WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MARGIE VILLA, *Applicant*

vs.

IN-HOME COMPASSIONATE CARE;
PAUL NORMANDIN, LIBERTY MUTUAL INSURANCE, *Defendants*

Adjudication Number: ADJ8899780

Anaheim District Office

OPINION AND DECISION
AFTER RECONSIDERATION

We previously granted defendant, In Home Compassionate Center's (IHCC), and defendant Liberty Mutual's, Petitions for Reconsideration of the First Amended Findings and Order After Reconsideration (F&O) issued on December 28, 2020, by the workers' compensation administrative law judge (WCJ), in order to further study the factual and legal issues. This is our Opinion and Decision After Reconsideration.[1]

The WCJ found, in pertinent part, that applicant was jointly employed on September 14, 2011, by Paul Normandin, insured by Liberty Mutual, and IHCC, when she claimed to have sustained an industrial injury. The WCJ further found that IHCC was the general employer and Paul Normandin was the special employer.

Liberty Mutual contends that the WCJ erred because IHCC was the general employer along with Mr. Normandin and thus there was joint and several liability between Liberty Mutual and IHCC.

[1] Commissioner Lowe was on the panel that issued the order granting reconsideration. Commissioner Lowe no longer serves on the Appeals Board. A new panel member has been substituted in her place.

IHCC contends that the WCJ erred because they incorrectly applied Labor Code sections 2775 through 2785, which codified the ABC test of employment as discussed in *Dynamex Operations West, Inc. v. The Superior Court of Los Angeles County*. (4 Cal. 5th 903 [83 Cal.Comp.Cases 817].) IHCC contends that the appropriate test of employment in this matter is that of *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal. 3d 341, 351, and that applying the *Borello* test, applicant is not an employee of IHCC, but an independent contractor.

We have received an answer from IHCC. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we grant IHCC's petition for reconsideration to either find no employment per *Borello* or return to the trial level for further proceedings, but deny Liberty Mutual's petition for reconsideration.

We have considered the allegations of the Petitions for Reconsideration, the Answer, and the contents of the WCJ's Report. Based on our review of the record and for the reasons discussed below, as our Decision After Reconsideration we will rescind the December 28, 2020 F&O and substitute a new finding that both Paul Normandin, insured by Liberty Mutual, and IHCC employed applicant on the date of injury. We will defer a determination of who is a special versus a general employer to the trial level.

FACTS

This matter initially proceeded to trial wherein the WCJ found that applicant was employed by Paul Normandin, who was insured by Liberty Mutual on the date of her injury. (Findings and Order, October 31, 2017.) Liberty Mutual sought reconsideration of that finding. The facts and procedure history were detailed in our prior Opinion and Decision After Reconsideration:

> Applicant claims a specific injury on September 14, 2011, while working as a licensed caregiver for petitioner, Paul Normandin, then insured with a homeowner's policy through defendant Liberty Mutual Insurance. Applicant and Mr. Normandin were introduced through IHCC, a company which matched individuals requiring home health care with licensed caregivers. IHCC was uninsured for workers' compensation insurance.
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> On June 21, 2017 and August 2, 2017, this matter proceeded to trial on the issue of employment, with co-defendants contending applicant was an independent contractor, and applicant contending dual employment by petitioner and IHCC. The documentary evidence submitted by petitioner included correspondence from Mr. Kaldoun Aboulelhosn to Mr. Paris, dated March 26, 2013 (Defendant's Ex. A); a 1099-MISC Income Form for the applicant (Defendant's Ex. B); an executed Service Agreement dated August 19, 2011 (Defendant's Ex. D); an

executed Service Agreement dated September 8, 2011 (Defendant's Ex. C); and portions of applicant's June 9, 2016 deposition transcript. Applicant did not submit any documentary evidence.

Applicant testified on her own behalf. She stated that she was employed by Dr. Khaldoun on the date of injury. The patients were typically hospice patients. Her usual assignments were for one week, which could be extended. She could accept or decline assignments. Initially, applicant worked for IHCC and Mr. Normandin. During the second week that applicant provided care services for Mr. Normandin, he requested applicant return to care for him. He further requested that applicant be the only caregiver assigned to him, and that she forego her weekends to work directly for him. Her tenure working for Mr. Normandin exceeded 52 hours in the 90 days prior to her injury.

