

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

SERAFIN JIMENEZ, *Applicant*

vs.

**LN COSTUME SUPPLY INC., STAR INSURANCE, ILLINOIS MIDWEST
SPRINGFIELD; NOWAKOWSKI PROPERTIES DBA STOR- MOR, *Defendants***

**Adjudication Number: ADJ9365230
Anaheim District Office**

**OPINION AND ORDER
DENYING PETITION
FOR RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration¹ (Petition) 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 in the WCJ's Report which we adopt and incorporate in part, we will deny reconsideration.

A petition is generally considered denied by operation of law if the Appeals Board does not grant the petition within 60 days after it is filed. (Lab. Code, § 5909.) However, we believe that "it is a fundamental principle of due process that a party may not be deprived of a substantial right without notice...." (*Shiple v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493].) In *Shiple*, the Appeals Board denied the applicant's petition for reconsideration because it had not acted on the petition within the statutory time limits of Labor Code section 5909. This occurred because the Appeals Board had misplaced the file, through no fault of the parties. The Court of Appeal reversed the Appeals Board's decision holding that the time to act on applicant's petition was tolled during the period that the file was misplaced. (*Shiple*, supra, 7 Cal.App.4th at p. 1108.) Like the Court in *Shiple*, "we are not convinced that the burden of the system's inadequacies should fall on [a party]." (*Shiple*, supra, 7 Cal.App.4th at p. 1108.)

¹ We also acknowledge receipt of defendant Illinois Midwest Springfield's Petition for Order of Remand to the District office, dated March 2, 2023. We find the request moot as this matter is returned to the District office upon this denial of the Petition.

In regard to petitioner's request that the Appeals Board order that references to STORMOR as an "illegally uninsured entity" be "stricken from the OPINION ON DECISION." (Petition, p. 2 fn. 2.) We note that the opinion on decision provides the rationale for the findings and order(F&O), but the actual findings of fact and orders must be contained in the F&O. (Lab. Code, § 5313.) Thus, the issue of whether petitioner is properly insured has not yet been determined in these proceedings because there has been no finding or order directly addressing petitioner's insured status.

Therefore, we will deny the Petition.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 10, 2023

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

**LAUGHLIN, FALBO, LEVY & MORESI, L.L.P.
FRIEDMAN & BARTOUMIAN**

LN/pm

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

**REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION**

I

INTRODUCTION

Defendant, NOWAKOWSKI PROPERTIES DBA STOR-MOR, [...] (hereinafter Stor-Mor), by and through its attorney of record, has file a timely verified Petition for Reconsideration to this Court's Orders finding dual employment and a presumption under Labor Code §3357. The co-defendant, LN COSTUME SUPPLY, INC., Illinois Midwest (hereinafter either LN or Illinois), has now filed an Answer in response thereto, as of the time of dictating this Report and Recommendation on Petition for Reconsideration it had not been received in filenet.

II

BACKGROUND

The applicant claims to have sustained an admitted injury for which benefits were provided by LN through is workers' compensation carrier, Illinois and resolved by Compromised and Release 4/10/19, EAMS Doc. #69852548, and not 6/8/99 as claimed by petitioner Stor-Mor on page 2, line 9 of the Petition for Reconsideration. On 7/31/17, an Order issued joining Stor-Mor as a party defendant, EAMS Doc. #64480282. On 2/19/19. The Law Offices Heywood + Friedman (hereinafter Friedman) entered their appearance on behalf of L&N Costume Service Inc., EAMS Doc. #28533492, and not Stor-Mor. LN already had counsel. Not correcting this defect The Law Offices of Heywood & Friedman now claim they now represent Stor-Mor. Based upon a Petition join the Uninsured Employer Benefit Trust Fund (hereinafter UEBTF) filed by LN and Illinois on 6/3/19, an order issued joining UEBTF [...]. There was no objection filed to this joinder by Stor-Mor or its counsel Friedman. Subsequent to this, OD Legal petitioned the court to release UEBTF as Illinois had agreed to settle and paid the settlement. Judge Spitzer granted that request on 6/4/20 EAMS Doc. #7206910. As indicated in the Compromise and Release on page 6, paragraph 8, the defendant, Illinois, reserved the right to seek contribution and or reimbursement from Stor-Mor only. In footnote 1 on page 2 of the petition, Stor-Mor's attorney alleges this court issued an order "sua sponte" indicating the only party to which contribution/reimbursement can be sought. This is not true, the court pointed out to the parties the only party they reserved jurisdiction against was Nowakowski Properties dba Stor-Mor. Contrary to the petition filed and claimed by Friedman on page 2, paragraph 3, nowhere in the C&R does it reserve the right of contribution/reimbursement for James Nowakowski or Nowakowski Family Trust, only against Stor-Mor. The Compromise and Release was signed by counsel for LN, MSKW and for Stor-Mor by Friedman as indicated on the signature page, page 8. On page 6 of the Compromise and Release it indicates that all the monies were to be paid by Illinois, EAMS doc. #69852548.

