

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 **JOSE LUIS MASTACHE,**

5 *Applicant,*

6 vs.

7 **STAFFCHEX, INC., JESSIE LORD BAKERY;**
8 **CALIFORNIA GUARANTEE ASSOCIATION**
9 **for ULLICO CASUALTY COMPANY in**
10 **Liquidation through its servicing facility**
11 **SEDGWICK CMS; TRAVELERS PROPERTY**
12 **CASUALTY COMPANY OF AMERICA,**

Defendants.

Case No. **ADJ7964733**
(Marina del Rey District Office)

**OPINION AND ORDER GRANTING
PETITION FOR RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

13 The California Insurance Guarantee Association (CIGA) seeks reconsideration of the March 5,
14 2018 Findings of Fact wherein the workers' compensation arbitrator (arbitrator) found that CIGA
15 remains liable for benefits to the applicant because an insurance policy issued by Travelers Property
16 Casualty Company of America (Travelers) to Jessie Lord Bakery excludes special employees from
17 coverage and is not "other insurance." In addition, the arbitrator found that there is a valid agreement
18 between Jesse Lord Bakery and Staffchex "excluding liability of special employment from the workers'
19 compensation policy" (Finding of Fact No. 3) and that "[t]here is no joint and several liability between
20 Jesse Lord Bakery and Staffchex, Inc." (Finding of Fact No. 4). With respect to the insurance policy, the
21 arbitrator found that an endorsement excluding special employees is not invalid because it did not contain
22 a signature or an affirmation (Findings of Fact Nos. 6, 7, and 8) and that "[t]he Regulations no longer
23 require an affirmation and does [*sic.*] apply retroactively (Finding of Fact No. 11).

24 CIGA contends that the Travelers policy issued to Jessie Lord Bakery does not exclude coverage
25 for leased employees such as applicant and, accordingly, is "other insurance." CIGA argues that the
26 limiting and restricting endorsement attached to the policy (WC 04 03 17) required the policyholder's
27 signature to be effective and the unsigned endorsement did not comply with the Insurance

1 Commissioner's rules in effect at the time of policy formation. Concurrently with its petition for
2 reconsideration, CIGA filed a "Request for Permissive Judicial Notice of WCIRB Bulletin No. 2016-21
3 and attached WC 04 03 17 B Endorsement and Points and Authorities in Support Thereof."

4 Travelers filed an Answer. Travelers requests that the Appeals Board affirm the Findings of Fact,
5 arguing that its policy was properly limited and restricted. Concurrently with its Answer, Travelers filed
6 a Request for Permissive Judicial Notice of certain rulemaking documents. CIGA filed a supplemental
7 brief. We have accepted all supplemental pleadings. With respect to the parties' requests for judicial
8 notice of various documents, we decline to take judicial notice of additional documents not produced at
9 the arbitration hearing.

10 We have considered the Petition for Reconsideration, and we have reviewed the record in this
11 matter. The arbitrator has filed a Report and Recommendation on Petition for Reconsideration,
12 recommending that the petition be denied. For the reasons discussed below, we will grant
13 reconsideration, rescind the arbitrator's decision and find that the Travelers policy provided coverage for
14 Jessie Lord Bakery.

15 **BACKGROUND**

16 At the Arbitration of January 18, 2016, Travelers and CIGA entered into the following
17 Stipulations:

- 18 1. Jose Luis Mastache has filed an Application for Adjudication of
19 Claim alleging a specific injury on August 31, 2011 to multiple parts of his
20 body.
- 21 2. The applicant was an employee of Staffchex, Inc., a staffing
22 company.
- 23 3. On the date of injury, the applicant was working at Jessie Lord
24 Bakery.
- 25 4. Staffchex, Inc. was insured for workers' compensation purposes by
26 Ullico Casualty Company.
- 27 5. Ullico Casualty Company was declared insolvent and went into
liquidation on May 30, 2013.

1 6. Jessie Lord Bakery was insured by Travelers Property Casualty
2 Company on the date of the alleged injury.

3 7. It is alleged that Staffchex, Inc. was the general employer and that
4 Jessie Lord Bakery was the special employer on the date of applicant's
5 alleged injury, that issue is to be litigated before the WCAB. (March 5,
6 2018 Opinion on Decision, p. 2.)

