

**WORKERS' COMPENSATION APPEALS BOARD  
STATE OF CALIFORNIA**

**VICTOR CALDERON, *Applicant***

**vs.**

**UNIFIED PROTECTIVE SERVICES; CVS; HAMPSHIRE INSURANCE  
COMPANY, administered by SEDGWICK; STATE COMPENSATION INSURANCE  
FUND; UNINSURED EMPLOYERS BENEFITS TRUST FUND, *Defendants***

**Adjudication Numbers: ADJ10054510, ADJ10036961, ADJ10375254  
Los Angeles District Office**

**OPINION AND ORDER  
DENYING PETITION FOR  
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will deny reconsideration.

As noted by the WCJ in her report, an employee may have more than one employer, and thus, "[w]hether a special employment relationship exists generally is a question of fact." (*Caso v. Nimrod Productions, Inc.* (2008) 163 Cal.App.4th 881, 889; citing *Kowalski v. Shell Oil Co.* (1979) 23 Cal.3d 168, 175 [44 Cal.Comp.Cases 134].)

For the foregoing reasons,

**IT IS ORDERED** that the Petition for Reconsideration is **DENIED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**

I CONCUR,

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**/s/ KATHERINE WILLIAMS DODD, COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**June 25, 2024**

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

**VICTOR CALDERON  
LAW OFFICES OF RAMIN R. YOUNESSI  
PEARLMAN, BROWN & WAX, L.L.P  
STATE COMPENSATION INSURANCE FUND, LEGAL  
OFFICE OF THE DIRECTOR-LEGAL UNIT, LOS ANGELES**

**JMR/mc**

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

**JOINT REPORT AND RECOMMENDATION ON  
PETITION FOR RECONSIDERATION  
(FILED BY COUNSEL FOR CVS/HAMPSHIRE/SEDGWICK ON APRIL 26, 2024)**

**INTRODUCTION**

Counsel for Party Defendant CVS insured by New Hampshire Insurance Company administered by Sedgwick Claims Management Services, Inc filed a timely, verified, Petition for Reconsideration on April 26, 2024, challenging the Joint Findings and Order (F&O) by the undersigned that issued on April 2, 2024 (dated March 29, 2024) in the above-referenced matters.

Victor Calderon (hereinafter “Applicant”) was a security officer at the time of all 3 of the applicant's injuries: the specific injury of April 16, 2015, the specific injury of March 16, 2015, and the CT for the period of October 20, 2013 through April 16, 2015. The only issue before the Court at Trial was whether the applicant was a special employee of CVS at the time of these injuries. All other issues were deferred.

The matter proceeded on the record on January 2, 2024 at which time stipulations and issues were read into the record, evidence offered and admitted as appropriate, and testimony obtained. The matters submitted on that date.

Thereafter, the undersigned Judge issued the joint F&O addressing the single issue raised for Trial as to each of the matters: whether CVS was Applicant's general employer and CVS was Applicant's special employer. This WCJ ordered that Unified Protective Services ("Unified") is Applicant's general employer with primary liability for providing workers' compensation benefits and CVS is Applicant's special employer with secondary liability. As Unified failed to secure the payment of workers' compensation obligations for the two specific dates of injury as required by Labor Code 3602(d), the court looks to the special employer CVS. Unified's primary liability is maintained for the CT period in ADJ10375254 as Unified was insured during the CT by State Compensation Insurance Fund.

CVS now asserts the following three questions challenging the decision set forth in the F&O: (1) whether CVS's provision of a walkie-talkie and the applicant's completion of loss prevention paperwork are enough control to transfer risk from Unified to CVS in order to meet the definition of a special employer; and, (2) whether a finding of CVS as a special employer for the injurious period of October 20, 2013 through April 16, 2015 is necessary when Unified had

insurance coverage during the continuous trauma period when such finding has implications outside of the jurisdiction of the Workers' Compensation Appeals Board.

Codefendants STATE COMPENSATION INSURANCE FUND ("SCIF") and OD Legal for Uninsured Employers Benefits Trust Fund ("UEBTF") have each filed Answers to the Petition.

### **STATEMENT OF RELEVANT FACTS**

As succinctly set forth by UEBTF in their Answer, the relevant facts are as follows:

Applicant Victor Calderon (Calderon or Applicant) worked as a security guard at CVS for approximately 6 years. When Calderon first began working at CVS, Prestige Security, Calderon's general employer, placed him there. (Minutes of Hearing and Summary of Evidence SOE, 1/2/24 trial, at 6:16-6:17.)

The CVS store he was placed at is located in Inglewood. (SOE, 1/2/24 trial, at 6:16-6:17.) Later, applicant Victor Calderon (Applicant) became employed by Defendant Unified Protective Services, Inc. (Unified) as a security guard. (SOE, 1/2/24 trial, at 6:16-6:17.)

While employed by Unified, Applicant was placed to work at the same CVS store in Inglewood. (SOE, 1/2/24 trial, at 5:19-5:20.)

In fact, except for a brief stint when he was stationed at Superior Market, Applicant worked exclusively at the same CVS store the entire time he was employed by Unified. (SOE, 1/2/24 trial, at 8:25- 9:3.)