Subsequent to this, a Declaration to Proceed (DOR) was filed over discovery between the defendants EAMS Doc. #31784065. At the hearing, [t]hen PJ Spitzer indicated an Order would issue regarding the discovery. EAMS reflects that she issued an Order on 5/11/20, but it is not in filenet. The matter went off calendar. A DOR was filed and a hearing held on 8/25/21 before Judge Nakatani. Judge Nakatani continued the matter on the issue of employment to 12/8/21, EAMS Doc. #24580820. On 12/8/21 new counsel entered an appearance and the matter was continued to 2/23/22, EAMS Doc. #74926828. On 2/23/22 the parties appeared completed the Pre-Trial Conference Statement (hereinafter PTCS) and set the matter for trial on 5/18/22 before the undersigned Judge Skelly, EAMS Doc. #75213430. On 5/18/22, the court met with the parties and due to a trial brief having been filed the court granted a continuance to 7/13/22 to allow a briefing schedule to address the issues as narrowed at the trial. The issue as memorialized on the MOH was dual employment. The parties also agreed to submit to the court a joint set of Stipulated Facts for the court to refer to in its decision, EAMS Doc. #41746564. In the briefs the parties raised the presumption under §3357 EAMS Doc. #75518100. The matter proceeded to trial on 7/13/22 based on the issues as memorialized in the Minutes of Hearing and Summary of Evidence, EAMS Doc. #75711004, without objection by either party. The issues raised were dual employment and §3357.

The court issued its Opinion on Decision and Findings and Orders that there was dual employment and a presumption under §3357.[..]

III DISCUSSION

Defendant's first contention as set forth in Section IV B claims the evidence does not support the finding of dual employment as found in Finding of Fact #2. The facts of this case and to this court clearly show by the Stipulated Facts (hereinafter SF) submitted for trial that the applicant was an employee of LN. LN is owned and operated by James Nowakowski. Per SFs #2 and 3, the applicant would occasionally do work at Stor-Mor. Stor-Mor had no employees; it is owned by the Nowakowki Family Trust and was controlled by James Nowakowski and his brother. When applicant worked for Stor-Mor. Stor-Mor would reimburse LN for the applicant's time, SF #4. There was a leak in the roof of one of the tenants at Stor-Mor and applicant was directed by James Nowakowski to get a tarp and cover it, see depo. James Nowakowski Joint Exh. 2, pages 30-31 and SF #6. It was during this work that the applicant was injured when he fell off the ladder. The Court in its Opinion on Decision cited the SF that it relied on in making its determinations. It is clear by the case law that based upon the SF cited above there is dual employment.

“Dual employment is well recognized in the case law. “Where an employer sends an employee to do work for another person, and both have the right to exercise certain powers of control over the employee, that employee may

be held to have two employers -- his original or 'general' employer and a second, the 'special' employer." *Miller v. Long Beach Oil Dev. Co.* (1959) 167 Cal.App.2d 546, 549.

Here, LN is the general employer and Stor Mor is the special employer.... The Supreme Court further held that, "If general and special employment exist, "the injured workman can look to both employers for [workers'] compensation benefits." *Kowalski v. Shell Oil Co.* (1979) 23 Cal.3d 168, 174- 175, 44 Cal.Comp.Cas. 134. Here, the parties stipulated the applicant was a dual employee of both LN and Stor Mor, Joint Exh 1, Stip. Fact #2, 3 and 4."

Even though the attorney for Stor-Mor attempts to argue no dual employment, the arguments raised in the petition for reconsideration support the finding of dual employment. The argument that there was no one at Stor-Mor who controlled his actions, that is not true Mr. Nowakowski the owner of both companies did per SF #6. The fact that the applicant received his wages from LN is not controlling either. The fact LN paid the applicant and paid for workers' compensation insurance does not preclude the finding of dual employment, *National Automobile and Casualty Insurance Co. v. IAC (Pitt)* (1947) 12 CCC 150. Here since the applicant performed work for the benefit of both companies and at the direction of the owner of both companies, dual employment exists.

In Section IV C. defendant Stor-Mor contends this court improperly found in compliance with §3357 that the applicant was an employee of Stor-Mor. As set forth in the Opinion on Decision page 2 last line through page 3 first 6 lines the court found,

"An applicant is presumed to be an employee, and eligible for workers' compensation benefits, if he or she rendered service for the alleged employer. "Any person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee." §3357. The applicant was performing services for and at the direction of Stor Mor. There is no evidence submitted that would show the applicant was an independent contractor, therefore under §3357 the applicant is presumed to be an employee of Stor Mor. The courts finds that the applicant is an employee of Stor Mor."

Here the applicant was working for the benefit of Stor-Mor when he at the direction of the owner of Stor-Mor went up on the roof to place the tarp over the leak in one of Stor-Mor's tenant's space. In the Petition for Reconsideration, the defendant states they are not asserting the applicant was an independent contractor. If he is not an independent contractor [then] he is an employee. Under §3357 where the applicant is performing a service for the benefit of another or is an independent contractor he is presumed to be an employee. There is no evidence submitted to support the position he was not working for the benefit of Stor-Mor. [...]

Here the facts support the finding of employment under §3357 as the applicant rendered service for the benefit of another, Stor-Mor he is presumed an employee under §3357. The defendant has submitted no evidence to rebut this presumption.

Therefore this court requests the Board deny the Petition for Reconsideration in its entirety as the facts support this Court's Findings of Fact #1, [...], #2 that there was dual employment and #3 that the applicant was a presumed employee of Stor-Mor under §3357.

IV CONCLUSION

Therefore, this court requests that the Petition for Reconsideration be denied in its entirety as it fails to set forth any basis to overturn this Court's Findings and Orders.

DATED: 9/30/2022

ALAN L. SKELLY
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE