WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

NOE SEBASTIAN, *Applicant*

vs.

ALDELANO CONTRACT STAFFING SERVICES; EMPLOYERS INSURANCE OF WASAU; RECALL TOTAL INFORMATION MANAGEMENT C/O IRON MOUNTAIN, *Defendants*

Adjudication Number: ADJ9957619
Oakland District Office

OPINION AND DECISION AFTER RECONSIDERATION

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

Applicant seeks reconsideration of the February 12, 2021 Findings and Order (F&O), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed on April 29, 2015, sustained industrial injury to his head, skull, eyes, neck, left shoulder, back, chest, ribs, internal bleeding, psyche, stress, sleep disorder and in the form of seizures. The WCJ found no evidence of serious and willful misconduct by defendant general employer Aldelano[2] Staffing Services, and that applicant's petition for increase in benefits due to the alleged serious and willful conduct of special employer Recall Total/Iron Mountain (Recall Total) was barred by Labor Code[3] section 5407.

Applicant contends that a January 6, 2020 order denying the joinder of the special employer as a party defendant to applicant's claim for benefits as a result of serious and willful misconduct

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[1] Commissioner Lowe, who was previously a member of this panel, no longer serves on the Workers' Compensation Appeals Board. Another panelist has been substituted in her place.

[2] Applicant's general employer is referred to at various points in the record as 'Adelanto' or 'Adelano'. We note however, that the June 19, 2015 Notice of Appearance by defense counsel lists the general employer as Aldelano Corporation.

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

confirmed that Recall Total was already a party to the case. Applicant asserts that because neither defendant appealed the order, principles of res judicata bar defendant from asserting a statute of limitations defense. Applicant further contends that any lack of particularity in his original pleadings with respect to alleged misconduct under section 4553 is not fatal to the claim and that that case law authority allows for the amendment of the claim.

Applicant has also filed a Petition to File Response to Defendant's Answer to Applicant's Petition for Reconsideration. (Cal. Code Regs., tit. 8, § 10964(b).) We have granted the request pursuant to Workers' Compensation Appeals Board (WCAB) Rule 10964 and have reviewed the supplemental petition herein. (Cal. Code Regs., tit. 8, § 10964(a).)

We have received an Answer from defendant Total Recall/Iron Mountain. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the Answer, applicant's Response, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will affirm the F&O.

FACTS

Applicant sustained admitted injury to his head, skull, eyes, neck, left shoulder, back, chest, ribs, internal bleeding, psyche, stress, sleep disorder and in the form of seizures, while generally employed by defendant Aldelano Contract Staffing Services Corporation (Aldelano) on April 29, 2015. On the date of injury, applicant was specially employed by Recall Total.

On May 8, 2015, applicant filed an Application for Adjudication of his workers' compensation claim and named Recall Total Information Management as his employer on the date of injury.

On May 26, 2015, applicant filed an amendment to his application, naming Aldelano Corporation of Michigan as his employer on the date of injury.

On July 28, 2015, applicant filed an Application for Award for Employer's Serious and Willful Misconduct, asserting that Aldelano was applicant's employer at the time of injury, and that "while employed by Defendant as a warehouse worker, sustained an injury arising out of and in the course of employment to various parts of his body, including, but not limited to, his head, skull, eyes, neck, left shoulder, back, chest, ribs internal bleeding, psyche, stress and sleeping

problems when he fell from an unenclosed elevated work location that had no guardrails." (Application for Award, dated July 28, 2015, at p. 1.) Applicant further alleged that "[a]t the time of the injury Applicant was in the course and scope of his employment under the direction and control of Nina Hernandez, who was then the employer's supervisor," and that "[w]ith knowledge of the requirements of Labor Code Sections 6400, et seq., with knowledge that a dangerous condition existed and with knowledge that serious injury to Applicant was a probable result of its continuance, the Employer … intentionally and willfully failed to provide a safe place to work in that the Employer allowed and authorized its employees to work on an unenclosed elevated work location without any guardrails." (*Id.* at p. 2.) The proof of service attached to the petition reflects service on general employer Aldelano at three different addresses, and also on special employer Recall Total Information Management. (*Id.* at p. 16.)

