WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ROSENDA RODRIGUEZ, ***Applicant,*** **vs.** **FAIRWAY STAFFING; SOLVIS STAFFING; STATE COMPENSATION INSURANCE FUND; ZURICH INSURANCE COMPANY; FRESH GRILL FOODS; PACIFIC COMPENSATION INSURANCE COMPANY,** ***Defendants.***	**Case Nos.** **ADJ10651475** **ADJ10762532** **(Anaheim District Office)** **OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION**

Defendant, Fairway Staffing Services (Fairway), seeks reconsideration of the Joint Findings and Order, served February 8, 2019, in which a workers' compensation administrative law judge (WCJ) found applicant Rosenda Rodriguez was not an employee of Solvis Staffing Services, Inc. (Solvis), but was an employee of Fairway, as applicant's general employer, and Fresh Grill Foods (Fresh Grill), as applicant's special employer, for a claimed October 11, 2016 injury at Fresh Grill (ADJ10651475), and was an employee of Fairway for a claimed December 14, 2016 injury at Fairway (ADJ10762532). This determination issued after the WCJ's previous finding that applicant was not employed by Solvis was rescinded and returned for further development of the evidentiary record.

Fairway contests the WCJ's determination, contending that Solvis should be found to be a concurrent employer of applicant for both dates of injury based upon the evidence of Solvis' contractual relationship with Fairway as a Professional Employer Organization (PEO).

Co-defendants Zurich American Insurance Company and State Compensation Insurance Fund, insurers of Solvis, have filed Answers to the Petition for Reconsideration. The WCJ has provided a Report and Recommendation on Petition for Reconsideration, in which he recommends that the petition be denied.

We have considered the allegations and arguments of the Petition for Reconsideration, as well as the answers thereto, and have reviewed the record in this matter and the WCJ's Report and

Recommendation on Petition for Reconsideration of February 27, 2019, which considers, and responds to, each of Fairway's contentions. Based upon our review of the record, and for the reasons stated in the WCJ's Report, which we adopt and incorporate as the decision of the Board, we will affirm the WCJ's Joint Findings and Order, and deny the Petition for Reconsideration.

The parties in this case set out the sole issue to be decided at trial as:

> Whether or not the applicant was employed by Solvis Staffing Services, Inc., Fairway Staffing Services, Inc., and/or Fresh Grill Foods, LLC, on either of the dates of injury herein.
>
> All other issues are bifurcated and deferred with jurisdiction reserved at this time.

Fairway's attempt to recast the issue as one of insurance coverage for a claimed injury is not persuasive in light of the determination in *Serrano v. Exact Staff* (2016) 81 Cal.Comp.Cases 777 (Appeals Board panel decision), upon which the WCJ elaborates in his Report. The WCJ correctly focused the inquiry on applicant's employment status vis á vis Solvis, and properly found an absence of indicia of employment. The issue of liability for insurance coverage was bifurcated and deferred, and is properly left to mandatory arbitration.

Accordingly, we will affirm the WCJ's Joint Findings and Order and will deny the Petition for Reconsideration.

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For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration, dated February 22, 2019, is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

K Zalewski CHAIR

KATHERINE ZALEWSKI

I CONCUR,

Jose H. Razo

JOSE H. RAZO

CONCURRING, BUT NOT SIGNING

DEIDRA E. LOWE

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APR 19 2019

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

ROSENDA RODRIGUEZ
LAW OFFICES OF DULIO R. CHAVEZ
PACIFIC COMPENSATION INSURANCE CO.
LAW OFFICES OF ROBERT M. HARMAN & ASSOC.
LAW OFFICE OF TRACEY LAZARUS
STATE COMPENSATION INSURANCE FUND
MANNING & KASS, ELLROD, RAMIREZ, TRESTER

SV/*pc*

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

CASE NUMBERS: ADJ 10651475; ADJ 10762532

ROSENDA RODRIGUEZ	**-vs.-**	**FAIRWAY STAFFING; SOLVIS STAFFING; SCIF; ZURICH INS. CO.; FRESH GRILL FOODS; PACIFIC COMP. INS. CO.**

WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE: **Hon. PAUL DeWEESE**

DATE: **February 27, 2019**

JOINT REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I INTRODUCTION

Dates of Injury:	October 11, 2016 (**ADJ 10651475**) December 14, 2016 (**ADJ 10762532**)
Age on DOI:	44, 45
Occupation:	Maintenance Worker
Identity of Petitioner:	Defendant Fairway Staffing Services, Inc.
Timeliness:	The petition was timely filed on February 22, 2019
Verification:	The petition was verified
Date of Findings & Order:	February 7, 2019 (served February 8, 2019)
Petitioner's Contentions:	Petitioner contends the WCJ erred by finding that applicant was not employed by Solvis Staffing, Inc. on either of the dates of injury herein.

II
FACTS

Sometime in 2016, applicant Rosenda Rodriguez applied for employment at a temporary staffing agency, Fairway Staffing Services, Inc. (Fairway). Fairway hired her and sent her to work at Fresh Grill Foods, LLC (Fresh Grill) (MOH/SOE 10/24/2017, p. 5, lines 11, 17-20).

Applicant claims to have been injured on October 11, 2016 while working at Fresh Grill. Applicant claims to have sustained additional injuries on December 14, 2016 while performing modified work at Fairway's offices during her recovery from the first injury. Issues regarding the existence, nature and extent of the claimed injuries were deferred with jurisdiction reserved.

Fairway signed a "Staffing Client Services Agreement" with Solvis Staffing, Inc. (Solvis) on December 1, 2015 (Ex. O). Solvis admitted that it acted as a professional employer organization (PEO) for Fairway and agreed with Fairway's assertion that applicant should be considered Solvis' employee for payroll and workers' compensation purposes (MOH/SOE 10/24/2017, p. 2, lines 22-25). However, Solvis' workers' compensation carriers, Zurich Insurance Company (Zurich) and State Compensation Insurance Fund (SCIF), denied that Solvis was applicant's employer.[1]

The matter first proceeded to trial on October 24, 2017 on the sole issue of employment. Testimony was heard from applicant and from Ramon Gonzalez, Fairway's safety coordinator. On November 15, 2017, the court issued Joint Findings that applicant was employed by all three defendants (Fresh Grill, Fairway and Solvis) on October 11, 2016 (**ADJ 10651475**) and by Fairway and Solvis on December 14, 2016 (**ADJ 10762532**), with the finding of employment by Solvis largely based on Solvis' admission that it was applicant's employer. On December 7, 2017, defendant Zurich filed a timely petition for reconsideration, asserting that Solvis was not applicant's employer. On December 8, 2017, the court rescinded

[1] Zurich and SCIF are also in litigation with Solvis for rescission of the insurance contracts, but the coverage disputes are subject to mandatory arbitration and are not before the Board at this time. This judge expressed no opinion in any of his decisions herein about contractual liability as between the defendants.

its Findings and Order and set the matter for further proceedings to address the effect of Unemployment Insurance Code section 606.5 on the issue and to allow further evidence regarding the contractual relationship between Fairway and Solvis.

After an additional Status Conference on February 1, 2018, further proceedings were held and the matter resubmitted on March 21, 2018. Additional testimony was heard from Nelson Gonzalez, Fairway's president (and Ramon's brother).

New Joint Findings were issued on June 11, 2018, finding that applicant was employed by Fresh Grill and Fairway on October 11, 2016 (**ADJ 10651475**) and by Fairway alone on December 14, 2016 (**ADJ 10762532**). The court expressly found that applicant was not employed by Solvis on either date. On July 5, 2018, defendant Pacific Compensation Insurance Company (PCIC), the carrier for special employer Fresh Grill, filed a timely petition for reconsideration. The court issued a report and recommendation on July 17, 2018.

On August 30, 2018, the Appeals Board issued its Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration, in which it rescinded the court's June 11, 2018 Findings and Order and returned the matter to the trial level to develop the record.

