WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

PAUL BUTELO, *Applicant*

vs.

GTB, INC., dba LEIGHTON & ASSOCIATES; LUMBERMENS MUTUAL CASUALTY, now in liquidation, administered by CIGA, by its servicing facility TRISTAR RISK MANAGEMENT; KOLL CONSTRUCTION CO., ZURICH AMERICAN INSURANCE CO., *Defendants*

Adjudication Numbers: ADJ2852888; ADJ6775021
Anaheim District Office

OPINION AND DECISION AFTER RECONSIDERATION

The Appeals Board previously granted reconsideration[1] in this matter to provide an opportunity to further study the legal and factual issues raised by the Petitions for Reconsideration. Having completed our review, we now issue our Decision After Reconsideration

Both defendant California Insurance Guarantee Association (CIGA) by its servicing facility, on behalf of GTG, Inc. dba Leighton & Associates (GTG, Inc.), and Zurich American Ins. Co. (Zurich) on behalf of Koll Construction Company (Koll), seek reconsideration of the Joint Findings and Orders issued by a workers' compensation administrative law judge (WCJ) on December 22, 2020, wherein the WCJ found that the applicant sustained injury arising out of and in the course of his employment (AOE/COE) on February 29, 2000 and during the period April 15, 1995 to February 29, 2000, and further, that the applicant had dual employment from approximately October 1999 to February 29, 2000 with Koll as applicant's special employer.

The WCJ additionally found that the joinder of Zurich and Koll was not valid as to applicant's specific injury of February 29, 2000 (ADJ2852888) but valid as to the applicant's continuous trauma claim (ADJ6775021). The WCJ vacated the Order of joinder as to Koll and

[1] Deputy Commissioner Schmitz, who was on the panel that granted reconsideration in this matter, is unavailable to participate. Another panelist has been assigned in her place.

Zurich on ADJ2852888. The WCJ admitted exhibit A into evidence, and ordered all remaining issues deferred and off calendar.

CIGA contends that the WCJ erred in vacating the Order of joinder as to Zurich on applicant's specific injury claim based upon the general release executed in 2002 involving applicant and AMICO, plaintiff-in-intervention in applicant's civil case, as AMICO did not have the power to waive the defenses or claims of CIGA in applicant's workers' compensation proceedings. CIGA further asserts that this release did not relieve Koll from further litigation as to claims of contribution or reimbursement by CIGA against them as a dual employer, which constitutes "other insurance" under Insurance Code section 1063.1(c)(9)(A).

Zurich contends that the evidence fails to prove dual or general/special employment exists as it relates to applicant with their insured, Koll, and applicant's employer, GTG Inc. Additionally, Zurich argues that the General Release executed by applicant (Ex. A.) precludes further litigation against Koll.

We have received an Answer from defendant CIGA. The WCJ prepared a Joint Report and Recommendation on Petition for Reconsideration and (Report), recommending that the Findings be amended to state that the Order of Joinder of Koll and Zurich on November 4, 2016 remain valid as to both cases.

We have considered the Petitions for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. As our decision after reconsideration, for the reasons discussed below, we will rescind the Findings of Fact and Orders of the WCJ and substitute findings that the Order of joinder of Zurich American and Koll as party defendants on both of applicant's cases was proper, but that applicant did not have dual or special employment with Koll for either date of injury.

FACTS

Applicant sustained admitted industrial injury on February 29, 2000 to his neck, hand, knees, back, right elbow and right shoulder. Applicant also suffered industrial injury in the form of carpal tunnel, as well as to his knees, and back, during the period April 15, 1995 through February 29, 2000.

At the time of both injuries, the applicant was employed as a soil technician by GTG, Inc., dba Leighton & Associates, and allegedly employed by Koll Construction. (Minutes of Hearing/Summary of Evidence (MOH/SOE), September 24, 2020, p. 2: 2-10.)

Applications for adjudication were filed for both claims. Applicant also filed a third-party claim as to his specific accident occurring on February 29, 2000.

On December 11, 2010, we issued an Opinion after Reconsideration, affirming defendant's right to a third-party credit of $ 102,237.77 for monies received by applicant as a result of that third-party recovery, and as ordered by a WCJ on October 30, 2002. (Opinion and Order, 12/11/2010.)

On November 4, 2016, WCJ Gordon issued an Order of Joinder for both cases as to defendant Koll and their insurance carrier Zurich.

On June 8, 2020, WCJ Gordon approved a Joint Compromise and Release as to both cases between applicant, Koll, and Zurich for $250,000.

On September 24, 2020, both cases proceeded to a trial regarding issues relative to disputes between GTG, Inc. and Koll.

The issues listed for trial were as follows:

1. Whether there is dual employment between GTG, Inc., and Koll Construction.
2. Whether Koll Construction is a special employer.
3. Whether the Court properly joined Koll Construction as by Order of Joinder.
4. Whether the general relief [sic] with the applicant's third-party settlement further precludes litigation against Koll Construction.

(MOH/SOE, 9/24/2020, p. 2: 11-17.)

On October 21, 2020, Zurich filed their Petition for Contribution and/or Reimbursement against defendant CIGA and National Union Fire Insurance.

On December 22, 2020, the WCJ issued her joint findings and orders, which are the subject of both defendants' petitions for reconsideration.

DISCUSSION

I.

An employee may have more than one employer for workers' compensation purposes. (*Riley v. Southwest Marine, Inc*. (1988) 203 Cal.App.3d 1242, 1247–1248, 250 Cal. Rptr. 718; *Santa Cruz Poultry, Inc. v. Superior Court* (1987) 194 Cal.App.3d 575, 578, 239 Cal. Rptr. 578, 52 Cal.Comp.Cases 429; *In-Home Supportive Services v. W.C.A.B. (Bouvia)* (1984) 152 Cal.App.3d 720, 732, 199 Cal. Rptr. 697, 49 Cal.Comp.Cases 177.)

When a general employer lends an employee to another employer and relinquishes to a borrowing employer all right of control over the employee's activities, a "special employment" relationship arises between the borrowing employer and the employee.

Further, when the general employer retains some right of control over the employee, a "dual employment" relationship arises, with the result that the general employer remains concurrently and simultaneously, jointly and severally liable with the special employer for any injuries to the employee. (*Kowalski v. Shell Oil Co.* (1979) 23 Cal.3d 168*,* 174–175, 151 Cal. Rptr. 671, 44 Cal.Comp.Cases 134, 588 P.2d 811; *Marsh v. Tilley Steel Company* (1980) 26 Cal.3d 486.)

When there is dual employment and both employers are insured, an injured employee is barred by the exclusive remedy provision of the workers' compensation law from maintaining a civil action against either employer for damages arising from industrial illness or injury. (Lab. Code § 3601; *Kowalski, supra*, 23 Cal.3d at p. 175; *Oxford v. Signal Oil & Gas Co*. (1970) 12 Cal.App.3d 403, 408, 90 Cal. Rptr. 700, 35 Cal.Comp.Cases 790.)

However, this statutory restriction does not affect the employee's rights to tort damages from persons with whom the employee has no employment relationship. (Lab. Code § 3852; *Witt v. Jackson* (1961) 57 Cal.2d 57, 69 [17 Cal. Rptr. 369, 366 P.2d 641].)

In general, the primary consideration in deciding whether a special employment relationship has been created is whether the special employer has the right to control and direct the activities of the alleged employee or the manner and method in which the work is performed, whether this right is exercised or not. (*Kowalski, supra* at p. 175; *Riley v. Southwest Marine, Inc*. (1988) 203 Cal.App.3d 1242, 1250, 250 Cal. Rptr. 718; *Santa Cruz Poultry, Inc. v. Superior Court* (1987) 194 Cal.App.3d 575, 580, 239 Cal. Rptr. 578, 52 Cal.Comp.Cases 429; *Thomas v. Edgington Oil Co.* (1977) 73 Cal.App.3d 61, 63, 140 Cal. Rptr. 635, 42 Cal.Comp.Cases 760. *See*

also, Brassinga v. City of Mountainview (1998) 66 Cal.App.4th 195, 219, 77 Cal. Rptr. 2d 660, 63 Cal.Comp.Cases 987, 1002–1003.)

However, more is required than mere instruction by the special employer on the result to be achieved.

Evidence that the alleged special employer has the power to discharge the employee is strong evidence of the existence of a special employment relationship. In addition, evidence that the employee provides unskilled labor, that the work they perform is part of the alleged special employer's regular business, that the employment period is lengthy, and that the alleged special employer provides the tools and equipment used tends to indicate the existence of special employment. (*Kowalski, supra* at p. 177; *Johnson v. Berkofsky-Barret Productions, Inc.* (1989) 211 Cal.App.3d 1067, 1073–1074, 260 Cal. Rptr. 67; *Oxford v. Signal Oil & Gas Co*. (1970) 12 Cal.App.3d 403, 408, 90 Cal. Rptr. 700, 35 Cal.Comp.Cases 790.)

Conversely, evidence of the following circumstances will mitigate against the existence of a special employment relationship:

- (1)The employee is not paid by and cannot be discharged by the special employer.
- (2)The employee is a skilled worker with substantial control over operational details.
- (3)The employee is not engaged in the special employer's usual business.
- (4)The employee is employed only for a brief time period.
- (5)The employee uses tools and equipment furnished by himself or herself or by the general employer.

(*Marsh supra*, at p. 492.)

In *Marsh,* it was found that an employee of a subcontractor on a construction project who was loaned to the general contractor on the project for one day did not become a special employee of the general contractor, when the employee remained on the subcontractor's payroll, the general contractor could not discharge the employee, and the employee retained unlimited discretion to perform his tasks as he deemed necessary to achieve the results desired by the general contractor. Therefore, an employee of the general contractor who was injured by the negligence of the borrowed employee was entitled to bring a negligence action against the subcontractor. (*Marsh, supra*, at pp. 490–493.)

Further, no special employment has been found when the alleged special employer is not, at the time of the injury or in connection with the specific task to be performed, exercising control over the details of the work, even though, at some other time and in connection with some other task, such control may have been exercised. (*Thomas v. Edgington Oil Co*. (1977) 73 Cal.App.3d 61, 64, 140 Cal. Rptr. 635, 42 Cal.Comp.Cases 760.)

The existence or nonexistence of a special employment relationship is generally a question reserved for the trier of fact. This is true when the evidence, although not in conflict, permits conflicting inferences. (*Marsh, supra*, 26 Cal.3d at p. 493; *Von Beltz v. Stuntman, Inc*. (1989) 207 Cal.App.3d 1467, 1486–1487, 255 Cal. Rptr. 755.) Further, when the employees of two employers are jointly engaged in a project of mutual interest, each employee ordinarily remains the servant of their own master and does not become the special employee of the other. (*Ibid*; *Moss v. Chronicle Pub. Co.* (1927) 201 Cal.610, 613, 616 [258 P. 88, 55 A.L.R. 1258]; *Woodall v. Wayne Steffner Productions* (1962) 201 Cal.App.2d 800, 811 [20 Cal. Rptr. 572].)

For example, when a subcontractor on a freeway construction project loaned a crane operator to the general contractor for less than one day to complete tasks on the project of mutual interest to both, the general contractor was not deemed the crane operator's special employer for purposes of a tort action filed by one of its employees who was injured as a result of the operator's negligence. Therefore, the injured employee was not limited to his workers' compensation remedy against his own employer, but was entitled to sue the operator's employer in tort.
(*Marsh, supra,* 26 Cal. 3d at p. 493.)

