WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

DENNIS GRAY, *Applicant,* vs. PATHWAY GROUP INCORPORATED; EMPLYERS' COMPENSATION INS., SOLVIS STAFFING SERVICES INC.; STATE COMPENSATION INSURANCE FUND; ZURICH AMERICAN INS. OF ILLINOIS; COMMERCIAL COOLING PAR ENGINEERING, INC.; ARGONAUT INSURANCE COMPANY, *Defendants.*	**Case Nos. ADJ10520702** **(Marina del Rey District Office)** **OPINION AND ORDERS GRANTING PETITIONS FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION**

Co-defendants, Commercial Cooling Par Engineering, Inc. (hereinafter, "Commercial Cooling"), and Pathway Group Incorporated (hereinafter, "Pathway") each seek reconsideration of the May 22, 2019 Findings and Order issued by a workers' compensation administrative law judge (WCJ), wherein the WCJ found that applicant, while allegedly employed on July 21, 2016, sustained industrial injury to his lumbar spine. The WCJ found that applicant was an employee of both Commercial Cooling and Pathway on the date of injury, with each co-defendant having joint and several liability. The WCJ also found that applicant was not an employee of Solvis Staffing Incorporated (hereinafter, "Solvis").

Commercial Cooling does not dispute the finding of general and special employment. Commercial Cooling contends that it does not have joint and several liability with Pathway for applicant's workers' compensation benefits.

Pathway contends that the WCJ erred in finding that applicant was not employed by Solvis, arguing that applicant was a joint employee of Solvis by contract with Commercial Cooling and Pathway.

Solvis filed an Answer in response to the Petitions for Reconsideration of Commercial Cooling and Pathway.

We have considered the allegations of the Petitions for Reconsideration, the Answer, and the record in this matter. The WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report), setting forth the relevant facts, and recommending that the petitions be denied and that the May 22, 2019 decision be amended to reflect the correct name of Commercial Cooling, and to delete language stating that Pathway and Commercial Cooling are jointly and severally liable.

Based on our review of the record and for the reasons discussed below, we grant the Petitions for Reconsideration, and amend the May 22, 2019 Findings and Order as recommended by the WCJ.

FACTS

Applicant, while allegedly employed on July 21, 2016, sustained industrial injury to his lumbar spine. At the time of the injury, the employers' workers' compensation carriers were as follows: for Pathway, the insurance carrier was Employers' Compensation Insurance; for Commercial Cooling the insurance carrier was Argonaut Insurance Company; and for Solvis, there was joint coverage by State Compensation Insurance Fund and Zurich American Insurance of Illinois.

This matter was set for trial on the sole issue of employment. Trial commenced on February 20, 2019 and was completed on April 24, 2019. The parties were allowed time to submit briefs, and the matter was submitted.

On May 22, 2019, the WCJ issued the disputed Findings and Order. The WCJ found that there was a general-special relationship between Pathway as the general employer and Commercial Cooling as the special employer, with joint and several liability. The WCJ also found that applicant was not employed by Solvis. Commercial Cooling and Pathway each seek reconsideration.

DISCUSSION

Pursuant to Labor Code section 3300, an "employer" includes, in relevant part, every "person . . . which has any natural person in service." (Lab. Code, § 3300(c).) A person rendering service for another is presumed to be an employee unless "the one for whom the service was rendered" affirmatively proves otherwise. (Lab. Code, § 3357; *Jones v. Workmen's Comp. Appeals Bd.* (1971) 20 Cal.App.3d 124 [36

Cal.Comp.Cases 563] citing *Gale v. Industrial Acc. Com.* (1930) 211 Cal.137, 141; see also, *Yellow Cab v. Workers' Comp. Appeals Bd.* (*Edwinson*) (1991) 226 Cal.App.3d 1288 [56 Cal.Comp.Cases 34].)