7 Travelers policy number YJUB-9506B27-6-11 provided workers' compensation insurance for
8 Jessie Lord Bakery LLC from July 31, 2011 through July 31, 2012. (Exh. A, Workers' Compensation
9 and Employers Liability Policy YJUB-9506B27-6-11, WC 00 00 01A, Information Page.) The policy
10 included an endorsement that states:

11 It is AGREED that, anything in this policy to the contrary notwithstanding,
12 this policy DOES NOT INSURE:

13 Any liability you may have as the special employer of an employee who is
14 not on your payroll at the time of injury based upon your representation
15 that (1) you have entered into a valid and enforceable agreement pursuant
16 to Labor Code Section 3602(d) with the employee's general employer
17 under which the general employer agrees to secure the payment of
18 compensation for such employee and (2) the general employer has obtained
19 workers' compensation coverage for the employee.

20 ...

21 By signature below, you affirm that, with respect to any employee who is
22 also the employee of a general employer, (1) you have entered into a valid
23 and enforceable agreement pursuant to Labor Code Section 3602(d) with
24 the employee's general employer under which the general employer agrees
25 to secure the payment of compensation for such employee and (2) the
26 general employer has obtained workers' compensation coverage for the
27 employee.

 Countersigned By _____ (Exh. A, WC 04 03
 17.)

 The endorsement was not countersigned. The Workers' Compensation Insurance Rating Bureau
(WCIRB), on behalf of the Insurance Commissioner, advised Travelers that it was permitted to use form
WC 04 03 17. (Exh. C, Lorenda Boatwright, November 8, 2006 letter to John Garamendi.)

1 ///

2 The Arbitrator admitted WCIRB Bulletin No. 2006-09 into evidence as CIGA's Exhibit D. The
3 bulletin states in relevant part:

4 ...since form 04 03 17 is a limiting and restricting form, its use is subject to
5 the rules set forth in Title 10 of the California Code of Regulations. Title
6 10, Section 2259(e) provides that a limiting and restricting endorsement
7 may be used '[w]here the endorsement seeks to exclude only such liability
8 of the employer for compensation as the latter affirms to the insurer in
9 writing is otherwise secured or is lawfully uninsured..' The policyholder's
countersignature at the bottom of form WC 04 03 17 constitutes written
affirmation of other coverage as required by Title 10. (Exh. D, WCIRB,
June 14, 2006, Bulletin No. 2006-09.)

10 Travelers also offered into evidence an unsigned Labor and Service Agreement between
11 Staffchex and Jessie Lord Bakery LLC that included an agreement that Staffchex "...will pay all wages
12 for Employees and all related workers' compensation insurance." (Exh. B, Staffchex, undated Labor and
13 Service Agreement, Section 2.) At the arbitration hearing, Gloria Knowles, Human Resources Manager
14 at Jesse Lord Bakery since 2014, testified that it appeared that the contract was initialed by Christine
15 Valley, the former General Manager, on December 18, 2008. (January 18, 2018 Arbitration Transcript,
16 p. 12:1-7.)

17 ANALYSIS

18 The law is well-settled that "[i]nterpretation of an insurance policy is a question of law and
19 follows the general rules of contract interpretation." (*TRB Investments, Inc. v. Fireman's Fund Ins. Co.*
20 (2006) 40 Cal. 4th 19, 27.) "A contract must be so interpreted so as to give effect to the mutual intention
21 of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." (Civ.
22 Code § 1636.) Workers' compensation insurance policies in California are subject to regulation by the
23 Department of Insurance and are conclusively presumed to contain certain required provisions. (Ins.
24 Code, §§ 11650, 11651, 11657, 11658.) A standard workers' compensation policy without any limiting
25 endorsements covers all employees of the employer. (Ins. Code, § 11660; *Fyne v. Industrial Acc. Com.*
26 (1956) 138 Cal.App.2d 467, 469-474 [21 Cal. Comp. Cases 13].)

27 The March 5, 2018 Findings of Fact relies on two incorrect premises for the conclusion that

1 CIGA remains liable for applicant's benefits. The arbitrator is incorrect that an agreement between a
2 general employer and a special employer can eliminate joint and several liability for their joint
3 employees. The arbitrator also erred in determining that the insurance policy excluded certain employees
4 based on a limiting and restricting endorsement that did not comply with the Insurance Commissioner's
5 regulations in effect at the time the insurance contract was formed.

6 **A. Joint and Several Liability**

7 The arbitrator determined that, as a result of Jessie Lord Bakery and Staffchex entering into an
8 employee leasing agreement, there is no joint and several liability between Jessie Lord Bakery and
9 Staffchex. (March 5, 2018 Findings of Fact, Finding of Fact No. 4.) This finding is incorrect.

