WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

TOMAS CARRILLO, *Applicant*

vs.

TRION SOLUTIONS, INC.; O'TASTY FOODS, INC.; BARON HR; UNITED WISCONSIN INS. CO., administered by NEXT LEVEL ADMINISTRATORS; FALLS LAKE INS. CO., administered by SEDGWICK, *Defendants*

Adjudication Numbers: ADJ12047380, ADJ12048111
Los Angeles District Office

OPINION AND DECISION AFTER RECONSIDERATION

The Appeals Board granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.[1]

In the Findings and Order of April 20, 2021, the workers' compensation judge ("WCJ") found that applicant was employed by "Baron HR," and not by "Trion Solutions," in connection with applicant's claims that he sustained industrial injury to various body parts on February 22, 2019 (ADJ12047380) and during the period January 6, 2014 through February 22, 2019 (ADJ12048111). The WCJ also found that there was general-special employer relationship between "Baron HR LLC" as the general employer and "O'Tasty Food, Inc." – allegedly insured by Falls Lake Insurance, administered by Sedgwick - as the special employer. In addition, the WCJ disallowed admission of Exhibits B and G into evidence, and the WCJ ordered Falls Lake Insurance ("Falls Lake"), the alleged insurer of special employer "O'Tasty Food, Inc.," to administer applicant's claims of injury.

Defendant Falls Lake filed a timely Petition for Reconsideration of the WCJ's decision. Defendant contends that the WCJ erred in relying upon Insurance Code 11663 to order Falls Lake to administer applicant's claims of injury, because the evidence justifies a finding that applicant

[1] Commissioner Deidra E. Lowe signed the Opinion and Order Granting Petition for Reconsideration dated July 8, 2021. As Commissioner Lowe is no longer a member of the Appeals Board, a new panel member has been substituted in her place.

was employed by Baron HR LLC, which allegedly provided workers' compensation coverage. Defendant further contends that the WCJ erred in excluding Exhibit G.

The Appeals Board did not receive an answer to defendant's petition for reconsideration.

The WCJ submitted a Report and Recommendation ("Report").

Based on our review of the record and applicable law, we find issues that were raised at trial but not correctly addressed by the WCJ, and we find issues that were not raised at trial but decided by the WCJ. This raises due process concerns, as the parties lacked notice of the issues that would be decided by the WCJ and deprives them of meaningful review upon reconsideration. (See *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584]; *Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157 [65 Cal.Comp.Cases 805]. See also, *Urlwin v. Workers' Comp. Appeals Bd.* (1981) 126 Cal.App.3d 466 [46 Cal.Comp.Cases 1276].) Further, we are persuaded that the WCJ must revisit the issue of general-special employment under the correct legal framework. Therefore, we will rescind the WCJ's decision and return this matter to the trial level for further proceedings and new decision by the WCJ. (See *Telles Transport, Inc. v. Workers' Comp. Appeals Bd.* (2001) 92 Cal.App.4th 1159, 1164 (66 Cal.Comp.Cases 1290) [Board may not leave undeveloped those issues which its acquired specialized knowledge should identify as requiring further evidence].)

At the outset, we observe that if a decision includes resolution of a "threshold" issue, then it is a "final" decision, whether or not all issues are resolved or there is an ultimate decision on the right to benefits. (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783, 784, fn. 2 (Appeals Board en banc).) Threshold issues include but are not limited to, injury arising out of and in the course of employment, jurisdiction, the existence of an employment relationship and statute of limitations issues. (See *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd.* (*Gaona*) (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].) Failure to timely petition for reconsideration of a final decision bars later challenge to the propriety of the decision before the WCAB or Court of Appeal. (See Lab. Code, § 5904.) Alternatively, non-final decisions may later be challenged by petition for reconsideration once a final decision issues.

A decision issued by the Appeals Board may address a hybrid of both threshold and interlocutory issues. If a party challenges a hybrid decision, the petition seeking relief is treated as a petition for reconsideration because the decision resolves a threshold issue. However, if the

petition challenging a hybrid decision disputes a determination made on an interlocutory question, then the Appeals Board will evaluate the issues raised by the petition under the removal standard applicable to non-final decisions, i.e., significant prejudice or irreparable harm. (Cal. Code Regs., tit. 8, § 10955.)

In this case, the Findings and Order of April 20, 2021 is a hybrid decision because it included a final finding on employment and it also included a non-final ruling, in which the WCJ disallowed admission of Exhibits B and G into evidence. The latter ruling is interlocutory in nature and thus is subject to challenge by petition for removal. However, we treat the petition filed by Falls Lake as a petition for reconsideration because the WCJ included a finding of employment, which is a final resolution of a threshold issue. In other words, the Findings and Order of April 20, 2021 is properly challenged by petition for reconsideration, and we address the petition of Falls Lake as such.

