WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ANDRES GARCIA, *Applicant*

vs.

DIAMOND STAFFING SERVICES, INC.; NATIONAL RETAIL TRANSPORTATION; CALIFORNIA INSURANCE GUARANTEE ASSOCIATION For LUMBERMEN'S UNDERWRITING ALLIANCE, In Liquidation; THE HARTFORD COMPANY, Administered by TRISTAR RISK MANAGEMENT, *Defendants*

Adjudication Number: ADJ9017829
Van Nuys District Office

OPINION AND ORDER
GRANTING PETITION FOR RECONSIDERATION
AND DECISION AFTER RECONSIDERATION

Defendant California Insurance Guarantee Association (CIGA) seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Order of September 30, 2024, wherein it was found that "ANDRES GARCIA … while employed on June 16, 2013 as a fo[r]k lift operator … by DIAMOND STAFFING SERVICES, whose workers' compensation insurance carrier was CALIFORNIA INSURANCE GUARANTEE ASSOCIATION FOR LUMBERMAN'S UNDERWRITING ALLIANCE IN LIQUIDATION, sustained injury arising out of and occurring in the course of employment to the lumbar spine, cervical spine, and bilateral knees." (Finding of Fact No. 1.) Finding of Fact Number 2 then contradicts the first finding, (incorrectly) stating, "Pursuant to the Directive of the Workers[']' Compensation Appeals Board, the Applicant was an employee of National Retail Transportation, and not an employee of Diamond Staffing Services." Finding of Fact Number 3 cryptically states, "No further issues will be addressed by the Court per Hartford's request." In this matter, Hartford is the carrier for National Retail Transportation (NRT).

As explained in our prior Opinion and Decision after Reconsideration of February 26, 2024 in this matter, in a Compromise and Release agreement approved on June 30, 2015, applicant settled his claims against Lumbermen's (carrier for Diamond Staffing Services) in exchange for $45,000.00. However, the Compromise and Release left adjustment and settlement of medical

treatment liens open. Subsequent to the Compromise and Release, while adjustment and litigation over medical treatment liens were still pending, Lumbermen's was placed in liquidation, and CIGA became responsible for its California claims, subject to statutory limitations. On August 29, 2019, CIGA filed to join NRT and its insurer The Hartford Company (Hartford), alleging that applicant was a special employee of NRT, and that Hartford therefore constituted "other insurance" pursuant to Insurance Code section 1063.1(c)(9)(A), rendering applicant's claim a non-covered claim for which CIGA had no liability, and which Hartford had the responsibility to administer and indemnify. On February 26, 2024, we issued an Opinion and Decision After Reconsideration finding that applicant was a special employee of NRT at the time of injury, but deferring all other matters relevant to CIGA's administration/liability.

CIGA contends that the WCJ erred in not ruling at all upon its Petition to change administration of the claim from CIGA to Hartford. CIGA contends that because Hartford represents "other insurance" pursuant to Insurance Code section 1063.1(c)(9)(A), any remaining benefits payable on this claim are a non-covered claim for which CIGA has no liability, and which Hartford had the responsibility to administer and indemnify. We have not received an Answer and the WCJ has filed a Report and Recommendation on Petition for Reconsideration which does not discuss any of the outstanding issues in this case, but which strangely asks us to reconsider our February 26, 2024 decision, which is long final.

As explained below, we will grant reconsideration, rescind the Findings and Order of September 30, 2024, and return this matter to the trial level in order for the WCJ to properly document and rule upon CIGA's Petition for change in administration so that the outstanding lien claims in this case may be decided.

Preliminarily, we note that former Labor Code section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, Labor Code section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b)

> (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
>
> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under Labor Code section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on November 5, 2024, and 60 days from the date of transmission is Saturday, January 4, 2025. The next business day that is 60 days from the date of transmission is Monday, January 6, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)[1] This decision is issued by or on Monday, January 6, 2025, so we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Labor Code section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on November 5, 2024, and the case was transmitted to the Appeals Board on November 5, 2024. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2)

[1] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

> Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

provided them with actual notice as to the commencement of the 60-day period on November 5, 2024.