Here, the issue in this matter comes down to whether applicant has dual or special employment with defendant Koll, in addition to his general employment with defendant GTG, Inc.

II.

Defendant Koll asserts that per the case of *Kowalski v. Shell Oil Co.* (1979) 23 Cal.3d 168, defendant CIGA has failed to prove the existence of an employment relationship between applicant and Koll.

The relevant facts, as set forth by the WCJ in his Opinion, are as follows:

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> Koll Construction Co was the general contractor and GTG, Inc. dba Leighton & Associates was a sub-contractor on the Sage Hill High School

construction job site in Irvine, California, where Mr. Butelo sustained his injuries. Mr. Butelo was called as a witness and testified at the trial.

Mr. Butelo testified in his 3/13/2017 deposition that he began working on the Sage Hill job site around October 1999. Applicant's 2/29/2000 injury occurred when he was hit by a boulder. The applicant testified that as the general contractor, Koll Construction oversaw the project. Koll Construction had a schedule of what was work to be done. Each sub-contractor had a specific job to perform. Koll Construction was described as overseeing the project to make sure the work was performed on time. Mr. Butelo would write a daily report to Koll Construction identifying the work Leighton and Associates was performing every day that it worked on site. The project manager employed by Koll Construction would walk around the job site giving instructions. No one at Koll Construction told him how to test soil. He used his own expertise to test the soil.

GTG, Inc. dba Leighton and Associates, not Koll Construction, paid Mr. Butelo. Leighton & Associates provided applicant's tools. All vacation requests were made to Leighton & Associates.

Applicant was required to attend Koll Construction safety meetings.

(Opinion, p. 3.)

The WCJ found dual employment based upon the testimony of both the applicant and witness Bruce Cox.

Petitioner asserts that pursuant to rationale in *Kowalski, supra,* there is insufficient evidence to support the WCJ's finding of dual employment of applicant with Koll Construction.

Petitioner relies upon the testimony and evidence presented at trial, in pertinent part, as follows:

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During the Trial, the Applicant testified that he was employed by GTG Inc. dba Leighton & Associates (Summary of Evidence, pg. 5, lines 3-4). Applicant stated that his employer was a subcontractor on the construction site where Koll Construction was the general contractor (Summary of Evidence, pg. 5, line 5 and 17). The Superintendents at the jobsite for Koll Construction were Robert Finney and Bruce Cox (Summary of Evidence, pg. 6, lines 1-2). The Applicant would provide a written daily report of his work to Leighton and would give a copy to Koll Construction on Leighton letterhead (Summary of Evidence, pg. 6, lines 11-13).

Applicant specifically testified that he did not "go to Mr. Cox or Mr. Finney for instructions about what to do" (Summary of Evidence, pg. 6, lines 14 -15). Upon

questioning as to whether Koll would direct people on the jobsite as to what they were supposed to do, Applicant testified Koll oversaw the project with scheduling but at the jobsite "each contractor had their own rules and each contractor had a specific job of what they were to do" (Summary of Evidence, pg. 6, lines 15 - 20). As to Koll Construction, Mr. Cox and Mr. Finney would walk around the jobsite to check on status of work performed by subcontractors (Summary of Evidence, pg. 6 to 7, lines 24 - 31). If instructions were provided, they would speak to Leighton's foreman (Summary of Evidence, pg. 7, lines 1- 3).