Applicant assisted Mr. Normandin with activities of daily living, including making his bed, preparing meals, giving medications, bathing, toileting, and light housework. These duties were personal to Mr. Normandin and were not provided in the course of any trade, business, profession or occupation of his. Any tools or supplies applicant needed to carry out her duties were provided by Mr. Normandin. Applicant was paid in cash: $125.00 for a 12-hour shift. She was paid by Sylvia Rodriguez every four or five days. Applicant never collected money directly from patients and was not aware of how much the patients paid IHCC. She had no investment in any of the jobs and was provided with everything she needed to care for the patients.

She is a certified nurse assistant and would use her independent judgment in determining the daily care Mr. Normandin needed. She relied on her own training, education and experience to provide care to her clients. During a 24-hour shift, applicant determined her own sleep period, but could get up during the night to assist Mr. Normandin. Applicant testified that she sometimes assigned part of her shift to her daughter.

Mr. Normandin directed when applicant was to work and when she was to take days off. He directed applicant when to prepare his meals. During the second week applicant worked, he added applicant as an insured driver on his truck. Mr. Normandin directed applicant to use his vehicle to transport him and assist him on errands. At the time of applicant's injury, Mr. Normandin had a homeowner's insurance policy with Liberty Mutual. California mandates that such policies include a provision for workers' compensation coverage and benefits for residential workers.

An employee for IHCC, Sylvia Rodriguez, was called by petitioner and testified that she offered the job assignments to caregivers, and that she obtained signed service agreements from them. The service agreements state that the caregivers are independent contractors. She stated that applicant signed the service agreement in her presence. She testified that applicant was paid in cash, at the

rate of $125.00 for each day that she worked a 24-hour period. Her pay was always the same rate. Applicant was issued a 1099 form for 2011 from IHCC, Ms. Rodriguez, and Khaldoun Abouelhosn, M.D. (Defendant's Ex. B.) She stated that IHCC did not authorize applicant to have her daughter cover any part of her shift.

The parties disputed whether applicant signed the service agreements. (Defendant's Ex. C, D.) The WCJ found that testimony of Ms. Rodriguez, that applicant signed the service agreements in her presence was credible, and gave it more weight than applicant's testimony denying her signature on the agreements.

It is not disputed that on the date of injury, September 14, 2011, applicant was driving Mr. Normandin's truck and sustained injury. Petitioner avers that applicant was working as an independent contractor on the date of injury, and that the co-employment agreement with IHCC absolves it from liability for applicant's workers' compensation benefits.

The WCJ considered the factors set forth in Borello v. Dept. of Industrial Relations (1989) 48 Cal.3d 341, 349 [54 Cal.Comp.Cases 80] (Borello) and wrote in his Report, as follows:

In weighing these [Borello] factors, I found most persuasive and gave great weight to the fact that [Mr. Normandin] went so far as to direct applicant to be added to his auto policy so that he could direct applicant to drive his vehicle when taking him on errands. This factor weighed heavily in the WCJ's rationale for finding a degree of control over how applicant performed her duties, and in total with the other facts indicated more than an independent contractor relationship. (Report, p. 3.)

In the Opinion on Decision, the WCJ explained that, in addition to the Borello factors, Labor Code sections 3351(d) and 3352(h) support a finding that applicant was petitioner's employee because the services provided by applicant were personal and not in the course of any trade, business, profession or occupation of Mr. Normandin. Applicant's period of service with him exceeded 52 hours in the previous 90 days, making her his employee.(§§ 3351(d) and 3352(h).)

With respect to co-defendant IHCC, the WCJ concluded that IHCC "appears to have merely paired applicant and Mr. Normandin, and otherwise exerted no control over how applicant carried out her duties." (Report, p. 4.)

> On October 31, 2017, the WCJ issued the disputed decision, finding that as to IHCC applicant was not an employee as it did not have sufficient control over applicant's activities. The WCJ found that applicant was an employee of petitioner pursuant to sections 3351(d), 3352(h) and Borello. Petitioner sought reconsideration.

(Opinion and Decision After Reconsideration, April 29, 2020, p. 2, line 5, through p. 4, line 25.)

The WCJ initially found the Paul Normandin was an employer, but that applicant's relationship with IHCC was that of an independent contractor. In our Decision After Reconsideration, we affirmed the finding that Paul Normandin was applicant's employer, however we rejected the WCJ's finding that applicant was an independent contractor and expressly stated that the issue required further development.

Thereafter the parties resubmitted the matter to the WCJ without development of the record. (Minutes of Hearing, June 30, 2020.) We are presented with the exact same record. The WCJ issued an amended F&O on December 28, 2020, which found that applicant was jointly employed by both Paul Normandin and IHCC on the date of injury.

DISCUSSION

I.

Only the Appeals Board is statutorily authorized to issue a decision on a petition for reconsideration. (Lab. Code, §§ 112, 115, 5301, 5901, 5908.5, 5950; see Cal. Code Regs., tit. 8, §§ 10320, 10330.)[2] The Appeals Board must conduct de novo review as to the merits of the petition and review the entire proceedings in the case. (Lab. Code, §§ 5906, 5908; see Lab. Code, §§ 5301, 5315, 5701, 5911.) Once a final decision by the Appeals Board on the merits of the petition issues, the parties may seek review under Labor Code section 5950, but appellate review is limited to review of the record certified by the Appeals Board. (Lab. Code, §§ 5901, 5951.)

Former Labor Code section 5909 provided that a petition was denied by operation of law if the Appeals Board did not "act on" the petition within 60 days of the petition's filing with the 'appeals board' and not within 60 days of its filing at a DWC district office. A petition for

[2] The use of the term 'appeals board' throughout the Labor Code refers to the Appeals Board and not a DWC district office. (See e.g., Lab. Code, §§ 110, et. seq. (Specifically, § 110 (a) provides: "'Appeals board' means the Workers' Compensation Appeals Board. The title of a member of the board is 'commissioner.'").) Section 111 clearly spells out that the Appeals Board and DWC are two different entities.

reconsideration is initially filed at a DWC district office so that the WCJ may review the petition in the first instance and determine whether their decision is legally correct and based on substantial evidence. Then the WCJ determines whether to timely rescind their decision, or to prepare a report on the petition and transmit the case to the Appeals Board to act on the petition. (Cal. Code Regs., tit. 8, §§ 10961, 10962.)[3] Once the Appeals Board receives the case file, it also receives the petition in the case file, and the Appeals Board can then "act" on the petition.

If the case file is never sent to the Appeals Board, the Appeals Board does not receive the petition contained in the case file. On rare occasions, due to an administrative error by the district office, a case is not sent to the Appeals Board before the lapse of the 60-day period. On other rare occasions, the case file may be transmitted, but may not be received and processed by the Appeals Board within the 60-day period, due to an administrative error or other similar occurrence. When the Appeals Board does not review the petition within 60 days due to irregularities outside the petitioner's control, and the 60-day period lapses through no fault of the petitioner, the Appeals Board must then consider whether circumstances exist to allow an equitable remedy, such as equitable tolling.

It is well-settled that the Appeals Board has broad equitable powers. (*Kaiser Foundation Hospitals v. Workers' Compensation Appeals Board* (1978) 83 Cal.App.3d 413, 418 [43 Cal.Comp.Cases 785] citing *Bankers Indem. Ins. Co.* v. *Indus. Acc. Com*. (1935) 4 Cal.2d 89, 94-98 [47 P.2d 719]; see *Truck Ins. Exchange v. Workers' Comp. Appeals Bd. (Kwok)* (2016) 2 Cal.App.5th 394, 401 [81 Cal.Comp.Cases 685]; *State Farm General Ins. Co. v. Workers' Comp. Appeals Bd. (Lutz)* (2013) 218 Cal.App.4th 258, 268 [78 Cal.Comp.Cases 758]; *Dyer v. Workers' Comp. Appeals Bd.* (1994) 22 Cal.App.4th 1376, 1382 [59 Cal.Comp.Cases 96].) It is an issue of fact whether an equitable doctrine such as laches applies. (*Kwok*, *supra* 2 Cal.App.5th at p. 402.) The doctrine of equitable tolling applies to workers' compensation cases, and the analysis turns on the factual determination of whether an opposing party received notice and will suffer prejudice if

[3] Petitions for reconsideration are required to be filed at the district office and are not directly filed with the Appeals Board. (Cal. Code Regs., tit. 8, § 10995(b); see Cal. Code Regs., tit. 8, § 10205(l) [defining a "district office" as a "trial level workers' compensation court."].) Although the Appeals Board and the DWC district office are separate entities, they do not maintain separate case files; instead, there is only ***one*** *case file*, and it is maintained at the trial level by DWC. (Cal. Code Regs., tit. 8, § 10205.4.)