10 Where a general and special employment relationship exists, the injured employee can look to
11 and is entitled to compensation benefits from either or both employers. (*Kowalski v. Shell Oil Co.* (1979)
12 23 Cal.3d 168, 175 [44 Cal.Comp.Cases 134, 138]; *McFarland v. Voorheis-Trindle Co.* (1959) 52 Cal.2d
13 698, 702 [24 Cal.Comp.Cases 216, 217]; *National Auto. Ins. Co. v. Industrial Acc. Com.* (Ivy) (1943) 23
14 Cal.2d 215, 219 [8 Cal.Comp.Cases 260, 263]; *Dept. of Water & Power v. Industrial Acc. Com.*
15 (*Winkler*) (1934) 220 Cal. 638, 641 [20 Ind.Acc.Com. 233, 235].) The liability of general and special
16 employers for compensation benefits is joint and several. (See *Fireman's Fund Indem. Co. v. State*
17 *Compensation Ins. Fund (Smith)* (1949) 93 Cal.App.2d 408 [14 Cal.Comp.Cases 180].) However,
18 pursuant to Insurance Code section 11663, "[a]s between insurers of general and special employers, one
19 which insures the liability of the general employer is liable for the entire cost of compensation payable on
20 account of injury occurring in the course of and arising out of general and special employments..." (Ins.
21 Code, § 11663.)

22 Labor Code section 3602(d) provides, in part, that:

23 "For the purposes of this division, including Sections 3700 and 3706, an
24 employer may secure the payment of compensation on employees provided
25 to it by agreement by another employer by entering into a valid and
26 enforceable agreement with that other employer under which the other
27 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

1 (b) of Section 3700, has been in fact obtained, and the coverage remains in
2 effect for the duration of the employment providing legally sufficient
3 coverage to the employee or employees who form the subject matter of the
4 coverage. That agreement shall not be made for the purpose of avoiding an
5 employer's appropriate experience rating as defined in subdivision (c) of
6 Section 11730 of the Insurance Code.”

7 The effect of a valid and enforceable agreement under Labor Code section 3602(d) is that “both
8 employers shall be considered to have secured the payment of compensation.” However, even after a
9 general and special employer enter into an agreement under Labor Code section 3602(d), the employers
10 remain jointly and severally liable. (*Proulx Manufacturing Company v. Workers' Comp. Appeals Bd.*
11 (*Bahney*) (2010) 75 Cal.Comp.Cases 782 [writ den.].) The Second District Court of Appeal addressed
12 the argument that the Legislature intended for a Labor Code Section 3602(d) agreement to extinguish
13 joint and several liability as follows:

14 Petitioners also argue that interpreting section 3602, subdivision (d), so that
15 joint and several liability to special employees for workers' compensation is
16 extinguished, is consistent with the Legislature's purpose of enacting the
17 statute to avoid duplicate coverage and premiums. However, the legislative
18 history and statutory language indicate that the Legislature intended to
19 provide a means by which an employer could be provided with employees
20 and mandatory workers' compensation insurance by another employer, and
21 avoid tort, civil and criminal liabilities. The legislative history of section
22 3602, subdivision (d) indicates that the Legislature intended to save general
23 and special employers duplicate workers' compensation coverage and
24 premiums. Since the Legislature authorized a means by which employers
25 could contract and satisfy workers' compensation insurance requirements
26 with a single policy, there was no need to change the long-standing rule of
27 their joint and several liability to affect coverage of another policy.
(*Fireman's Fund Ins. Co. v. Workers' Comp. Appeals Bd. (Colamaria)*
(2010) 189 Cal.App.4th 101, 127 [75 Cal.Comp.Cases 1123.]

Because both employers are jointly and severally liable, if either employer's insurer becomes
insolvent, the remaining insurer would be responsible for paying the claim unless the remaining insurer's
policy excludes coverage for the claim.¹

¹ While Insurance Code section 1063.1, subdivision (c)(1)(vi) defines “covered claims” as “the obligations of an insolvent insurer ... in the case of a policy of workers' compensation insurance, to provide workers' compensation benefits under the workers' compensation law of this state,” subdivision (c)(9) provides, “Covered claims' does not include (i) any claim to the extent it is covered by any other insurance of a class covered by this article available to the claimant or insured”

1 We also note that the Employment Services Agreement between Staffchex and Jessie Lord
2 Bakery is an agreement that Staffchex will obtain insurance for their joint employees, but the agreement
3 does not, by its terms, limit the special employer's liability for those employees. Even if Staffchex and
4 Jesse Lord Bakery intended for their agreement to limit liability, coverage is determined by looking at the
5 terms of the relevant insurance policy and not an agreement between employers. (*Colamaria, supra*, at
6 128.)