On November 25, 2019, applicant filed an amended Application for Award for Employer's Serious and Willful Misconduct which named general employer Aldelano Corporation and, for the first time, special employer Recall Total Information Management, Inc. (Amended Application, dated November 25, 2019, at p. 1.)

On January 4, 2020, applicant filed a Petition to Join Defendant Recall Total Information Management "as a defendant in the above-captioned proceeding, specifically on the issue of Applicant's serious and willful misconduct claim, on the grounds that the Applicant was a temporary employee of Aldelano Corporation of Michigan (general employer) but loaned to Recall Total Information Management, Inc. (special employer) on the date of injury." (Petition to Join Defendant, dated January 4, 2020, at p.1:18.) Applicant asserted that both the general and the special employers were jointly and severally liable for applicant's claimed benefits. (*Id.* at p. 1:25.)

On January 6, 2020, a WCJ issued an Order of Dismissal of Petition for Joinder (Moot), stating that Recall Total Information Management, "has been a party since 2015 and has been represented with respect to the Serious and Willful Misconduct Claim since 2019." (Order of Dismissal of Petition for Joinder, dated January 6, 2020.) The attached proof of service is dated January 7, 2020, and lists service on Aldelano Corporation as well as Recall Total Information Management.

On January 22, 2020, the parties reached an agreement to settle the case in chief by way of Compromise and Release, and on April 7, 2020, a WCJ approved the settlement.

On November 12, 2020, the parties proceeded to trial and stipulated in relevant part that "Defendant Adelano Staffing Services lacked knowledge of the dangerous condition." (Minutes of Hearing and Summary of Evidence (Minutes), dated November 12, 2020, at p. 2:32.) The parties placed in issue applicant's claim for benefits under section 4553. Defendant Aldelano asserted that notwithstanding a general/special employment arrangement, the general employer and special employer are individually liable for claim of serious and willful misconduct. (*Id.* at p. 3:1.) Aldelano also alleged applicant's petition for benefits under section 4553 failed to name a supervisor at Aldelano with knowledge of a dangerous condition, and that it lacked control over the premises where the injury occurred. (*Id.* at p. 3:5.) Defendant Recall Total/Iron Mountain asserted that it was not named in the original petition seeking benefits under section 4553, and that applicant's subsequent amendment to include Recall Total/Iron Mountain was untimely under section 5407. (*Id.* at p. 3:13.) The WCJ heard testimony from applicant and from defense witness Nicole Smith, and ordered the matter submitted for decision as of November 19, 2020.

On February 12, 2021, the WCJ issued his F&O, determining in relevant part that Aldelano "lacked knowledge of the dangerous condition," and that there was no evidence of serious and willful misconduct by Aldelano. (Findings of Fact Nos. 3 & 4.) The WCJ also determined that "the Application for Serious and Willful Misconduct as against Recall Total (aka Iron Mountain) is barred by Labor Code section 5407." (Finding of Fact No. 5.)

The WCJ's Opinion on Decision initially discussed the legal definition of serious and willful misconduct pursuant to section 4553. (Opinion on Decision, at pp. 6-8.) However, the WCJ also observed that:

> Prior to reaching the question of serious and willful misconduct, however, the issue of statute of limitations must be addressed as a threshold question. The parties stipulated that [Aldelano] lacked knowledge of the dangerous condition. There is no evidence that the supervisor named in the [serious and willful] Application, Nina Hernandez, was an employee of [Aldelano]. Therefore, the proper defendant for the [serious and willful] claim is Recall Total. Recall Total was, however, not named in the [serious and willful] application within one year of the date of injury.

(Opinion on Decision, at p. 8.)

The WCJ observed that the facts of this case were substantially similar to that in *McGee St. Productions v. Workers' Comp. Appeals Bd.* (*Peterson*) (2003) 108 Cal.App.4th 717 [68 Cal.Comp.Cases 708, 712] (*McGee Street*), wherein the Court of Appeal held that section 5407

barred the amendment of a special employer to a petition for section 4553 benefits more than one year from the date of injury. The WCJ concluded that, "[a]s applied to the facts of the instant case, the holding of *McGee Street Productions* compels a finding at the trial level that the case against Recall Total is barred by the statute of limitations, because Recall Total was not named in the [serious and willful] Application within one year of the date of the injury." (Opinion on Decision, at pp. 9-10.)

Applicant's Petition responds that a January 6, 2020 order denied applicant's petition to join Recall Total/Iron Mountain as a party to the serious and willful misconduct claim because they were already a party, and the joinder was moot. (Petition, at p. 3:5.) Applicant asserts that in light of this January 6, 2020 Order, principles of res judicata preclude Recall Total/Iron Mountain from asserting they were not a properly joined party to applicant's serious and willful misconduct claim. (Petition, at p. 3:5.) Applicant further contends any lack of particularity in a serious and willful conduct petition would not be fatal to applicant's claim because the original petition listed a Recall Total employee as applicant's supervisor sufficient to place Recall Total/Iron Mountain on notice of its involvement in the claim. Applicant further contends the limitations of section 5407 do not preclude amendment of the particular aspects of an otherwise timely filed claim for section 4553 benefits. (*Id.* at p. 4:24.)

Defendant Recall Total's Answer responds that the January 6, 2020 order denying applicant's petition for joinder of Recall Total/Iron Mountain was "neither [a] 'final order, decision, or award,' nor [a] 'pre-trial order, evidentiary ruling, or venue decision,' and therefore petition for reconsideration or petition for removal were not available as legal remedies." (Answer, at p. 4:4.) Defendant contends the issue of res judicata was not timely raised in trial proceedings and is subject to waiver. (*Id.* at p. 6:17.) Defendant's Answer also agrees with the WCJ's analysis of *McGee Street*, *supra*, noting that "[i]n both cases, the special employer was not named as a defendant in the original petition for serious and willful misconduct filed by the applicant … [i]n both cases, the special employer was added beyond the statute of limitations, and served the initial petition but not named as a defendant in the original petition." (*Id.* at p. 5:11.)

DISCUSSION

The F&O determined that "[t]he Application for Serious and Willful Misconduct as against Recall Total (aka Iron Mountain) is barred by Labor Code section 5407." (Finding of Fact No. 5.)

Section 5407 provides that the proceedings for the collection of compensation on the ground of serious and willful misconduct of the employer must be commenced within twelve months of the date of injury. (Lab. Code, § 5407.)

Applicant sustained admitted industrial injury on April 29, 2015, and filed an application for adjudication of claim on May 8, 2015, naming Recall Total Information Management as the employer. (Application for Adjudication, dated May 8, 2015.) On May 26, 2015, applicant filed an amended application naming Aldelano as the employer. On July 28, 2015, applicant filed the instant petition seeking benefits under section 4553. The petition alleges that "at all relevant times," applicant was employed by Aldelano Corporation of Michigan, and that the "Employer" intentionally and willfully failed to provide a safe place to work. (Application for Award for Employer's Serious and Willful Misconduct, dated July 28, 2015, at p. 1.) Thus, the applicant timely commenced proceedings for the collection of benefits under section 4553 within one year of the date of injury as against Aldelano.

However, despite naming Recall Total in his initial application and Aldelano in the amended application, applicant's serious and willful petition identified only Aldelano as the employer. It was not until November 25, 2019, more than four years after the date of injury, that applicant amended the serious and willful petition to include "Defendants Aldelano Corporation of Michigan (as the general employer) and Recall Total Information Management Inc. (as the special employer)." (Amended Application for Award for Employer's Serious and Willful Misconduct, dated November 25, 2019, at p. 1:20.)

The F&O determined that the purported amendment to applicant's section 4553 petition impermissibly sought to name an additional employer more than one year from the date of injury and was barred by section 5407. (Finding of Fact No. 5.)

Applicant's Petition responds that on January 4, 2020, he petitioned for the joinder of "Recall Total Information Management" as a defendant "specifically on the issue of Applicant's serious and willful misconduct claim." (Petition to Join Defendant, dated January 4, 2020, at p. 1:18.) Applicant notes that the WCJ's January 6, 2020 order denied his petition to join Recall Total as a party defendant on the grounds that "this defendant has been a party since 2015 and has been represented with respect to the Serious and Willful Misconduct Claim since 2019." (Order of Dismissal of Petition for Joinder, dated January 6, 2020.) Applicant asserts that "[s]ince there has been no timely petition for reconsideration of [the January 6, 2020 Order], no timely petition by

Recall for removal of the issue of [its] joinder as a party defendant, and no timely action by the Board itself to modify or set aside the subject [January 6, 2020] Order, that Order is now res judicata on the issue of Recall's joinder as a party to the present action." (Petition, at p. 4:7.)

We find this argument unpersuasive for several reasons. Initially, we note that res judicata is being raised for the first time in applicant's petition for reconsideration. Principles of due process require that parties identify and submit all issues during trial proceedings rather than for the first time when seeking reconsideration of that trial decision. (See *Telles Transport, Inc. v. Workers' Comp. Appeals Bd.* (*Zuniga*) (2001) 92 Cal.App.4th 1159, 1167 [66 Cal.Comp.Cases 1290]; *Cotrell v. Workers' Comp. Appeals Bd.* (1998) 63 Cal.Comp.Cases 760, 761 (writ den.); *Paula Ins. Co. v. Workers' Comp. Appeals Bd.* (*Diaz*) (1997) 62 Cal.Comp.Cases 375, 375–376 (writ den.).) Issues raised for the first time on reconsideration are thus ordinarily subject to waiver. (*Telles Transport, supra,* 92 Cal.App.4th at p. 1167.)

We also disagree with applicant's characterization of the January 6, 2020 Order as "an Order expressly stating that Recall has been a party to Applicant's S&W claim since 2015." (Petition, at p. 3:5.) The Order merely states that "this defendant [Recall Total] has been a party since 2015…." Given that the original application for adjudication filed in 2015 named Recall Total as defendant *in the case in chief* and given the fact that the serious and willful petition was not amended to name Recall Total until November 25, 2019, it appears the January 6, 2020 order states only that Recall Total had been a defendant in the case in chief since 2015. Neither a plain reading of the text of the January 6, 2020 Order nor the underlying pleadings in this matter support applicant's contention that the WCJ "expressly" determined that Recall Total was properly named or joined as a party defendant to the serious and willful claim in 2015.

However, irrespective of the issues of waiver or the text of the January 6, 2020 order, we also observe that the doctrine of res judicata would not apply on the current facts. Both claim preclusion (res judicata) and issue preclusion (collateral estoppel) are affirmative defenses, and the burden of raising and sustaining the issue rests with the party with the affirmative of the issue. (Lab. Code, § 5705 ["The burden of proof rests upon the party or lien claimant holding the affirmative of the issue."]; *Johnson v. Workers' Comp. Appeals Bd.* (1970) 2 Cal.3d 964 [35 Cal.Comp.Cases 362]; see *Morales v. Universal Furniture, American Home Assur. Co.* (September 25, 2017, ADJ634371) [2017 Cal. Wrk. Comp. P.D. LEXIS 591].)

In *DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813 [189 Cal.Rptr.3d 809], the Supreme Court described res judicata "as an umbrella term encompassing both claim preclusion and issue preclusion," and characterized each doctrine as follows:

> 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. (*Ibid*.; *In re Crow* (1971) 4 Cal.3d 613, 622 [94 Cal. Rptr. 254, 483 P.2d 1206]; *Teitelbaum Furs*, *supra*, 58 Cal.2d at p. 604.) If claim preclusion is established, it operates to bar relitigation of the claim altogether.
> Issue preclusion prohibits the relitigation of issues argued and decided in a previous case, even if the second suit raises different causes of action. (*Mycogen*, *supra*, 28 Cal.4th at p. 896.) Under issue preclusion, the prior judgment conclusively resolves an issue actually litigated and determined in the first action. (*Boeken*, *supra*, 48 Cal.4th at p. 797.) There is a limit to the reach of issue preclusion, however. In accordance with due process, it can be asserted only against a party to the first lawsuit, or one in privity with a party. (*Bernhard v. Bank of America*, *supra*, 19 Cal.2d at p. 812.)
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> Issue preclusion differs from claim preclusion in two ways. First, issue preclusion does not bar entire causes of action. Instead, it prevents relitigation of previously decided issues. Second, unlike claim preclusion, issue preclusion can be raised by one who was not a party or privy in the first suit. (*Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 828 [88 Cal. Rptr. 2d 366, 982 P.2d 229].) "Only the party against whom the doctrine is invoked must be bound by the prior proceeding. [Citations.]" (*Ibid*.) 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. (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341 [272 Cal. Rptr. 767, 795 P.2d 1223]; *Vandenberg*, at p. 828; *Teitelbaum Furs*, *supra*, 58 Cal.2d at p. 604.)

(*Id.* at pp. 824-825.)

Here, issue preclusion would not operate to bar defendant from asserting the running of the statute of limitations as a result of the January 6, 2020 order because the issue of whether Recall Total was properly named as a defendant in the serious and willful petition was not "actually litigated and necessarily decided." (*DKN Holdings*, *supra*, at p. 825.) In the absence of a final determination of an issue *actually litigated* and *necessarily decided*, the doctrine of issue preclusion is inapplicable.

We thus conclude that the January 6, 2020 order did not substantively address or resolve the issue of whether Recall Total was timely named a defendant in applicant's petition for section 4553 benefits, and that in any event, principles of issue preclusion would not attach absent actual prior litigation and decision of the issue.

Applicant next contends that "[t]he fact that the petition does not state Applicant's claim with particularity is not fatal. (Petition, at p. 5:1.) Citing *Rubio v. Workers' Comp. Appeals Bd.* (1985) 165 Cal.App.3d 196 [50 Cal.Comp.Cases 160]), applicant submits that "[s]uch particularity may be provided by way of an amended application, even if that amendment is filed more than one year after the injury." (Petition, at p. 5:2.)

In *Rubio*, applicant filed an application for adjudication that alleged, inter alia, "serious and willful misconduct by employer." (*Rubio*, *supra*, at p. 198.) However, because applicant did not timely file pleadings alleging the specific *nature* of the alleged serious and willful misconduct until more than one year after the date of injury, the WCAB ultimately dismissed the claim. The Third District Court of Appeal granted review, and noted "[i]t is not disputed that petitioner's original written application for benefits failed to specify the factual basis for the claim of serious and wilful misconduct. It was therefore technically deficient under section 10440 of the Board's Rules of Practice and Procedure." (*Id.* at p. 199.) The court observed, however, that "provisions in the workmen's compensation law must be liberally construed in favor of the employee unless otherwise compelled by the language of the statute, and such enactments should not be interpreted in a manner which will result in a loss of compensation." (*Id.* at p. 200.) The court further noted that applicant's "original application is not vague as to the issue presented, only as to underlying facts," and that "[t]hese facts were provided informally at [defendant's] request and later set forth in an amended application." (*Id.* at p. 201.) The *Rubio* court also noted that "[t]here is no evidence [applicant's] failure to comply strictly with the formalisms of the Board's rules prejudiced [defendant]." (*Ibid*.)

The *Rubio* court also distinguished two prior appellate cases involving amendments to serious and willful misconduct claims. In *Peterson v. Industrial Acc. Com.* (1947) 81 Cal.App.2d 352 (*Peterson*), the petitioner did not allege serious and willful misconduct at all in his original application and failed to specifically raise a claim for serious and willful misconduct until four years after the injury date. Applicant's contention on appeal that it was unnecessary to specifically or separately allege serious and willful misconduct was ultimately rejected by the court of appeal

because a claim based on serious and willful misconduct must be specifically alleged or pleaded within the statutory time period. (*Peterson*, at pp. 359-360.)

Similarly, in *Lambreton v. Industrial Acc. Com.* (1956) 46 Cal.2d 498 (*Lambreton*) applicant's original application alleged only that his employer was grossly negligent in causing the injury, and it was only after the statute of limitations had run that applicant amended the application to allege serious and willful misconduct. The Supreme Court concluded, however, that "misconduct means something different from gross negligence and the 'amended' application set forth an entirely new and different cause of action than set forth in the original application. The bar of the statute of limitations applied." (*Lambreton*, at p. 503.)

The court in *Rubio* observed that in contrast to both *Peterson* and *Lambreton*, the claim advanced by Rubio specifically identified serious and willful misconduct as an issue in the original application, and the amended application *did not set forth a new and different cause of action*. Accordingly, the court annulled the WCAB decision dismissing applicant's amended claim for benefits under section 4553, observing that applicant's claim was "entitled to adjudication upon substance rather than upon formality of statement." (*Rubio*, *supra*, 165 Cal.App.3d at p. 202.)

Here, however, the WCJ's Opinion ultimately relied on subsequent appellate authority issued by the Second District Court of Appeal in *McGee Street*, *supra*, 108 Cal.App.4th 717. Therein, applicant spouse claimed both specific and cumulative injuries following the April 17, 2000 death of her husband on a movie set in Arizona. At the time of his death, decedent was employed by both a general employer, Entertainment Partners, and a special employer, McGee Street Productions. Applicant's claim proceeded as against the general employer who ultimately settled the case-in-chief.

On February 2, 2001, within one year of the date of injury, applicant filed a petition alleging serious and willful misconduct against only general employer Entertainment Partners. The special employer, McGee Street, was served by mail with a copy of the petition but was not named as a defendant. On April 19, 2001, more than one year after decedent's death, an amended petition naming both McGee Street and Entertainment was served on McGee Street. An order joining McGee Street Productions issued on December 10, 2001. McGee Street objected, contending the joinder more than one year from the date of injury was not statutorily permissible, but a WCJ ultimately determined that applicant was unaware that McGee Street and another entity, Hallmark Entertainment, were decedent's employers at the time applicant filed the serious and willful

petition, and following the reasoning in *Rubio*, sustained the timeliness of the claim amendment. Thereafter, the WCAB denied reconsideration, and defendant appealed to the Second District Court of Appeal, which granted review.

The Court began its discussion with *Lambreton*, *supra*, 46 Cal.2d 498, noting that "our Supreme Court held that the statute of limitations was not extended to assert a serious and willful claim by the injured worker's original application for regular benefits because a serious and willful claim 'was an entirely new and different cause of action.'" (*McGee Street*, 108 Cal.App.4th at p. 723.) The Court further addressed the holding in *Rubio*, noting:

> *[R]ubio* rejected a statute of limitations defense to a serious and willful petition filed beyond one year when the original application for regular benefits also specified that one of the contested issues was serious and willful misconduct. The court distinguished *Lambreton v. Industrial Acc. Com.*, *supra*, 46 Cal.2d 498, because the correct cause of action was alleged. Amendment to describe the misconduct was permitted after the statute of limitations had expired because only explanatory facts underlying the serious and willful claim were added. *The amendment did not name a new party.*
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> The *Rubio* court reasoned "[l]imitations provisions in the workmen's compensation law must be liberally construed in favor of the employee unless otherwise compelled by the language of the statute, and such enactments should not be interpreted in a manner which will result in 'a loss of compensation.' [Citations.] Moreover, informality of pleading in proceedings before the Board is recognized and courts have repeatedly rejected pleading technicalities as grounds for depriving the Board of jurisdiction. [Citation.] [P] . . . In workers' compensation proceedings, as in civil proceedings generally, [t]he statute of limitations will not bar amendment of an application where the original application was timely and the amendment does not present a different legal theory or set of facts constituting a separate cause of action." (*Rubio v. Workers' Comp. Appeals Bd.*, *supra*, 165 Cal. App. 3d at p. 200, italics omitted.)

(*McGee Street*, *supra*, at pp. 723-724, italics added.)

The *McGee Street* court then discussed what constitutes "a separate cause of action" as follows:

> Unlike the situation in *Rubio*, the amendment here involves new party defendants. Applying the analogy to civil cases suggested by *Rubio* and *Blanchard*, we refer to the familiar rule that under the Code of Civil Procedure, a complaint may not be amended to add a new defendant after the statute of limitations has run. (*Woo v. Superior Court* (1999) 75 Cal.App.4th 169, 175-178 [89 Cal. Rptr. 2d 20]; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 1999) P 6:733, at p. 6-146; 5 Witkin, Cal.