When a petition for reconsideration is filed, the petition is automatically routed electronically through the Electronic Adjudication Management System (EAMS) to the WCJ to review the petition. Thereafter, the entire case file, *including the petition for reconsideration*, is then electronically transmitted, i.e., sent, from the DWC district office to the Appeals Board for review.

equitable tolling is permitted. (*Elkins v. Derby* (1974) 12 Cal.3d 410, 412 [39 Cal.Comp.Cases 624].) As explained above, only the Appeals Board is empowered to make this factual determination.[4]

In *Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493], the Appeals Board denied 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, especially in light of the fact that the Appeals Board had repeatedly assured the petitioner that it would rule on the merits of the petition. (*Id.*, at p. 1108.)

Like the Court in *Shipley*, "we are not convinced that the burden of the system's inadequacies should fall on [a party]." (*Ibid.*) The touchstone of the workers' compensation system is our constitutional mandate to "accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character." (Cal. Const., art. XIV, § 4.) "Substantial justice" is not a euphemism for inadequate justice. Instead, it is an exhortation that the workers' compensation system must focus on the *substance* of justice, rather than on the arcana or minutiae of its administration. (See Lab. Code, § 4709 ["No informality in any proceeding . . . shall invalidate any order, decision, award, or rule made and filed as specified in this division."].)

With that goal in mind, all parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) If a timely filed petition is never considered by the Appeals Board because it is "deemed denied" due to an administrative irregularity not within the control of the parties, the petitioning party is deprived of their right to a decision on the merits of the petition. (Lab. Code, §5908.5; see *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 754-755 [33 Cal.Comp.Cases 350]; *LeVesque, supra* 1 Cal.3d 627, 635.) Just as significantly, the parties'

[4] Labor Code section 5952 sets forth the scope of appellate review, and states that: "Nothing in this section shall permit the court to hold a trial de novo, to take evidence, or to exercise its independent judgment on the evidence." (Lab. Code, § 5952; see Lab. Code, § 5953.)

ability to seek meaningful appellate review is compromised, raising issues of due process. (Lab. Code, §§ 5901, 5950, 5952; see *Evans, supra,* 68 Cal.2d 753.)

Substantial justice is not compatible with such a result. A litigant should not be deprived of their due process rights based upon the administrative errors of a third party, for which they bear no blame and over whom they have no control. This is doubly true when the Appeals Board's action in granting a petition for reconsideration has indicated to the parties that we will exercise jurisdiction and issue a final decision on the merits of the petition, and when, as a result of that representation, the petitioner has forgone any attempt to seek judicial review of the "deemed denial." Having induced a petitioner not to seek review by granting the petition, it would be the height of injustice to then leave the petitioner with no remedy.

In this case, the WCJ issued the first amended Findings and Award on December 28, 2020. Defendant, Liberty Mutual, filed a timely petition for reconsideration on December 30, 2020, Defendant, IHCC, filed a timely petition for reconsideration on January 6, 2021. According to EAMS, the case file was transmitted to the Appeals Board on January 21, 2021. However, for reasons that are not entirely clear from the record, the Appeals Board did not actually receive notice of and review the petition until June 21, 2021. Accordingly, the Appeals Board failed to act on the petition within 60 days, through no fault of the parties. The Appeals Board granted the petition on July 13, 2021. In so doing so, we sent a clear signal to the parties of our intention to exercise jurisdiction and issue a final decision after reconsideration. Neither party expressed any opposition to this course of action, and it appears clear from the fact that neither party sought judicial review of our grant of reconsideration that both parties have acted in reliance on our grant.

Under the circumstances, the requirements for equitable tolling have been satisfied in this case. Accordingly, our time to act on defendants' petitions was equitably tolled until 60 days after June 21, 2021. Because we granted the petitions on July 13, 2021, our grant of reconsideration was timely, and we may issue a decision after reconsideration addressing the merits of the petition.

II.

Turning to the issue of employment, employment was found with Mr. Normandin in our April 29, 2020 Opinion and Decision After Reconsideration. To the extent that Liberty Mutual seeks to collaterally attack that finding, we decline to review our prior finding.

As to the issue of employment with IHCC, we agree that the WCJ incorrectly applied the ABC test in this matter. However, for the reasons discussed below, the WCJ's error was harmless.