Applicant testified that the tools he used at the jobsite were provided by Leighton and that the truck he used at the jobsite was provided Leighton (Summary of Evidence, pg. 9, lines 12 - 13). Further, Koll Construction did not any pay wages; 401K or health insurance and all of Applicant's vacation requests were made to Leighton (Summary of Evidence, pg. 9, line 25 - page 10, line 3). At the jobsite the project engineer from Leighton was Mr. Bradley and that Applicant would report to Mr. Bradley (Summary of Evidence, pg. 9, lines 13 - 20). Further, "no one from Koll Construction told him how to test soil" (Summary of Evidence, pg. 9, lines 21-22). No one from Koll told him he had to work in a specific manner nor provided instructions (Summary of Evidence, pg. 10, line 6). Lastly, Applicant testified other than mere scheduling and basic planning, Koll did not direct him as "we know what we are supposed to do" (Summary of Evidence, page 12, lines 8 - 11). Applicant testified he was not even sure which entity hired Leighton for the project (Summary of Evidence, page 12, lines 8 – 11).

On examination by CIGA's counsel the Applicant confirmed that the Applicant would inform Koll when he was taking his vacation but got permission for his vacation from Leighton & Associates (Summary of Evidence, pg. 10, lines 2 - 3). Similarly, Applicant would inform Koll employees of "problems" at the end of the day (Summary of Evidence, pg. 6, lines 6 - 7).

The Applicant's testimony clearly establishes that Koll exerted no control and did not direct Applicant's work at the job site. As the general contractor, employees from Koll merely coordinated schedules and managed workflow among multitudes of subcontractors. Applicant's job entailed testing soil samples and providing reports. This was the extent of their contact: providing soil reports on Leighton letterhead and coordinating schedules. This level of interaction does not rise to the level of control and direction that creates a dual employment relationship.

The Applicant repeatedly affirms he was not told what to do nor how to do anything. Leighton provided his pay, equipment, vacation time, and benefits. He had a Supervisor who was often on site to whom he reported. This reaffirms the lack of control by Koll.

Further, the WCJ has provided a summary of evidence [in] her Opinion on Decision virtually identical to the above yet provides a conclusory and unsubstantiated finding of a dual employment relationship. However, there is no explanation as to what interactions that led to control over the Applicant. There is no evidence of such.

Finally, Applicant did not know which entity hired Leighton. Witness Mr. Robert Edward Finney of Koll Construction was deposed on 8/30/01 as part of the third-party case. He testified he was the Lead Superintendent for Koll Constructions

(Exhibit "B" - Page 10, line 8). Further, the witness testified that Leighton & Associates was hired by "I believe the school." (Exhibit "B" - Page 50, line 22). In referring to "the school", the witness is referencing the owners of the Sage Hill School job site and *not* the general contractor Koll construction. The witnesses also testified that Applicant did not attend any safety meeting led by Koll Construction because "he's a part-time subcontractor. He was not a full-time contractor under our jurisdiction." (Exhibit "B" – Page 50, lines 16-17).

(Petition, pp. 3-6.)

In *Kowalski*, *supra,* the California Supreme Court reversed a trial court judge's decision that overturned the jury's finding that applicant was not a special employee of Shell Oil.

Defendant Shell argued applicant was their special employee in reliance upon language in a contract between Shell and applicant's employer, the C. Norman Peterson Company, since the contract expressly stated that Shell had the right to control and direct Kowalski's work.

In reversing the trial judge and finding substantial evidence to support the jury's finding that Kowalski was not Shell's special employee, the Court of Appeal stated:

> Although the terms of a contract may specify that a special employer retains the right to control the details of an individual's work or purports to establish an employment relationship, "the terminology used in an agreement is not conclusive . . . even in the absence of fraud or mistake." [Citations.] "The contract cannot affect the true relationship of the parties to it. Nor can it place an employee in a different position from that which he actually held." (*Martin v. Phillips Petroleum Co., supra, 42 Cal.App.3d at p. 919*.)
>
> Since a contract is not conclusive evidence of the existence of the right to control, the courts have looked to a number of factors as evidentiary indicia of the existence of a special employment relationship. The paramount consideration appears to be whether the alleged special employer exercises control over the details of [an employee's] work. Such control strongly supports the inference that a special employment exists." [Citations.] However, "[the] fact that instructions are given as to the result to be achieved does not require the conclusion that a special employment relationship exists." (*McFarland v. Voorheis-Trindle Co., supra,* 52 Cal.2d at p. 704; Umsted v. *Scofield Eng. Const. Co*. (1928) 203 Cal. 224, 230 [263 P. 799].)
>
> Evidence that the alleged special employer has the power to discharge a worker "is strong evidence of the existence of a special employment The payment of wages is not, however, determinative." (*McFarland v. Voorheis-Trindle Co., supra,* 52 Cal.2d at p. 705.) Other factors to be taken into consideration are "the nature of the services, whether skilled or unskilled, whether the work is part of the employer's regular business, the duration of the employment period, . . . and who supplies the work tools." (*Oxford v. Signal Oil & Gas Co., supra,* 12 Cal.App.3d