> Procedure (4th ed. 1997) Pleading, § 1158, pp. 617-619.) The only exception to this rule is when the original complaint states a cause of action against a Doe defendant and the plaintiff is unaware of the true identity of that party at the inception of the suit. Upon ascertaining the true name of the Doe defendant, the plaintiff may amend the complaint even after the expiration of the statute of limitations. (Code Civ. Proc., § 474; *Woo v. Superior Court*, *supra*, 75 Cal.App.4th at pp. 175-178.) The requirement of good faith ignorance of the true name of a fictitiously designated defendant set forth in Code of Civil Procedure section 474 is designed to promote the policies supporting the statute of limitations. (*Motor City Sales v. Superior Court* (1973) 31 Cal. App. 3d 342 [107 Cal. Rptr. 280].)

(*McGee Street*, *supra*, at p. 724.)

The Court thus reasoned that "section 5407 compels filing a serious and willful action within one year of the date of injury. Absent evidence of true ignorance of the identity of the alleged employer, we see no justification to depart from the unambiguous and plain language of the statute." (*McGee Street*, *supra*, at p. 725.)

Here, the WCJ has determined that defendant made a prima facie showing that section 5407 precludes applicant's amendment of the serious and willful claim to include Recall Total more than one year from the date of injury. Applicant filed a timely original petition alleging serious and willful misconduct on July 28, 2015 naming general employer Aldelano Corporation. It was not until November 25, 2019 that applicant sought to amend the petition to include Recall Total. Thus, the purported claim amendment naming a new party defendant was made more than four years after the date of injury, well beyond the one-year limitation period set forth in section 5407.

Applicant's Petition acknowledges that an allegation of serious and willful misconduct must be stated with particularity, but that "[s]uch particularity may be provided by way of an amended application, even if that amendment is filed more than one year after the injury." (Petition, at p. 5:2, citing *Rubio*, *supra*, 165 Cal.App.3d at p. 202.) The court in *McGee*, however, specifically considered *Rubio* in its discussion of whether an amendment of the "particulars" of a claim could be amended in excess of the limitations period of section 5407, and concluded that the statute of limitations would preclude amendment of a serious and willful claim to name a defendant more than one year from the date of injury absent "true ignorance" of the identity of the alleged employer. (*McGee Street*, *supra*, at p. 725.)

The *McGee* court weighed the argument for equitable relief as follows:

> [A]t the time she filed the serious and willful misconduct petition, [applicant] was not ignorant of the identity of the employer that exercised control over the details of her husband's work. This is borne out by the fact that she mailed a copy of the petition to McGee Street at the time of filing. There is no showing that her knowledge of Hallmark was any different. The second amended petition does not allege she discovered any new information, nor did [applicant] explain why she could not have obtained the information earlier.

(*Id.* at p. 725.)

Here, we similarly conclude that the facts are not supportive of equitable relief arising out of applicant's ignorance of the true identity of Recall Total as the special employer. The original May 8, 2015 application filed herein named Recall Total Information Management as applicant's employer on the date of injury. Applicant amended the application on May 26, 2015 to name Aldelano Corporation of Michigan as the employer. Thereafter, applicant's July 28, 2015 petition for benefits arising out of serious and willful misconduct asserted applicant was employed by Aldelano and was served on both Recall Total and Aldelano at three different service addresses. (Application for Award, dated July 28, 2015, at p. 16.) Nor does applicant's Petition herein assert that she was unaware of Recall Total at the time the petition was filed, or the discovery of Recall as the special employer at some time only after the running of the statute of limitations. Thus, the record does not support "true ignorance" of the identity of the alleged employer. (*McGee Street*, *supra*, at p. 725.) We are therefore not persuaded that equitable relief in the form of tolling of the statute of limitations is warranted under the present facts.

We also address applicant's assertion, as set forth in the January 4, 2020 Petition to Join Recall Total as a defendant to applicant's serious and willful misconduct claim, that the liability of the general and special employer for compensation benefits is joint and several. Applicant's joinder petition asserts that when a general and special employment situation arises, the injured employee "can look to and is entitled to benefits from either or both employers." (Petition to Join Defendant, dated January 4, 2020, at p. 1:25.)