The WCJ explained in his Report that an entity may be an employer if it exerts control over wages, hours and working conditions; if it "engages" a person's services; or if it "suffers or permits" a person to work. (Report, p. 6.) We do not endorse this discussion of employment in the Report. In addtition to the "control" test, the WCJ relied, in part, on the "suffer or permit" to work language in *Martinez v. Combs* (2010) 49 cal.4th 35 [75 Cal.Comp.Cases 430] and *Curry v. Equilon Enterprises, LLC* (2018) 23 Cal.App. 5th 289 [2018 Cal. App. LEXIS 466]. (§ 1194.) These cases arose from wage and hour claims, and the "suffer or permit" to work language applies only to the question of "whether workers should be classified as employees or independent contractors for purposes of California wage orders, which impose obligations relating to the minimum wages, maximum hours, and a limited number of very basic working conditions." *(Dynamex Operations West, Inc., v. Superior Court* (2018) 4 Cal.5th 903, 913-914 [83 Cal.Comp.Cases 817] (*Dynamex*).)

We note that the "eight factor test" from *Borello* remains the standard in California to determine if applicant is an employee or an independent contractor[1]. In this matter, we disagree with the legal analysis employed by the WCJ to determine to determine the joint employers of applicant. The issue presented to the WCJ for determination at trial was *not* whether applicant was or was not an independent contractor, but rather, whether Commercial Cooling, Pathway and Solvis were all liable as joint employers of applicant.

"When an employer lends an employee to another employer and relinquishes to the borrowing employer some right of control over the employee's activities, a 'special employment relationship' arises between the borrowing employer and the employee. (citation)" (*Caso v. Nimrod Prods.* (2008) 163 Cal.App.4th 881, 888-889 ("*Caso*") citing *Marsh v. Tilley Steel Co.* (1980) 26 Cal.3d 486 [45 Cal.Comp.Cases 193] ("*Marsh*") and *Kowalski v. Shell Oil Co.* (1979) 23 Cal.3d 168 [44

[1] The California Supreme Court in *Borello* "ordered review to decide whether agricultural laborers engaged to harvest cucumbers under a written 'sharefarmer' agreement are 'independent contractors' exempt from workers' compensation coverage." (*Borello, supra*, 48 Cal.3d at 345.)

Cal.Comp.Cases 134] ("*Kowalski*").) A special employer is liable to an injured employee for workers' compensation benefits. (*Caso, supra,* 163 Cal.App.4th at 888 citing *Kowalski* and *Santa Cruz Poultry, Inc. v. Superior Court (Stier)* (1987) 194 Cal.App.3d 575 [52 Cal.Comp.Cases 429].)[2] The determination of whether a special employment relationship exists is a question of fact. (*Kowalski, supra,* 23 Cal.3d at p. 176.)

> The decision turns on "(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, 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 [its] 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." (*Riley v. Southwest Marine, Inc.* (1988) 203 Cal.App.3d 1242, 1250 [250 Cal. Rptr. 718].) Circumstances tending to negate the existence of a special employment relationship include situations in which "[t]he employee is (1) not paid by and cannot be discharged by the borrower, (2) a skilled worker with substantial control over operational details, (3) not engaged in the borrower's usual business, (4) employed for only a brief period of time, and (5) using tools and equipment furnished by the lending employer." (*Marsh, supra,* 26 Cal.3d at p. 492.) (*Caso, supra,* 163 Cal.App.4th at 889.)

We note that there is abundant evidence in the record supporting dual employment between Commercial Cooling and Pathway. We are not persuaded that the employment contract between Pathway and Commercial Cooling was a "hybrid of a general-special agreement with three parties instead of two" imposing liability on Solvis, as urged by Pathway. On this record, the finding by the WCJ that applicant was "jointly employed" by Pathway (the general employer) and Commercial Cooling (the special employer) is justified.

Accordingly, we grant the Petitions for Reconsideration to amend the May 22, 2019 Findings and Order as recommended by the WCJ.

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[2] The liability of general and special employers for compensation benefits is joint and several. (See *Fireman's Fund Indem. Co. v. State Compensation Ins. Fund (Smith)* (1949) 93 Cal.App.2d 408 [14 Cal.Comp.Cases 180].)