Calderon testified that Prestige Security stopped providing security services to CVS, and the CVS managers asked him to continue to work as a security guard but with the new company, Unified Protective Services (SOE, 1/2/24 trial, at 6:18-6:19.) Calderon testified that he believes that he started working at the CVS store in Inglewood with Prestige Security beginning in 2009. (SOE, 1/2/24 trial, at 6:17-6:18.)

Calderon also testified that Unified placed him at the same CVS location in Inglewood in 2013 and he worked there until the end of the continuous trauma injury time period of April 2015. (SOE, 1/2/24 trial, at 6:18-6:19.)

Each day, the CVS manager gave Calderon instructions on how to do his job at the CVS store (SOE, 1/2/24 trial, at 5:23-5:24.) When starting his shift each day, Calderon would pick up a radio, furnished by CVS, to communicate with CVS workers, and he had to return the radio to CVS at the end of his shift. (SOE, 1/2/24 trial, at 6:4-6:5, 8:2-8:3.)

Calderon would report an incident occurring during his shift to the CVS manager. (SOE, 1/2/24 trial, at 5:23-5:24.) The CVS manager at the location told Calderon what to do and if Calderon did not follow CVS' instructions, then he would get in trouble. (SOE, 1/2/24 trial, at 6:14-6:15.)

Calderon would complete reports that he would turn into the supervisor of loss prevention at CVS. (SOE, 1/2/24 trial, at 8:8-8:9.) Calderon testified that the CVS manager instructed him to patrol the parking lot. (SOE, 1/2/24 trial, at 8:10 -8:11.)

Each day of work the CVS manager instructed Calderon specifically what to do, for instance, he was instructed to patrol the store every half hour. (SOE, 1/2/24 trial, at 8:10 -8:11.) For Calderon to be paid, CVS supervisors had to sign off on his timesheet at the start and end of his work shifts. (SOE, 1/2/24 trial, at 6:11-6:12.)

Unified contracted with CVS to provide security services. (Exhibits A, B, C, and D.) The initial service agreement between CVS and Unified stated in relevant part:

#### 2.2 Scope of Work

Vendor [Unified] will provide Services in accordance with CVS' requirements determined at CVS sole discretion...CVS may amend the Services purchased from time to time at the sole discretion of CVS based on CVS' requirements.

Applicant has filed three claims: a specific injury claim dated March 16, 2015; a second specific injury claim dated April 16, 2015; and a continuous trauma injury claim for the time period October 20, 2013 through April 16, 2015.

Unified was illegally uninsured at the time of the two specific injury claim dates. Unified was insured through State Compensation Insurance Fund (SCIF) for a portion of the continuous trauma injury claim period. During the time periods encompassed by the two specific injury claims and the continuous trauma injury claim, Applicant worked at the same CVS store the entire time. CVS was insured by New Hampshire Insurance Company administered by Sedgwick. (UEBTF Answer to Petition, 2:5-4:3, EAMS ID# 51848169)

The facts in this matter are undisputed. The only party offering testimony was Applicant. Although Applicant was cross-examined by Defendants, no rebuttal testimony was offered to attempt to contradict the testimony offered nor to attempt to challenge Applicant's credibility.

## **DISCUSSION**

### **RECONSIDERATION OR REMOVAL**

Is Applicant's Petition filed on April 26, 2024 a Petition for Reconsideration or a Petition for Removal? Removal is an extraordinary remedy that may be requested to challenge interim and non-final orders issued by a workers' compensation judge. (*Cortez v. Workers' Compensation Appeals Board* (2006) 136 Cal. App. 4th 596, 600, fn 5; *Kleeman v. Workers' Compensation Appeals Board* (2005) 127 Cal. App. 4th 274, 281, fn 2.) The petitioning party must demonstrate that substantial prejudice or irreparable harm will result if removal is not granted (8 CCR 10955(a)) and that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. A Petition for Reconsideration on the other hand is the appropriate mechanism to challenge a final order, decision, or award. (Labor Code Section 5900.) An order that resolves or disposes of the substantive rights and liabilities of those involved in a case is a final order. (See *Maranian v. Workers' Compensation Appeals Board* (2000) 81 Cal. App. 4th 1068; *Safeway Stores, Inc. v. Workers' Compensation Appeals Board* (*Pointer*(1980) 104 Cal. App. 3d 528.)

The instant Petition involves party defendant CVS's objection to this WCJ's Findings & Order and Opinion on Decision finding CVS is Applicant's special employer in each of the Applicant's three claimed injuries. The Findings & Order is a final order finding special employment by CVS resolving substantive rights and liabilities and therefore Reconsideration is the proper mechanism to challenge this Court's Findings & Order and Opinion on Decision.