> at p. 408; *Martin v. Phillips Petroleum Co., supra,* 42 Cal.App.3d at pp. 921-922.) Evidence that (1) the employee provides unskilled labor, (2) the work he performs is part of the employer's regular business, (3) the employment period is lengthy, and (4) the employer provides the tools and equipment used, tends to indicate the existence of special employment. Conversely, evidence to the contrary negates existence of a special employment relationship.
>
> In addition, consideration must be given to whether the worker consented to the employment relationship, either expressly or impliedly, and to whether the parties believed they were creating the employer-employee relationship. (*Martin v. Phillips Petroleum Co., supra,* 42 Cal.App.3d at pp. 920 and 922.)

(*Kowalski,* 23 Cal.3d, at pp. 176-178.)

We note that here, there is no evidence of a written contract involving applicant, GTG, Inc. and Koll as to the Sage Hill High School construction job where applicant sustained his injuries. Further, applicant appears to have settled both a potential civil third-party case as well as a workers compensation case with Koll Construction, perhaps in an abundance of caution, should Koll be found to be applicant's employer or a third-party for which civil liability may fall.

Based upon the existing facts and circumstances in this case, we conclude that based upon the facts as presented, defendant GTG, Inc. has failed to prove that Koll was a special employer of the applicant. As such, we must rescind the findings of the WCJ as to this issue.

With respect to the additional issues raised, including the issue of joinder of Koll and Zurich on both of applicant's cases, we find the Order of joinder of November 4, 2016 to be proper.

Further, in light of our finding that Koll is not a dual or special employer of applicant for either date of injury, the issues of admissibility of Exhibit A, and whether the general release of the applicant's third-party settlement as to Koll precludes litigation against Koll by CIGA are no longer relevant.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the December 2, 2020, Findings of Fact and Orders issued by a workers compensation administrative law judge are **RESCINDED**, and that the below findings of fact are **SUBSTITUTED** in its place:

JOINT FINDINGS OF FACT

1. The applicant, PAUL BUTELO, age 49, while employed on 2/29/2000, and during the period 4/15/1995 to 2/29/2000, sustained injury arising out of and in the course of his employment as a soil technician in California with his general employer being GTG, Inc. dba Leighton & Associates, whose workers' compensation insurance carrier was American Motorists Insurance, now identified as California Insurance Guarantee Association by its servicing facility, Tristar Risk Management, for Lumbermens Mutual Casualty Company in liquidation.

2. The applicant did not have dual or special employment with Koll Construction Company on February 29, 2000 nor during the period October 1999 to February 29, 2000.

3. Exhibit A is admissible.

4. The November 4, 2016 Order of joinder of Zurich American and Koll Construction on both ADJ2852888 and ADJ6775021 was proper.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSE H. RAZO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 3, 2025

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

PAUL BUTELO
THOMAS F. MARTIN, ESQ.
SILBERMAN & LAM
GUILFORD, SARVAS & CARBONARA
TRACEY LAZARUS, ESQ.
ZURICH LOS ANGELES
OFFICE OF THE DIRECTOR – LEGAL UNIT (LOS ANGELES)

LAS/abs

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