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## LEGAL BRIEFS NEWSLETTER

CASES & COMMENTS ON WORKERS' COMPENSATION

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# THE TRUTH ABOUT TEMPORARIES

Cases involving temporary workers who have been placed by a temporary employment agency at a third party location may bring some special issues and challenges for claims personnel. There are also some special legal considerations when examining the employment relationship between the parties and determining who has liability for paying Workers' Compensation benefits.

An employer-employee relationship must exist in order to bring the Workers' Compensation Act into effect. (LC §3600.) An "employee" is defined as "every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written. In *Laeng v. Workmen's Comp. Appeals Bd.* (1972) 37 CCC 185, the Supreme Court held that LC §3351 defines the term "employee" broadly. A person who renders service to another is presumed to be an "employee." *County Of Los Angeles, Petitioner, v. Workers' Compensation Appeals Board, Francis P. Conroy Et Al., Respondents* (1981) 46 CCC 1322 (Supreme Court of California).

The test of whether an employment relationship exists is multi-faceted, but includes such questions as whether the alleged employer had direction and control over the activity of the employee, whether the alleged employer provided the place to work, whether the alleged employer had the right to hire and fire the employee, and whether the alleged employer had the individual on its payroll.

"The primary consideration" (in determining whether a special employment relationship exists) ". . . is whether the special employer has "[the] right to control and direct the activities of the alleged employee or the manner and method in which the work is performed, whether exercised or not. . . ." *Kowalski v. Shell Oil Co.*, 23 Cal.3d 168 at p. 175. Factors relevant to determining whether an employee is the borrowed employee of another include: (1) whether the borrowing employer's control over the employee and the work he is performing extends beyond mere suggestion of details or cooperation; (2) whether the employee is performing the special employer's work; (3) whether there was an agreement, understanding,

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or meeting of the minds between the original and special employer; (4) whether the employee acquiesced in the new work situation; (5) whether the original employer terminated his 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 borrowing employer had the right to fire the employee and (9) whether the borrowing employer had the obligation to pay the employee.

*Gaudet v. Exxon Corp.*, 562 F.2d 351, 355; *Ruiz v. Shell Oil Company* (5th Cir. 1969) 413 F.2d 310, 312-313.

Circumstances which tend to negate the existence of a special employment relationship include the following factors: the worker is skilled and has substantial control over operational details, the worker is not engaged in the borrower's usual business, the worker works only for a brief period of time, does not use the tools or equipment of the borrowing employer but uses his own tools or the tools of the lending employer and the borrower employer neither pays the worker nor has the right to discharge him. *Marsh v. Tilley Steel Co.*, 26 Cal.3d 486 at p. 492.

When an employee is loaned from one employer to another, such as in the case where a temporary employment service places an individual to work in an office or factory of one of its clients, most of the litmus test questions enumerated above would be resolved in favor of finding an employment relationship between the individual and the facility where the individual is assigned to work. This is due to the fact that, once the individual is sent out on the temporary assignment, the placement agency has little or no control over how and when the employee works, nor are they (in the strictest sense) providing the place to work or the tools to work with. Therefore, one might be tempted to argue that there is only one employer involved in this

scenario, and that employer should be providing Workers' Compensation Insurance coverage.

The legal status of this relationship, however, is not so simple. The law in California considers *both* the placement agency and the actual entity providing daily work to be employers. In the vernacular, the placement agency is normally considered the "general employer" and the company where the individual is assigned is considered the "special employer." There are numerous reasons for this. Among them is the fact that the temporary placement agency generally is the entity that keeps the employee on its payroll, thus relieving the special employer of the payroll and tax accounting. In addition, the temporary agency does retain some element of control over the employee over the long run, since they retain the ability to reassign the worker as needed.

Since the law in California requires all employers (without regard to their status as General or Special employers) to secure Workers' Compensation benefits should an employee be injured on the job, absent anything else, both the general employer and the special employer must be responsible for securing and providing those benefits.