1 **IT IS ORDERED** that co-defendant Commercial Cooling's Petition for Reconsideration of the
2 May 22, 2019 Findings and Order is **GRANTED.**
3 **IT IS FURTHER ORDERED** that co-defendant Pathway's Petition for Reconsideration of the
4 May 22, 2019 Findings and Order is **GRANTED.**
5 **IT IS FURTHER ORDERED**, as the Decision After Reconsideration of the Workers'
6 Compensation Appeals Board, that the May 22, 2019 Findings and Order is **AFFIRMED, EXCEPT** that
7 it is **AMENDED** to read as follows:
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2 **FINDINGS OF FACT**

3 1. Applicant, Dennis Gray, was an employee of Pathway Group
4 Incorporated and Cooling Par Engineering Incorporated on July 21,
5 2016 at the City of Industry, California. There was a general-special
6 employment relationship between Pathway Group Incorporated as the
general employer and Commercial Cooling Par Engineering
Incorporated as the special employer. Applicant was not employed by
7 Solvis Staffing Services Incorporated.

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9 **WORKERS' COMPENSATION APPEALS BOARD**

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11 DEPUTY
ANNE SCHMITZ

12 **I CONCUR,**

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16 CRAIG SNELLING
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19 KATHERINE WILLIAMS DODD

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21 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**
22
23 AUG 1 2 2019

24 **SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED ON THE**
25 **FOLLOWING PAGE AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL**
26 **ADDRESS RECORD.**

27 **MG/abs**

WCAB Case No: ADJ10520702

DENNIS GRAY,	V. PATHWAY GROUP INCORPORATED, EMPLOYERS' COMPENSATION INS., SOLVIS STAFFING SERVICES INC., STATE COMPENSATION INS. FUND and ZURICH AMERICAN INS. OF ILLINOIS, COMMERCIAL COOLING PAR ENGINEERING, INC., ARGONAUT INSURANCE COMPANY.
Workers' Compensation Administrative Law Judge:	**TERRY L. SMITH**

REPORT AND RECOMMENDATION ON DEFENDANT'S PETITION FOR RECONSIDERATION

I.

INTRODUCTION:

1. Applicant's Occupation : Not an Issue
   Applicant's Age : 56
   Date of Injury : July 21, 2016
   Parts of Body Injured : Lumbar spine
   Manner in which injury occurred : Not an issue

2. Identity of Petitioner : **Defendant Pathway** filed the Petition.
   Timeliness : The petition is timely.
   Verification : The petition is verified.

   Identity of Petitioner : **Defendant Commercial Cooling** filed the Petition.
   Timeliness : The petition is timely.
   Verification : The petition is verified.

3. Date of Joint Findings & Order : May 22, 2019

4. Petitioner Pathway contends that: applicant was a joint employee of Solvis Staffing Services, Inc. by contract with Pathway Group Incorporated and Commercial Cooling Par Engineering, Inc.

5. Petitioner Commercial Cooling contends: they are not an employer with joint and several liability with Pathway in respect to workers' compensation coverage and benefits as the issue of liability is addressed by statute and is the subject of a binding contract.

II.
STIPULATED FACTS

Dennis Gray, born November 23, 1960, while allegedly employed on July 21, 2016 at the City of Industry, California, sustained injury arising out of and in the course of employment to the lumbar spine.

At the time of the injury, the employers' Workers' Compensation carriers were as follows: for Pathway Group Incorporated, the insurance carrier was Employer's Compensation Insurance; for Solvis Staffing Services, there was joint coverage by State Compensation Insurance Fund and Zürich American Insurance of Illinois; Commercial Cooling Par Engineering Incorporated was insured by Argonaut Insurance Company.

FACTS:

Applicant was injured on July 21, 2016, while working at Commercial Cooling. Applicant's friend told him about working at Commercial Cooling. Applicant went to Commercial Cooling and was told by David Alfaro and Juan Carlos that he had to go to Pathway to be hired. On applicant's first day of work, March 2016, he first went to Pathway where he met with the office manager completed paperwork and drug testing. (MOH/SOE 2/20/19, p. 4, lines 10-18).