7 **B. Applicable Regulations**

8 The terms of workers' compensation policies issued in California are governed by statute, and
9 each policy is conclusively presumed to contain all the provisions required by law. (Ins. Code, § 11650.)
10 All workers' compensation policies must "contain a clause to the effect that the insurer will be directly
11 and primarily liable to any proper claimant for payment of ...compensation." (Ins. Code § 11651.)
12 Endorsements that limit or restrict coverage of workers' compensation policies are subject to prior
13 approval by the Insurance Commissioner. (Ins. Code § 11657; Cal. Code of Regs., tit. 10, § 2257.)
14 Workers' compensation policies may only be limited and restricted in accordance with regulations
15 adopted by the Insurance Commissioner and failure to follow the regulations renders the policy
16 unlimited. (Ins. Code, §§ 11659, 11660.)

17 The rules applicable to limiting and restricting endorsements were amended effective April 1,
18 2016. The rule in effect at the time the insurance contract was formed allowed policies to be limited only
19 in certain circumstances including "Where the endorsement seeks to exclude only such liability of the
20 employer for compensation as the latter affirms to the insurer in writing is otherwise secured or is
21 lawfully uninsured." (Cal. Code of Regs., tit. 10, § 2259(e) [Effective January 1, 1979].)

22 Effective April 1, 2016, in addition to excluding liability for compensation that the insured
23 affirmed to the insurer in writing is otherwise secured, an insurer could also "exclude liability of an
24 employer for employees who are covered under another employer's workers' compensation policy
25 pursuant to an agreement made under Labor Code Section 3602(d)." (Cal. Code of Regs., tit. 10,
26 § 2259(a)(7).)

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1 The arbitrator found that: “The Regulations no longer require an affirmation and does [*sic.*] apply
2 retroactively.” (March 5, 2018 Findings of Fact, Finding of Fact No. 11.)

3 However, the change in the rules applicable to limiting and restricting endorsements should not
4 have been applied retroactively because it is a substantive rather than procedural change in the law.

5 When a statute changes the legal consequences of past conduct it is
6 considered substantive. (*As You Sow v. Conbraco Industries* (2005) 135
7 Cal.App.4th 431, 459–460 [37 Cal. Rptr. 3d 399] (*As You Sow*) [a statute is
8 said to be substantive when it changes the legal effect of past events].) A
9 procedural statute, in contrast, is one that governs the procedures to be
10 followed to determine the legal significance of past events. Courts have
found substantive statutes to be impermissibly retroactive when they
change the legal consequences of past events while upholding procedural
statutes as prospective because they apply to the conduct of existing and
future litigation. (*Lozano v. Workers' Comp. Appeals Bd.*, (2015) 236 Cal.
App. 4th 992, 998-999, 80 Cal. Comp. Cases 407, 411-412.)

11 Former Rule 2259(e) provided that a policy could be limited and restricted where the insured
12 provided a written affirmation of other insurance but did not allow a policy to be limited and restricted
13 solely based on a Labor Code section 3602(d) agreement between employers. The April 1, 2016
14 amendment to Rule 2259 expanded the possible grounds for limiting policies. Giving the 2016 changes
15 retroactive effect would mean that an endorsement that was invalid at the time the parties entered into an
16 insurance contract would be considered valid. This would impermissibly change the legal significance of
17 past events. Therefore, we will apply the relevant regulations that were in effect at the time the contract
18 was formed to evaluate whether the policy was properly limited and restricted.

19 **C. Limiting and Restricting Endorsement**

20 To properly exclude liability for applicant’s injuries under Form 04 03 17, an insurer must show:
21 (1) It received approval to use the endorsement from the Insurance Commissioner; (2) the special
22 employer entered into a valid and enforceable 3602(d) agreement with the general employer; and (3) the
23 general employer obtained workers’ compensation coverage for the excluded employees.

24 Travelers did receive approval to use Form 04 03 17 from the Insurance Commissioner. (Exh. C,
25 Lorenda Boatwright, November 8, 2006 letter to John Garamendi.) However, the version of form 04 03
26 17 submitted by Travelers that the Insurance Commissioner approved included an affirmation and a
27 space for a countersignature.

1 The form 04 03 17 endorsement attached to the policy excludes coverage based upon the
2 employer's representation that it has "entered into a valid and enforceable agreement pursuant to Labor
3 Code section 3602(d) with the employee's general employer under which the general employer agrees to
4 secure the payment of compensation for such employee..." (Exh. A, Workers' Compensation and
5 Employers Liability Policy YJUB-9506B27-6-11, WC 04 03 17.)