In the seminal case of *Kowalski v. Shell Oil Company* (1979) 23 Cal.3d 168, 174-175 [44 Cal.Comp.Cases 134], the California Supreme Court explained the concept of "general" and "special" employment as follows:

> The possibility of 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." [Citation.] In *Industrial Ind. Exch. v. Ind. Acc. Com.* (1945) 26 Cal.2d 130, 134-135 [156 P.2d 926], this court stated that "an employee may at the same time be under a general and a special employer, and where, either by the terms of a contract or during the course of its performance, the employee of an independent contractor comes under the control and direction of the other party to the contract, a dual employment relation is held to exist. [Citations.]"
>
> If general and special employment exist, "the injured workman can look to both employers for [workers'] compensation benefits. [Citations.]"

Although both the general and special employer are jointly and severally liable to the injured worker (*County of Los Angeles v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 391, 405 [46 Cal.Comp.Cases 1322]; *Stephenson v. Argonaut Ins. Co.* (2004) 125 Cal.App.4th 962, 973), as between the two employers, the insurer of the general employer is liable for the entire cost of compensation unless the special employer had the injured worker on its payroll at the time of the injury. (Ins. Code, § 11663.)

However, as explained at length by the Court of Appeal in *Industrial Indemnity Co. v. Workers' Comp. Appeals Bd. (Garcia)* (1997) 60 Cal.App.4th 548, 556 [62 Cal.Comp.Cases 1661], CIGA was created by statute in 1969 to establish a fund from which policy-holders could obtain financial and legal assistance in the event their insurers become insolvent. "CIGA is not, and was not created to act as, an ordinary insurance company. [Citation.] It is a statutory entity that depends on the Guarantee Act for its existence and for a definition of the scope of its powers, duties, and protections." (*Ibid.*) "'CIGA's duties are not co-extensive with the duties owed by the insolvent insurer under its policy.' [Citation.] Instead, CIGA's authority and liability in discharging 'its statutorily circumscribed duties' are limited to paying the amount of 'covered

claims.' [Citation.]" (Ibid.) CIGA may only pay "covered claims" as that phrase is defined by statute. (Ibid.)

Subdivision (c)(9) of Insurance Code section 1063.1 provides: "'Covered claims' shall not include (A) any claim to the extent it is covered by any other insurance of a class covered by the provisions of this article available to the claimant or insured …." In *Garcia*, the Court of Appeal held that when a solvent insurer and an insolvent insurer are jointly and severally liable to an applicant, CIGA has no obligation to pay. Accordingly, if the policy issued by Hartford to covers the industrial injury to the applicant, then there is no "covered claim," and CIGA is properly relieved of liability in this case. However, if Hartford's policy to NRT expressly excluded coverage for special employees, there would be no "other insurance" and liability could be continued to be enforced against CIGA. (*Travelers Property Casualty Co. v. Workers' Comp. Appeals Bd. (Mastache)* (2019) 40 Cal.App.5th 728 [84 Cal.Comp.Cases 883].)

In our Opinion and Decision After Reconsideration of February 26, 2024, we explained and expressly found that "Applicant was a special employee of NRT at the time of his June 16, 2023 injury." (Finding No. 2.) Since the parties had stipulated to industrial injury to the lumbar spine, cervical spine, and bilateral knees (Minutes of Hearing and Summary of Evidence of October 19, 2023 trial at p. 2), our finding that NRT was applicant's special employer was our only finding on a contested issue. We deferred all other issues regarding CIGA's Petition for change in administration/continued liability for determination at the trial level. We noted that if Hartford contended that its policy contained an exclusion for special employees, that issue was subject to mandatory arbitration pursuant to Labor Code section 5275(a)(1). Neither reconsideration nor appellate review was sought of our February 26, 2024 decision which is now long final.

After our Opinion and Decision after Reconsideration of February 26, 2024, a lien claimant apparently filed a Declaration of Readiness to Proceed and a lien conference was set for July 2, 2024. CIGA again sought a ruling on its Petition for change of administration. In the Minutes of Hearing and Summary of Evidence of the August 29, 2024 trial, Hartford raised the issues of statute of limitations, "joinder not appropriate," "Labor Code Section 5804," "Lack of Jurisdiction," "OACR issued by Workers['] Compensation Judge final and binding," "laches," and "State Farm General Insurance Company versus WCAB 2d civil number B240742." CIGA contended that these defenses had been waived. (Minutes of Hearing and Summary of Evidence

of August 24, 2024 trial at p. 2.) It appears that Hartford was no longer contending that is policy contained an express exclusion of special employees. Trial briefs were submitted by CIGA and Hartford.