Exhibit Y EAMS Document ID#69487933 is the personnel file. The documents found within the personnel file are as follows: Employment Application "Pathway Group", Pathway Group, Inc. Background and Drug Screening Authorization, Form W-4, Proof of Receipt of Employee Handbook Provided by Pathway Group, Pathway Group Data Input Sheet, all dated 3/8/16; Form I-9, signed by Branch Manager, "Employer" Pathway Group, dated 3/28/19 and Employee Pay History, Client : 7007 Pathway Group from 1/1/16 through 9/16/16.

Upon arriving at Commercial Cooling David Alfaro assigned him the job of an assembler. He worked under the supervision of Juan Carlos and David Alfaro. Juan Carlos advised him of his job duties, hours, and would assign any required overtime. Applicant's tools were provided by Commercial Cooling. (MOH/SOE 2/20/19, p. 4 line 21- p. 5 line 3). *EAMS Document ID#69487969*

A Commercial Cooling employee would hand out the paychecks. The paycheck and paycheck stub were enclosed in an envelope that said, "Pathway." The check stub showed "Solvis Staffing," and

the check showed "PROG HR Corporation for Solvis Services." (MOH/SOE 2/20/19, p. 5 lines 4-8). *EAMS Document ID#69487969*

***Exhibit 1** EAMS Document ID#69487527 is a photocopy of a 3/18/16 paycheck issued to applicant. The top left corner notes "PROG HR Corporation for Solvis Services." The top center notes "Services Provided for: Pathway Group, 510 N. Tustin St., Orange, CA 92867.*

***Exhibit 2** EAMS Document ID#69487543 is a photocopy of the applicant's paycheck stub dated 7/22/16. The top left corner list "Employer: Solvis Staffing Services, Inc." The envelope attached is from "Pathway Group. Congratulations 206 Days Without Injury!"*

***Exhibit A** EAMS Document ID#69487580 is a photocopy of a 2016 Form W-2, which list Solvis as the employer.*

Applicant does not know who Solvis is. Applicant asked who Solvis was after he received the checks, and Commercial Cooling told him that the checks were delivered by Pathway. (MOH/SOE 2/20/19, p. 5 lines 9-11). *EAMS Document ID#69487969*

A female at Pathway gave applicant instructions on what to do if he was injured. She advised him to contact Commercial Cooling and then they would notify Pathway, and he was also to contact Pathway. He met with her on approximately 10 occasions. If he was sick he was to call Pathway and also advise Juan Carlos at Commercial Cooling. After he was injured, he contacted Pathway and was advised that he needed to come to Pathway and complete an incident report. Pathway sent him to an industrial clinic on Mountain. (MOH/SOE 2/20/19, p. 5 lines 13-22). *EAMS Document ID#69487969*

Applicant was evaluated by the clinic. Thereafter, Pathway advised the applicant that his position at Commercial Cooling was no longer needed. He continues to believe he is employed by Pathway. Applicant did not receive any additional paperwork from Solvis. When he went to Pathway to complete paperwork, he was told that Solvis was a "mother company." He did not inquire any further to determine who Solvis was. He received his paychecks from Pathway. During the entire time he worked for Commercial Cooling, he never talked with anyone from Solvis. He did talk with a female manager at Pathway, and they said they would reassign him. Pathway was the entity that would place him at different locations. He believes Pathway was the employer because their name was on the envelopes, and they sent them to Commercial Cooling. (MOH/SOE 2/20/19, p. 5 line 23- p. 6, line 8). *EAMS Document ID#69487969*

David Osborne testified he is the president of Pathway Group which is a "recruiting group." Solvis is a vendor of Pathway that they use for employer-of-records services for payroll, Workers' Compensation, and taxes for Solvis employees. **Pathway entered into an agreement with Solvis to take on the employment functions and to manage the employees.** They have a Service Agreement with Solvis that Dennis Gray would work for Solvis. Pathway never paid the applicant. Pathway does not have a payroll service for persons like Mr. Gray. They only find locations for

persons like Mr. Gray to work. **They are skilled recruiting firm.** The client (Commercial Cooling) will make a selection as to whom they want to work for them, and Pathway would run a background check and other checks and provide the information to Solvis for review. Solvis **reviews the information, approves it and "on-boards" the employee.** (MOH/SOE 2/20/19, p. 7 lines 5-17). *EAMS Document ID#69487969 (Although the contract indicates Solvis fuctions as an employer, and Mr. Osborne testified Pathway was only "a skilled recruiting firm, " factually, Pathway controlled applicant, acting like applicant's employer as Solvis had no control.*