While we agree with this assertion generally, we are not persuaded that principles of joint and several liability in the context of California's compulsory *no-fault* workers' compensation system would apply in the context of serious and willful misconduct, which requires aggravated criminal or quasi-criminal intent.

As applicable in a general and special employment scenario, joint and several liability is a public-policy driven legal doctrine in which each defendant is subject to liability for the entire claim, subject to an assessment of individual liability in collateral proceedings. (Lab. Code, § 5500.5(a).)

> It is the established rule in cases where disability or death results to an employee from a progressive occupational disease or cumulative industrial injury that the employee (or his dependents) may elect to recover full compensation benefits from any employer (or insurer) *in the chain of causation* and that the appeals board must thereafter apportion the liability among the successive employers (or insurers) in the proportion that each period of employment (or correspondent coverage) contributed.

(*Raischell & Cottrell, Inc. v. Workmen's Comp. App. Bd.* (1967) 249 Cal.App.2d 991, 995–996 [32 Cal.Comp.Cases 135], as cited in *Marsh v. Workmen's Comp. Appeals Bd.* (1968) 33 Cal.Comp.Cases 19 [1968 Cal. Wrk. Comp. LEXIS 19] (italics added).)

In the workers' compensation context, joint and several liability is designed to promptly deliver benefits to injured workers without the delay and cost involved in assessing individual employer liability. When two employers exercise joint control over an employee, both are also jointly and severally liable for California workers' compensation benefits. (*County of Los Angeles v. Workers' Comp. Appeals Bd.* (*Conroy*) (1981) 30 Cal. 3d 391, 405 [46 Cal.Comp.Cases 1322].)

In contrast, serious and willful misconduct within the meaning of section 4553 requires an intentional act or an intentional failure to act, either with knowledge that serious injury is a probable result, or with a positive and active disregard for the consequences. (*Johns-Manville Sales Corp. v. Workers' Compensation Appeals Bd.* (*Horenberger*) (1979) 96 Cal.App.3d 923, 930 [44 Cal.Comp.Cases 878].) An employer guilty of serious and willful misconduct must know of the dangerous condition, know that the probable consequences of its continuance will involve serious injury to an employee, and deliberately fail to take corrective action. (*Id.* at p. 933.)

While normal workers' compensation benefits automatically follow from an injury *within a covered employment relationship*, "the additional award based on serious and willful misconduct of the employer is an additional award which, although denominated and regarded for administrative purposes as 'increased compensation,' is actually of the nature of a penalty, which is imposed … only upon proof of the aggravated criminal or quasi-criminal behavior which constitutes serious and willful misconduct, and against which the employer cannot purchase

insurance." (*Bigge Crane & Rigging Co. v. Workers' Comp. Appeals Bd.* (2010) 188 Cal.App.4th 1330, 1340 [75 Cal.Comp.Cases 1089].)

Thus, while joint and several liability may arise in dual employment scenario, the shared liability arises out of *the status of the parties*, i.e., the role of each employer in the no-fault workers' compensation system. (*Marsh v. Tilley Steel Co.* (1980) 26 Cal.3d 486, 492 [45 Cal.Comp.Cases 193].) In contrast, the liability of a defendant guilty of serious and willful misconduct arises out of its individual quasi-criminal conduct, not its status as an employer. Accordingly, even where a general and special employer share joint and several liability for workers' compensation benefits, this joint and several liability would not extent to allegations of serious and willful misconduct. The aggravated criminal or quasi-criminal behavior must be proven individually with respect to each employer.

Here, the parties have stipulated that "Defendant Aldelano Staffing Services lacked knowledge of the dangerous condition." (Minutes, at p. 2:32.) Accordingly, the record does not support the "aggravated criminal or quasi-criminal" behavior necessary to a claim of serious and willful misconduct as against the general employer and principles of joint and several liability would not render Aldelano vicariously liable for the alleged aggravated criminal or quasi-criminal acts of the special employer.

We will affirm the F&O, accordingly.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the February 12, 2021 Findings and Order is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 23, 2026

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

NOE SEBASTIAN
FROST LAW
LAUGHLIN, FALBO, LEVY & MORESI
HANNA, BROPHY, MacLEAN, McALEER & JENSEN

SAR/abs

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