Turning to the merits of the petition, we note that the minutes of the trial hearing of January 27, 2021 reflect that the only two issues to be decided by the WCJ were employment and "applicant's right to elect against a special employer." In the Findings and Order of April 20, 2021, the WCJ addressed the issue of employment by finding that applicant was employed by "Baron HR," not by "Trion Solutions," and that there was general-special employer relationship between "Baron HR LLC" as the general employer and "O'Tasty Food, Inc." as the special employer. However, the WCJ did not address the issue of "applicant's right to elect against a special employer."

In addition, we observe that the WCJ decided issues that were not raised at trial on January 27, 2021, i.e., Insurance Code section 11663 and the issue of administration. This was error because these issues were not raised at trial, and because there was no stipulation that the injuries and dates of injuries claimed by applicant were, in fact, industrial injuries. Similarly, the WCJ determined the issue of insurance coverage even though there were no stipulations of insurance coverage for any of the alleged employers herein.

We further note that findings two and three of the WCJ's decision are incomplete and inconsistent. Finding two seems to include a finding of employment only for applicant's claim of cumulative trauma from January 6, 2014 through February 22, 2019 (ADJ12048111) and not for the specific injury claim of February 22, 2019 (ADJ12047380). Further, finding two names "Baron HR" as the employer but does not specify whether this entity is a general or special

employer, while finding three names "Baron HR LLC" as the general employer without clarifying whether this is the same entity as "Baron HR." We do not view these issues as unimportant details, because the "Baron" employer name has been associated with various, different entities in other cases.[2] (See, e.g., *Santelices v. Baron HR, LLC* (2020) 2020 Cal. Wrk. Comp. P.D. LEXIS 10.) It is also unhelpful that "Baron HR" was represented at trial by an attorney who claimed to be making a special appearance, yet it is unknown whether "Baron HR" is contesting personal jurisdiction in this matter. If the attorney did not accept the WCAB's personal jurisdiction over "Baron HR," the attorney should not have been permitted to cross-examine the applicant, but the WCJ allowed it. (See Minutes of Hearing, 1/27/21, pp. 2 & 6.)

Finally, we note that the WCJ's Opinion on Decision is perplexing in that it relies upon *Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341 [54 Cal.Comp.Cases 80], which addresses the issue of employee versus independent contractor status, whereas here it appears there is no allegation that applicant was an independent contractor. Assuming, rather, that the WCJ must analyze the issues of dual employment and a probable general-special employment relationship, the WCJ should consult the following discussion provided by the Board panel in *Calderon v. Unified Protective Services* (2024) 2024 Cal. Wrk. Comp. P.D. LEXIS 175, at pp. *10-11:

> An employee may have more than one employer. The characteristics of such dual employment are: 1) that the employee is sent by one employer (the general employer) to perform labor for another employer (the special employer); 2) rendition of the work yields a benefit to each employer; and 3) each employer has some direction and control over the details of the work. (See *Kowalski v. Shell Oil Co.* (1979) 23 Cal.3d 168 [151 Cal. Rptr. 671, 588 P.2d 811, 44 Cal.Comp.Cases 134]; *Meloy v. Texas Co.* (1953) 121 Cal.App.2d 691 [18 Cal.Comp.Cases 313]; *Ridgeway v. Industrial Acc. Com.* (1955) 130 Cal.App.2d 841 [20 Cal.Comp.Cases 32]; *Doty v. Lacy* (1952) 114 Cal.App.2d 73 [17 Cal.Comp.Cases 316]; *Caso v. Nimrod Prods.* (2008) 163 Cal.App.4th 881, 77 Cal. Rptr. 3d 313.) In determining whether a special employment relationship exists, the primary consideration is whether the Special Employer has the right to direct and control the activities of the worker or the manner and method in which the work is performed, whether exercised or not. (*Caso, supra,* at 888.) When such a special employment relationship is found, the borrowing employer becomes liable for workers' compensation coverage. (*Ibid*.)

[2] Further, it appears from applicant's pay stubs in Exhibit 1 that he was paid by various "Baron" entities such as "Baron HR Technical" and "Baron HR West, Inc."

In conclusion, we are persuaded that this matter must be returned to the WCJ for a "do-over" to determine who applicant's employer(s) are, including but not limited to clarification of all the issues discussed in this opinion. This requires the parties and the WCJ to create a clear and complete record, including a complete and precise statement of stipulations and issues. For the same reason, when the WCJ issues a new decision, the findings and Opinion on Decision must closely correspond to, and resolve the issues at hand. (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473 [Appeals Board en banc].) The WCJ also may revisit his ruling excluding Exhibits B and G. As our rescission of the WCJ's decision includes rescission of that ruling, any significant prejudice or irreparable harm in the ruling is a moot point. It should be noted that we express no final opinion on any substantive issue. When the WCJ issues a new decision, any aggrieved party may seek reconsideration as provided in Labor Code sections 5900 *et seq*.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Order of April 20, 2021 is **RESCINDED**, and this matter is **RETURNED** to the trial level for further proceedings and new decision by the WCJ, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA
November 5, 2024

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

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JTL/ara