**WHETHER CVS' PROVISION OF A WALKIE-TALKIE AND THE APPLICANT'S COMPLETION OF LOSS PREVENTION PAPERWORK ARE ENOUGH CONTROL TO TRANSFER RISK FROM UNIFIED TO CVS IN ORDER TO MEET THE DEFINITION OF A SPECIAL EMPLOYER.**

CVS' assertion that the sole facts supporting special employment in this matter are that Applicant was provided with a walkie-talkie and Applicant's completion of loss prevention paperwork is disingenuous. As set forth in the Answer submitted by Defendant SCIF to the CVS Petition:

Applicant testified extensively about how CVS management directed and controlled his work activities daily. In addition, the Applicant testified that he "never received any specific work instructions from Unified." (MOH 6:2-3). The only evidence of Unified giving any direction to the Applicant at all is the Applicant's credible testimony that Unified told him to follow CVS' instructions. (MOH 7:12-13). This unrebutted testimony demonstrates that CVS was provided the right to and did indeed exercise substantial control over the Applicant's work.

Petitioner has not presented any evidence that disputes Applicant's testimony, but rather attempts to downplay it. However, the evidence clearly establishes that Applicant's work duties, as created, directed, and controlled by CVS, demonstrates that Applicant was an integral part of CVS' retail operations and loss prevention program by preventing and stopping theft by employees and shoplifters alike and maintaining a safe working and shopping environment for CVS.

Upon arrival at work, Applicant reported to a CVS manager to receive instructions of his security duties for the day. The CVS manager would give Applicant a radio communications device so that the CVS manager could communicate with the Applicant throughout his shift. The Applicant would return the device to the CVS manager at the end of his shift. Applicant followed CVS managers' instructions and knew he would be subject to discipline for disobeying them. The CVS manager instructed him on CVS' procedures to follow when observing shoplifters. Applicant reported security incidents to CVS loss prevention personnel on forms provided by CVS. [record citations omitted in original] (SCIF Answer to Petition, 5:1-24, EAMS ID# 51739038)

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 [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.) 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.*)

The undisputed facts in this matter as per Applicant's testimony evidence that CVS had the right to direct and control the Applicant's activities and actually exercised such right. Specifically: the CVS manager would tell Applicant specifically what to do each day (MOH/SOE, *supra*, at 8); Applicant would report in to the CVS manager at the start of each shift and such manager would tell him what to do and where to be each day in the store (*Id.*, at 5:22-6:1); Applicant would only receive instruction from CVS employees (*Id.*, at 6:1-5, 6:12-15, 7:4-5, ); Applicant was advised by his general employer Unified to follow the instructions of CVS (*Id.*, at 12-13); Applicant was trained by CVS as to what to do in the event he identified a perpetrator during his shift (*Id.*, 7:16-19).

These undisputed facts set forth above, beyond CVS providing Applicant with a walkie-talkie and Applicant's completion of the CVS loss prevention paperwork, support this WCJ's finding that CVS was Applicant's special employer.



## **BORELLO FACTORS**

Defendant CVS cites to the *Borello* factors in their analysis as to whether the Applicant can be considered an employee of CVS. The *Borello* factors, as set forth in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, addresses whether workers are properly classified as independent contractors who would be exempt from workers' compensation coverage instead of as employees. Such argument is not applicable in this matter as it is undisputed that the Applicant was not an independent contractor for the general employer Unified and the basis for finding special employment with CVS relates to the exercise and control in a situation where the general employer loans the Applicant out to perform their duties at another location and for the dual benefit of both the general and special employers. It is an improper assertion that an analysis into independent contractor status comes into play in this matter.

## **SCIF INSURANCE COVERAGE DURING CT PERIOD**

CVS argues that as SCIF had viable coverage of the general employer during the alleged CT period it was an error for this WCJ to opine that CVS was Applicant's special employer during the CT period instead of only on the dates of the 2 specific dates of injury (on which general employer Unified was illegally uninsured). The issues that the undersigned was asked to address by the parties was specifically whether CVS was Applicant's special employer on each of the dates of injury alleged. The WCJ did not make any finding as to liability for the dates of injury, merely that Applicant was a general employee of Unified and a special employee of CVS on all three dates of injury.

Although not specifically a part of the undersigned's F&O, but as set forth in the Opinion on Decision, this WCJ identified, in a dicta portion of the Opinion, that:

Unified is Applicant's general employer with primary liability for providing workers' compensation benefits and CVS is Applicant's special employer with secondary liability. Unified's **primary liability** is maintained for the CT period in ADJ10375254 as Unified was insured during the CT by State Compensation Insurance Fund. However, on the dates of the two specific injuries in ADJ10054510 and ADJ10036961, Unified was not insured and thus CVS becomes liable, as special employer. [emphasis added] (Opinion on Decision at 5, EAMS ID# 77805019.)

Issues relating to liability resulting from the special employment finding are not ripe as all issues other than addressing whether or not CVS was Applicant's special employer were deferred. Based on the above, it is this Court's recommendation that the Defendant's Petition for Reconsideration be denied as the arguments alleged therein are unsupported and without merit.

**RECOMMENDATION**

For the reasons stated above, it is respectfully recommended that the Petition for Reconsideration filed on behalf of Defendant CVS/New Hampshire/Sedgwick be ordered denied.

Dated: 5/21/2024

**HON. ELISHA LANDMAN**  
**Workers' Compensation Judge**