. The document identified the "client company" as "BDS." A physical address and an email address appear on the document but there is no other information linking this acronym to BEST.

Also, no definition was provided for the term "client company" and no agreement between the general and special employer was introduced into evidence. No document was provided linking BEST as having any relationship with CORPORATE RESOURCE SERVICES. No testimony established any such relationship either. Thus, there does not appear to be enough evidence to establish that Ms. DURON was the special employee or that BEST had any relationship to CORPORATE RESOURCE SERVICES.

Also, CIGA's case is weakened further by the fact that there appears to be another company called "Best Delivery, LLC" located in Rancho Cucamonga. While insufficient evidence exists on this record to establish that "Best Delivery, LLC was the special employer, the fact that they exist and are not very far away casts doubt as to whether the parties have identified the correct special employer. However, the probative value of this fact was also weakened by the fact that there was no foundation for the evidence and little evidence to link this other company to CORPORATE RESOURCE SERVICES. However BEST does not have the burden of proof to establish the

alternative employer, so the photographs of the trucks bearing the logo for Best Delivery do little to identify the special employer.

Lastly, CIGA argues that the fact that BEST is listed on the official address record at the Vernon address is evidence that they are the same company. However, BEST was added to that address at the behest of CIGA when they filed their Petition for Joinder. Listing a party or alleged party on the address record does not require a factual hearing or the burden of proof. An address need only be listed on a pleading (or proof of service) by any party or lien claimant to be included on the official address record (known as the "Case Participants" list in EAMS.) At best, listing on the address record is an assertion by a party that the addressee matches the address.

Under Labor Code section 3202.5, CIGA is required to establish each element of its claim of employment by a preponderance of the evidence. This they have not done.

IV
RECOMMENDATION

It is recommended that the Petition for Reconsideration be denied.

Respectfully submitted,

ROGER A. TOLMAN, JR.
Workers' Compensation Judge