Labor Code[5] section 3357 provides that, "Any person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee." Section 3353 defines an "independent contractor" as "any person who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished." "[T]he fact that one is performing work and labor for another is prima facie evidence of employment and such person is presumed to be a servant in the absence of evidence to the contrary." (*Narayan v. EGL, Inc*. (2010) 616 F.3d 895, 900 [75 Cal.Comp.Cases 724] (*Narayan*) quoting *Robinson v. George* (1940) 105 P.2d 914, 916 [5 Cal.Comp.Cases 233].) A worker must establish a prima facie case of "employee" status, but then the burden shifts to the employer to affirmatively prove that the worker is an independent contractor. (*Cristler v. Express Messenger Sys., Inc*. (2009) 171 Cal.App.4th 72, 84 [74 Cal.Comp.Cases 167]; *Narayan, supra*, 616 F.3d at p. 900.)

Here, the record is clear that applicant performed services on behalf of IHCC. Accordingly, applicant is presumed to be an employee. It is IHCC's burden to prove that applicant is an independent contractor. (§ 5705.) Again, turning to the April 29, 2020 Opinion and Decision After Reconsideration, we expressly reviewed the WCJ's finding that applicant was an independent contractor for IHCC and **rejected it**. Thus, IHCC was on notice that the current record lacked sufficient evidence to find an independent contractor applicant. For reasons unknown, IHCC then resubmitted the matter upon the exact same record. To the extent that IHCC again argues that applicant was an independent contractor, we have already addressed that issue.

Finally, we address the issue raised by Liberty Mutual as to general versus special employment.

[5] All future references are to the Labor Code unless noted.

California law recognizes the possibility that a worker may have two employers for workers' compensation purposes. (*Kowalski v. Shell Oil Co. (1979) 23 Cal. 3d 168, 174 [151 Cal. Rptr. 671, 588 P.2d 811, 44 Cal. Comp. Cases 134] (Kowalski).)*; *Caso, supra,* 163 Cal. App. 4th at pp. 888–889; *Riley v. Southwest Marine* (1988) 203 Cal. App. 3d 1242, 1247–1248 [250 Cal. Rptr. 718].) When an employer—the "general employer"—lends an employee to another employer and relinquishes all right of control over the employee's activities to the borrowing employer, a "special employment" relationship arises between the borrowing employer and the employee. (*Marsh v. Tilley Steel Co.* (1980) 26 Cal. 3d 486, 492 [162 Cal. Rptr. 320, 606 P.2d 355, 45 Cal. Comp. Cases 193] (*Marsh*).) "Once a special employment relationship is identified, two consequences ensue: (1) the special employer's liability for workers' compensation coverage to the employee, and (2) the employer's [and its other employees'] immunity from a common law tort action, the latter consequence flowing from the exclusivity of the compensation remedy embodied in Labor Code section 3601." (*Caso, supra,* 163 Cal. App. 4th at p. 888.)

Alternatively, 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, supra,* 23 Cal. 3d at pp. 174–175; *Caso, supra,* 163 Cal.App.4th at pp. 893–894; *Marsh, supra,* 26 Cal. 3d at pp. 494–495.)

The primary consideration in determining whether a "special" employment relationship exists is "whether the special employer has '[t]he right to control and direct the activities of the alleged employee or the manner and method in which the work is performed, whether exercised or not. …'" (*Caso, supra,* 163 Cal. App. 4th at p. 888, quoting *Kowalski, supra,* 23 Cal. 3d at p. 175; see also *Brassinga v. City of Mountain View* (1998) 66 Cal. App. 4th 195, 215–216 [63 Cal. Comp. Cases 987] ["It is only where some measure of control over the employee is relinquished by the employee's general employer to another entity that the other entity may become the employee's special employer."].)

Additional factors relevant to determining whether a special employment relationship exists include: (1) whether the employee is performing the special employer's work; (2) whether there was an agreement, understanding, or meeting of the minds between the original and special employer; (3) whether the work performed by the employee was unskilled; (4) whether

the employee acquiesced in the new work situation; (5) whether the original employer terminated its relationship with the employee; (6) whether the special employer furnished the tools and place for performance; (7) whether the new employment was over a considerable length of time; (8) whether the special employer had the right to discharge the employee; and (9) whether the special employer had the obligation to pay the employee. (*Kowalski, supra*, 23 Cal. 3d at pp. 176–177; *Caso, supra*, 163 Cal. App. 4th at p. 889; *Riley v. Southwest Marine* (1988) 203 Cal. App. 3d 1242, 1250, 250 Cal. Rptr. 718.) On the other hand, a special employment relationship may be negated by evidence that "[t]he employee is (1) not paid by and cannot be discharged by the borrower, (2) a skilled worker with substantial control over operational details, (3) not engaged in the borrower's usual business, (4) employed for only a brief period of time, and (5) using tools and equipment furnished by the lending employer." (*Marsh, supra*, 26 Cal. 3d at p. 492.)