However, instead of ruling on CIGA's Petition for change of administration, or any of the deferred issues the WCJ issued a decision on the only issue we had already ruled upon in our Decision After Reconsideration of February 26, 2024. As noted above, the WCJ found "Pursuant to the Directive of the Workers Compensation Appeals Board, the Applicant was an employee of NRT, and not an employee of Diamond Staffing Services." Not only was this incorrect, as we expressly found joint employment by Diamond Staffing Services (general employer) and NRT (special employer), but it was the only issue that had already been settled by our February 26, 2024 decision. It appears that the WCJ was redetermining the issues that were already final and not deciding any of the issues that were expressly deferred for decision by the WCJ. We are also confused by the finding that "No further issues will be addressed by the Court per Hartford's request." We see no such request in the record, and we see no basis to not address further issues when issues were expressly deferred so that the WCJ could rule upon them.

The WCJ's Report and Recommendation on Petition for Reconsideration raises more questions than answers. It begins with the unintelligible statement, "A determination was made by this Judge on December 12, 2023 finding that Diamond Staffing Services Inc. was the employee of Defendant." It states that "The Hartford filed a verified timely Petition for Reconsideration on October 24, 2024," however we do not see any petition for reconsideration filed by Hartford in the electronic file. CIGA filed the Petition for Reconsideration on October 24, 2024. In the Report, without discussing any of the evidence or legal authority cited in our prior decision, the WCJ states that our decision was in error and should now somehow be overturned. In the conclusion, the WCJ again states that "the Petition for Reconsideration of the Hartford should be GRANTED" even though we are unable to locate a Petition from Hartford in the electronic file. No mention is made regarding CIGA's Petition for Reconsideration which is in the electronic file.

We will grant reconsideration, rescind the WCJ's decision and return this matter to the trial level so that the actual outstanding issues in this case be heard, properly documented, ruled upon, and have any decision properly explained with reference to the evidence and the law pursuant to Labor Code section 5313. We have already ruled and issued an express finding that applicant was employed by both Diamond Staffing Services and NRT. That finding is now long final and may

not be revisited.[2] There must now be a proceedings and decision on all other issues relevant to CIGA's administration/liability in this matter. Labor Code section 5313 mandates that a WCJ specify "the reasons or grounds upon which the determination was made." As explained in our en banc decision in *Hamilton v. Lockheed Corp.* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc), "The WCJ is … required to prepare an opinion on decision, setting forth clearly and concisely the reasons for the decision made on each issue, and the evidence relied on. (Lab. Code § 5313.) The opinion enables the parties, and the [Appeals] Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful. (See *Evans v. Workers' Comp. Appeals Bd.* (1968) 68 Cal. 2d 753, 755 [33 Cal. Comp. Cases 350].) For the opinion on decision to be meaningful, the WCJ must refer with specificity to an adequate and completely developed record." To the extent that the WCJ's references to Hartford's petition for reconsideration in the Report were not a repeated clerical error, the parties and the WCJ must make sure this document is included in the electronic record and then retransmit this matter to us. As we held in *Hernandez v. AMS Staff Leasing* (2011) 76 Cal.Comp.Cases 343, 346-350 (Appeals Board significant panel decision), it is the responsibility of the parties and the WCJ to ensure that the electronic file is complete.

We therefore grant reconsideration, rescind the WCJ's decision, and return this matter to the trial level so that the issues and evidence can be properly listed, so that the outstanding issues in this matter may be decided, and so that the grounds behind any future decision be properly explained as required by Labor Code section 5313 and *Hamilton, supra*. Our determination that applicant was a special employee of National Retail Transportation is final, not an outstanding issue in this case, and not subject to redetermination. As noted in above, although it is not clear if Hartford is still arguing that its policy contains an exclusion for special employees, to the extent that Hartford still makes this contention, this issue is subject to mandatory arbitration which must be initiated and concluded prior to the determination of any other outstanding issue in this case.

[2] Although no longer relevant, we see no error whatsoever in our finding.

For the foregoing reasons,

IT IS ORDERED that CIGA's Petition for Reconsideration of the Findings and Order of September 30, 2024 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Order of September 30, 2024 is **RESCINDED** and that this matter is **RETURNED** to the trial level for proceedings and decision consistent with the opinion herein.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 6, 2025

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

ANDRES GARCIA
JCR LAW GROUP
ROSENBERG YUDIN
HERMANSON, GUZMAN & WANG

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