Further proceedings were held, including a third trial with additional testimony from Nelson Gonzalez, and the matter was again resubmitted on January 15, 2019.

Another Joint Findings and Order issued on February 8, 2019 in which the court again found that applicant was employed by Fresh Grill and Fairway on October 11, 2016 (**ADJ 10651475**) and by Fairway alone on December 14, 2016 (**ADJ 10762532**), and was not employed by Solvis on either date.

On February 22, 2019, defendant Fairway filed a timely petition for reconsideration, asserting that Solvis was applicant's employer.

III
DISCUSSION

The court's prior report and recommendation dated July 17, 2018 contained a lengthy discussion of the common-law, statutory and contractual bases for finding employment. Since much of it was tangential and probably unnecessary, the discussion is not reiterated here. At this point, the court will focus more narrowly on the Appeals Board's reasons for returning the

matter to the trial level for development of the record.

In its August 30, 2018 decision, the Appeals Board noted that the record was unclear regarding whether Solvis was the PEO responsible for providing workers' compensation insurance coverage for applicant's employment at Fresh Grill, and returned the matter to the trial level to develop the record on that issue. In the meantime, the Appeals Board referenced Insurance Code section 11663 regarding liability as between general and special employers, and also cited *Serrano v. Exact Staff* (2016) 81 Cal. Comp. Cases 777 (Appeals Board panel decision) for the proposition that a PEO contract can "create an employment relationship for workers' compensation insurance purposes."

First, if one accepts the most recent testimony from Nelson Gonzalez at face value and ignores the clear contradictions between his testimony on March 21, 2018 and January 15, 2019,[2] Solvis was Fairway's PEO for the Fresh Grill account beginning on or about December 1, 2015 and continuing through the dates of applicant's injuries. While Fairway also continued its relationship with KBS on other accounts, KBS was not involved with the Fresh Grill account after December 1, 2015 (MOH/SOE 1/15/2019, p. 3, lines 19-20; p. 4, lines 4-8 and 17-19).

Second, the court is aware of Insurance Code section 11663. It applies to liability as between insurers of general and special employers. Inherent in the statutory language is the existence of a general employer and a special employer. If no employment is found, the statute would not apply; using that statute to support a finding of employment would be circular. Instead, that statute is used to determine liability as between two employers. The present case is still at the "is Solvis an employer or not" stage; as this court has stated repeatedly throughout this case, the issue of liability as between whatever entities are found to be employers is still pending, has not been submitted for decision, and is not before the Board at this time. Nevertheless, if the Appeals Board believes that determining which company paid the applicant is crucial to deciding employment itself and not just liability as between employers, it should be noted that ***applicant was paid directly by Fairway and not Solvis***. After some initial confusing testimony from Mr. Gonzalez that appeared to contradict his prior trial testimony, he

[2] The court did not find Mr. Gonzalez to be particularly credible in light of his conflicting testimony. However, because the court believes deciding the current dispute does not depend on whether or not Mr. Gonzalez's testimony is entirely accurate, this judge accepts his most recent (and unrebutted) testimony to establish the facts that the Appeals Board wanted to see in order to decide the employment issue.

clarified that Fairway paid the net pay due to its employees directly, while Solvis was responsible for paying payroll taxes, insurance, and other administrative items (MOH/SOE 1/15/2019, p. 5, lines 5-10). Under those circumstances, this court believes that Solvis acted in the capacity of a payroll service for Fairway with an additional contractual obligation to provide workers' compensation insurance and not as an actual employer.

Finally, the court urges the Appeals Board to carefully review the admittedly convoluted facts and case history in *Serrano v. Exact Staff, supra*. *Serrano* involved a fact pattern remarkably similar to the present case. Mr. Serrano was hired by a staffing agency, Exact Staff, who assigned him to work as a laborer at Service Connection. Exact Staff had a contract with HR Comp in which HR Comp agreed to pay payroll taxes and workers' compensation insurance premiums, while Exact Staff paid the net payroll directly to Serrano. In the present case, Fairway is in the same position as Exact Staff, Fresh Grill is in the same position as Service Connection, and Solvis is in the same position as HR Comp.