6 Pursuant to the version of Rule 2259 that was in effect at the time the policy was written, a
7 "limiting and restricting endorsement other than California Approved Form Endorsement No. 11 may be
8 used only under one or more of the following circumstances..." The enumerated circumstances include:
9 "(e) Where the endorsement seeks to exclude only such liability of the employer for compensation as the
10 latter affirms to the insurer in writing is otherwise secured or is lawfully uninsured..." (Former Cal. Code
11 of Regs., tit. 10, § 2259(e).) In its Answer, Travelers suggests that form 04 03 17 endorsement was based
12 on subsection (a) which permits the use of a limiting and restricting endorsement "[w]here the purpose of
13 the endorsement is to limit insurance coverage to the liability for compensation to employees of the
14 specific entity named as the insured in the policy." (Former Cal. Code of Regs., tit. 10, § 2259(a).)
15 However, if applicant is employed by both Jessie Lord Bakery and Staffchex, an endorsement on Jesse
16 Lord Bakery's policy could not exclude coverage for an applicant who is an employee of Jesse Lord
17 Bakery under Rule 2259(a) because Jesse Lord Bakery is the named insured.

18 Under Rule 2259(e), the insurer may exclude "**only** such liability of the employer for
19 compensation as the latter affirms to the insurer in writing is otherwise secured..." (Former Cal. Code of
20 Regs., tit. 10, § 2259(e) [Emphasis added].) When the relevant insurance policy was written, use of a
21 form 04 03 17 endorsement was conditional upon an insurer obtaining a written affirmation that the
22 excluded liability was otherwise insured. The endorsement allows the insurer to obtain the required
23 written affirmation from the employer with a countersignature from the employer on the endorsement.
24 There is no evidence that Travelers obtained the required written affirmation either by a countersignature
25 on the endorsement or through a separate document.

26 Furthermore, by the terms of the endorsement, it only excludes liability that the employer affirms
27 in writing is otherwise insured. Without the written affirmation, the endorsement has no effect.

1 Given that the policy is not limited and restricted to exclude employees leased from Staffchex, we
2 need not reach the issue of whether the unsigned undated agreement between Staffchex and Jesse Lord
3 Bakery is a valid and enforceable agreement pursuant to Labor Code Section 3602(d). We also note that
4 the parties have not stipulated that applicant was an employee of Jesse Lord Bakery. Therefore, the issue
5 of employment may be adjudicated at the trial level, if necessary. As discussed above, assuming
6 applicant is an employee of Jesse Lord Bakery, the Travelers policy is "other insurance" and CIGA is not
7 liable for applicant's benefits.

8 For the foregoing reasons,

9 **IT IS ORDERED** that defendant's Petition for Reconsideration of the March 5, 2018 Findings of
10 Fact is **GRANTED**.

11 **IT IS FURTHER ORDERED**, as the Decision After Reconsideration of the Workers'
12 Compensation Appeals Board, that the March 5, 2018 Findings of Fact is **RESCINDED**, and that the
13 following is **SUBSTITUTED** in its place:

14 **FINDINGS OF FACT**

- 15 1. Travelers policy number YJUB-9506B27-6-11 provided workers' compensation insurance
16 coverage for Jessie Lord Bakery LLC. from July 31, 2011 through July 31, 2012.

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1 2. The policy provides coverage for workers' compensation claims sustained during the policy
2 period by any employees of Jesse Lord Bakery LLC., including employees who were not on its payroll.

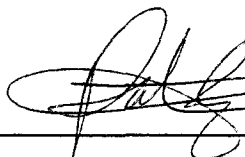
3 3. All other issues raised at the January 18, 2018 arbitration are moot.

5 **WORKERS' COMPENSATION APPEALS BOARD**

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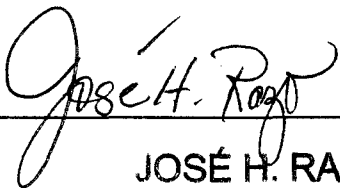
8 DEIDRA E. LOWE

8 I CONCUR,

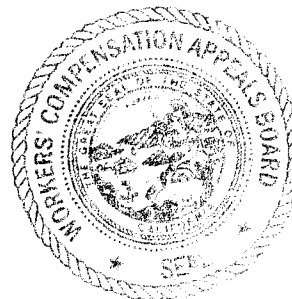
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DEPUTY

11 PATRICIA A GARCIA

12
13 

14 JOSÉ H. RAZO



16
17 DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

18 **MAY 29 2018**

19
20 SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR
21 ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

22 ALTMAN, LUNCHE & BLITSTEIN
23 CIPOLLA & CALABA
24 JOSE LUIS MASTACHE
25 TRINIDAD & ASSOCIATES

A handwritten mark, possibly a signature or initials, is located to the right of the list of names.

26
27 MWH/ebc