In the WCJ's Report, he believes that he inadvertently mixed the analysis of general versus special employment. IHCC objects to this issue arguing that it was not specifically raised on the pre-trial conference statement. The WCJ's opinion does not adequately address the factors of special versus general employment. Accordingly, and as a precaution to preserve all parties rights to due process, we will defer that issue to the trial level to determine in the first instance. (See *Hamilton v. Lockheed Corporation* (2001) 66 Cal. Comp. Cases 473 (Appeals Board en banc); see also *Gangwish v. Workers' Comp. Appeals Bd*. (2001) 89 Cal. App. 4th 1284, 1295 [108 Cal. Rptr. 2d 1, 66 Cal. Comp. Cases 584].)

However, we would observe that the question of general versus special employment may be moot.

Where, a general and special employment relationship exists, the injured employee can look to and is entitled to compensation benefits from either or both employers. (*Kowalski v. Shell Oil Co*. (1979) 23 Cal.3d 168, 175 [151 Cal. Rptr. 671, 588 P.2d 811, 44 Cal.Comp.Cases 134, 138]; *McFarland v. Voorheis-Trindle Co*. (1959) 52 Cal.2d 698, 702 [24 Cal.Comp.Cases 216, 217]; *National Auto. Ins. Co. v. Industrial Acc. Com*. (*Ivy*) (1943) 23 Cal.2d 215, 219 [8 Cal.Comp.Cases 260, 263]; *Dept. of Water & Power v. Industrial Acc. Com*. (*Winkler*) (1934) 220 Cal. 638, 641, 32 P.2d 354 [20 Ind.Acc.Com. 233, 235].) The liability of general and special employers for compensation benefits is joint and several. (See *Fireman's Fund Indem. Co. v. Stale Compensation Ins. Fund* (*Smith*) (1949) 93 Cal.App.2d 408 [209 P.2d 55, 14 Cal.Comp.Cases 180].) However, pursuant to Insurance Code section 11663, "[a]s between insurers of general and

special employers, one which insures the liability of the general employer is liable for the entire cost of compensation payable on account of injury occurring in the course of and arising out of general and special employments…" (Ins. Code, § 11663 (emphasis added).)

Here, it appears that IHCC is illegally uninsured for workers' compensation benefits. As both Liberty Mutual and IHCC are jointly and severally liable and it appears that there is no dispute between "insurers", it appears that the question of general versus special employment is moot. However, as a precaution, we will defer that issue and the parties are free to raise it again as part of contribution proceedings.[6]

Accordingly, as our Decision After Reconsideration we will rescind the December 28, 2020 F&O and substitute a new finding that both Paul Normandin, insured by Liberty Mutual, and IHCC employed applicant on the date of injury. We will defer a determination of who is a special versus a general employer to the trial level.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Order issued on December 28, 2020, is **RESCINDED** with the following **SUBSTITUTED** in its place:

FINDINGS OF FACT

1. MARGIE VILLA, who was 62 years old, while employed on September 15, 2011, as a caregiver at Temecula, California, by PAUL NORMANDIN, whose workers' compensation insurance carrier was LIBERTY MUTUAL ORANGE, and jointly employed by IN HOME COMPASSIONATE CARE, claims to have sustained injury arising out of and occurring in the course of employment to her left arm and other body parts which are deferred to a subsequent hearing.

2. The issue of who was applicant's general employer versus special employer is deferred.

[6] On October 10, 2024, Liberty Mutual filed a proposed Compromise and Release agreement, which appears to only resolve issues between Liberty Mutual and applicant. While a matter is pending on reconsideration, a WCJ may not issue an order approving a settlement. (Cal. Code Regs., tit. 8, § 10961.) As the settlement has not yet been approved, and at a minimum, there are remaining issues with respect to IHCC, the dispute is not rendered moot, and we issue a decision on the merits.

IT IS FURTHER ORDERED that this matter is **RETURNED** to the trial level for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 22, 2024

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

MARGIE VILLA
LAW OFFICES OF JESSE A. MARINO
PAUL NORMANDIN, EMPLOYER
LIBERTY MUTUAL, CARRIER
STOCKWELL, HARRIS WOOLVERTON & FOX

EDL/mc

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