The parties in *Serrano* initially proceeded to trial before a WCJ on the issue of employment. The WCJ found that applicant was *not* an employee of the PEO, HR Comp (see Findings of Fact 11/18/2013, ADJ 7244192), and that finding was final.

The parties then proceeded to mandatory arbitration on the issue of insurance coverage/liability. Arbitrator Robert Rassp (now a WCJ) found that the carriers for Exact Staff and HR Comp (York and Travelers, respectively) were jointly and severally liable for applicant's claim, based on the language of the contract between Exact Staff and HR Comp. HR Comp's carrier, Travelers, filed a petition for reconsideration, noting that a WCJ had previously found that Travelers' insured, HR Comp, was not applicant's employer. An Appeals Board panel denied reconsideration, adopting and incorporating the arbitrator's report and recommendation without further comment.

In his report and recommendation, the arbitrator specifically noted that "the matter before the Arbitrator is the issue of insurance coverage and not employment." Addressing HR Comp/Travelers' argument that the finding of no employment as to HR Comp should be *res judicata* because of the WCJ's findings, the arbitrator opined as follows:

> "TRAVELERS is also claiming it is *res judicata* that the Applicant was not an employee of HR COMP based on Judge Lemberg's Findings of Fact in his decision dated November 18, 2013. While this decision was binding with respect to the Applicant, it is not a final finding *on insurance coverage* which

> is subject to mandatory arbitration *and is a completely different issue*. The employer-employee relationship between the Applicant and HR COMP was created by contract between EXACT STAFF and HR COMP *which is a separate and distinct analysis* from the case at bar before Judge Lemberg since his analysis was based on the issue of control of the Applicant's means of work under case law that governs who controls an employee's time, place, manner of work activities [citation omitted]. The within arbitration proceedings address *a separate issue* as to whether or not HR COMP's workers' compensation policy covers the Applicant's date of injury, *regardless of whether or not the Applicant actually worked for HR COMP*." *Serrano,* 81 Cal. Comp. Cases 777, 785 (emphasis added).

Arbitrator Rassp saw no contradiction between the trial judge's finding that applicant was not an employee of the PEO and the arbitrator's own finding of an employment relationship by contract *for purposes of insurance coverage and liability* because, as he explained, they are two completely different issues.

This court agrees with the Appeals Board's statement that *Serrano* supports the idea that the PEO contract between Solvis and Fairway creates "an employment relationship for workers' compensation insurance purposes." However, the court does not agree that a contractual relationship *for insurance purposes* necessarily requires a finding that the PEO was actually applicant's employer. As *Serrano* makes abundantly clear, those are two completely different issues. Only the issue of whether Solvis was actually applicant's employer is at issue in the present case. The issue of whether Solvis is an employer "for purposes of insurance coverage and liability" is a separate issue that is not before the court and is subject to mandatory arbitration as a coverage issue in the first instance.

On the issue of whether Solvis was actually applicant's employer, there is nothing in the record to support such a finding; in fact, all of the evidence supports the finding that applicant was not actually employed by Solvis. Applicant was hired by Fairway. Fairway assigned applicant to work at Fresh Grill. Fairway and Fresh Grill controlled applicant's wages, hours and working conditions; there is no evidence at all that Solvis had any input on any of that. Applicant did not even know Solvis existed until after her injuries. Applicant received her net pay directly from Fairway. As discussed in detail in the court's prior report and recommendation on July 17, 2018, none of the common-law or statutory bases for employment support a finding that Solvis was applicant's employer. The *only* way that Solvis could be found to be an "employer" was by virtue of the PEO contract between Solvis and

Fairway, and pursuant to *Serrano*, such an employment relationship would be for insurance coverage and liability purposes only, which is not before the court at this time.

IV
RECOMMENDATION

It is respectfully recommended that defendant Fairway's Petition for Reconsideration be denied in its entirety.

DATE: February 27, 2019

Paul DeWeese

PAUL DeWEESE
WORKERS' COMPENSATION JUDGE

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