As between insurers of general and special employers, the 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 unless the special employer had the employee on his or her payroll at the time of injury, in which case the insurer of the special employer is solely liable. For the purposes of this section, a self-insured or lawfully uninsured employer is deemed and treated as an insurer of his or her workers' compensation liability. Ins. Code §11663.

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There is often an agreement between the temporary agency and the special employer that the temporary agency will secure Workers' Compensation coverage. LC §3602(d) provides that "... an employer may secure the payment of compensation on employees provided to it by agreement by another employer by entering into a valid and enforceable agreement with that other employer under which the other employer agrees to obtain, and has, in fact, obtained workers' compensation coverage for those employees. In those cases, both employers shall be considered to have secured the payment of compensation within the meaning of this section and Sections 3700 and 3706 if there is a valid and enforceable agreement between the employers to obtain that coverage, and that coverage, as specified in subdivision (a) or (b) of Section 3700, has been in fact obtained, and the coverage remains in effect for the duration of the employment providing legally sufficient coverage to the employee or employees who form the subject matter of the coverage."

Given these facts, you might be tempted to conclude that the discussion about who pays for the comp benefits when the employee is injured is cut and dried for all cases. Nothing, of course, is quite so easy. What happens when the insurance carrier for the general employer (the temporary placement agency) becomes insolvent, or has their policy cancelled?

Absent evidence that special employees were expressly excluded from coverage under the special employer's insurance policy, the special employer was jointly and severally liable for applicant's injury as a matter of law, and whether or not the general and special employers had agreed that the general employer's insurance would provide workers' compensation for applicant was not dispositive. *Proulx Manufacturing Company, Travelers Property*

*Casualty Corporation, Petitioners v. Workers' Compensation Appeals Board, Applied Workforce Solutions, California Insurance Guarantee Association, administered by Intercare Insurance Services, on behalf of Reliance National Insurance Company, in liquidation, (Bahney), Respondents (2010) 75 CCC 782 (writ denied).*

The joint and several liability of a special employer is not extinguished by Insurance Code § 11663, since the language and legislative history of this section confirm that it was not intended to change the joint and several liability of general and special employers with respect to workers' compensation benefits. Furthermore, Insurance Code §11663 does not apply to CIGA because it is not an "insurer." Finally, the WCAB noted, joint and several liability between general and special employers cannot be extinguished by Labor Code § 3602(d), since this section does not change the requirement of Labor Code §3700 that every employer must secure the payment of compensation. Nor does this section suggest that it was intended to have any effect on issues of general and special employment when the general employer's carrier becomes insolvent. Moreover, although Labor Code § 3602(d) allows an employer to enter an agreement with another employer under which the other employer agrees to obtain workers' compensation insurance, any agreements between general and special employers do not eliminate their joint and several liability.

*Northrop Grumman Corporation, Petitioner v. Workers' Compensation Appeals Board, National Fire Insurance Company of Pennsylvania (insurer for Northrop Grumman Corporation), Chipton-Ross, Inc., California Insurance Guarantee Association, on behalf of Superior National Insurance Company, in liquidation, (James Pritchett), Respondents 75 CCC 537 (2010) Miceli v. Jacuzzi, Inc. (2006) 71 Cal. Comp. Cases 599.*

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In other words, despite the language in LC 3602(d) allowing the special employer to get “off the hook” in the face of a contract providing that the general employer secure the coverage, if the general employer fails to secure coverage or if the carrier for the general employer becomes insolvent, the special employer is still liable under the law *unless* its policy of comp coverage expressly excludes temporary employees.

Special considerations abound when investigating or litigating claims involving temporary general/special employment relationships. An adjuster new to a particular account is well advised to secure and review a copy of the contractual agreement between the temporary agency and the special employer. It is also important to determine which entity was issuing the paychecks to the injured employee. If there is any question about who bears responsibility for provision of benefits, both the general and special employers should be active parties to a litigated case until the question can be adjudicated.

Most companies who pay the higher hourly rate to obtain employees from a temporary placement service do so primarily for convenience and cost control over the long haul. The big convenience factor is that the special employer is relieved of many of the burdens of personnel administration and payroll accounting for employees whose tenure will be of short duration. The adjuster’s ability to thoroughly investigate the circumstances of an injury may be impaired by personnel of the general employer who would just as soon not be bothered any more than absolutely necessary. Often, potential witnesses may be engaged elsewhere in short order, and hard to track down. Therefore, when an employer level investigation is needed, it should be conducted as soon as possible before memories, and personnel, fade.

This can be especially troublesome where causation is not clear or where claims of occupational disease are involved. In such cases, the general employer may wish to avoid too many probing questions about possible exposures, and some degree of tenacity on the part of the adjuster and the investigator may be required. However, even if there is negligence on the part of the special employer which causes the injury, that employer is normally immune from tort suit under the exclusive remedy provisions of the Labor Code. For the same reason, subrogation recovery by the carrier for the temporary agency will also be precluded in the normal case. *Santa Cruz Poultry, Inc. v. Superior Court* (1987) 194 Cal.App.3d 575, 578-579 [239 Cal. Rptr. 578, 52 Cal. Comp. Cases 429]. Therefore, management of the special employer can be reassured that cooperation with the investigation should pose any potential threat to them.

Earnings issues tend to abound in cases where temporary employment agencies are involved. Almost by definition, the “average weekly earnings” to be calculated as a basis for indemnity benefits will be an average of earnings over many job assignments and over a period of reasonable length prior to the injury to allow a fairly accurate project of future earnings.

Many of these situations are complicated by the fact that individuals often register, and obtain temporary assignments from, multiple agencies. In such cases, it will be necessary to identify and obtain their payroll records. At the same time, considering that average weekly earnings are to be based on earnings potential, the labor market outlook may take on greater significance in those cases where there is no permanent employment.

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If the labor market is spotty for a particular type of employment, average weekly earnings may arguably be less than the mathematical average. At the same time, an injured worker with very marketable skills taking only temporary jobs for a period of time for reasons of personal choice may be able to argue a higher earning capacity than the mathematical average

If there is any indication that occupational disease or continuous trauma is a causative factor in the case, complete information (usually by deposition) will have to be obtained as to each work assignment and each agency and special employer involved for at least the year prior to onset of disability. The treating physician and any Agreed or Qualified Medical Examiner will then have to review the information and determine whether there may be a case for bringing in additional defendants.

Another potentially complicating scenario which has caused a large amount of litigation occurs when, for the date of injury involved, the temporary agency had an insurance carrier that became insolvent prior to or during the pendency of the Workers' Compensation case. When a carrier becomes insolvent, the California Insurance Guarantee Association (CIGA) steps in to pay covered claims when there is no other available insurance coverage. However, as can be seen from the legal authorities cited earlier in this article, since the special employer usually had valid coverage, CIGA can be relieved of its duty to pay pursuant to the operation of Ins. Code §1063.1(c)(9). If, however, the special employer's insurance policy *expressly excludes* coverage for temporary employees, then CIGA may still be responsible. *Miceli v Jacuzzi* (supra); *Prolux Manufacturing v* (supra).

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## **A Special Thank You**

To our valued clients and all our loyal readers, we want to express our heartfelt thanks for your support during the past year. Our planned issues for the coming year will cover such topics and discovery and privileged communications, case law updates, and a review of things to know for adjusting claims in 2011.

With a new administration coming in Sacramento, we will have much to discuss in the next few years, and we anticipate that, as always, the only constant to expect in the realm of Workers' Compensation will be change.

May this coming year bring interesting times, and may you and all the important people in your life enjoy happiness and good health.

*From Everyone at McDermott & Clawson LLP*

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