Mr. Osborne testified Solvis asked Pathway to fill out employment applications on Pathway's letterhead as Solvis did not have employment applications. Pathway would take employment applications from all of the candidates after they were completed and forward them to Solvis to onboard. (MOH/SOE 4/24/19, p. 2 line 24 – p. 3, line 2). *EAMS Document ID#70086418*

Mr. Osborne ***acknowledged using Pathway envelopes in some cases to pass out Solvis checks as they had run out of blank envelopes.*** He is not sure whether Solvis had any envelopes stamped. (MOH/SOE 4/24/19, p. 3, lines 9-13). *EAMS Document ID#70086418 (However, the Pathway envelope, **Exhibit 2**, indicates "Congratulations, 206 Days Without injury! Week 26 Safety Tip". Thus, it appears the envelope was specifically printed for use at Commercial Cooling, not just some envelopes laying around the office at Pathway as they ran out of blank envelopes.)*

Mr. Osborne testified the procedures for employees to report injuries at the time Mr. Gray had his injury would be to report the injury to Commercial Cooling and to Pathway, then Pathway would ***send the information to Solvis's TPA, ATAS.*** The witness did not know what occurred in this case or whether applicant would deal with Rebecca Trujillo or any other person at Pathway. (MOH/SOE 4/24/19, p. 3, lines 14-18). *EAMS Document ID#70086418*

Mr. Osborne identified Rod Brundle as the safety consultant for Pathway. He identified "***Exhibit Z***" *EAMS Document ID# 70087222* as the First Report of Injury. (MOH/SOE 4/24/19, p. 3, line 21- p. 4, line 1). *EAMS Document ID#70086418 (**Exhibit Z**, is The First Report of Injury which is labeled "ATAS Insurance and was prepared by Rod Brundle, "Claims Manager". The employer is listed as Solvis Staffing Services, Inc.. The WCJ notes that ATAS is not the insurance carrier for any of the three defendants.)*

Mr. Osborne would not deal directly with Solvis. He did receive a letter from Mr. Carr, the president of Solvis, indicating Mr. Gray was a Solvis employee. (MOH/SOE 4/24/19, p. 4, lines 4-5). *EAMS Document ID#70086418* (Correspondence on Solvis letterhead dated 8/11/16, "Exhibit B" *EAMS Document ID#69487739*) *(However, the carriers for Solvis Staffing Services, State Compensation Insurance Fund and Zürich American Insurance of Illinois deny Solvis was an employer of the applicant. The fact that Mr. Carr is misrepresenting the insurance carrier, that ATAS is handling the claim when it appears they were not and the letter is not signed under penalty of perjury, makes the correspondence suspect and thus given its due weight.)*

Mr. Osborne testified Pathway entered into a contract with Solvis in January 2016. Exhibit AA *EAMS Document ID#69487879* Solvis had the power to cancel the contract or the relationship at

any time. They could terminate the workers by "stop cutting a paycheck." He does not know if applicant ever completed an I-9 form for Solvis. (MOH/SOE 4/24/19, p. 4, lines 6-12). *EAMS Document ID#70086418*

Procedural

The matter first proceeded to Trial on February 20, 2019 and was completed on April 24, 2019 with Briefs being submitted prior to May 6, 2019 and the case stood submitted. On May 22, 2019, the court issued a Findings and Order that there was a general-special employment relationship between Pathway Group Incorporated as the general employer and Commercial Cooling Par Engineering Incorporated as the special employer, with joint and several liability. Applicant was not employed by Solvis Staffing Services Incorporated. On June 13, 2019, defendant Employers Compensation Insurance Company filed a timely petition for reconsideration, asserting that applicant was a joint employee of Solvis Staffing Services, Inc. by contract with Pathway and Commercial Cooling Par Engineering. On June 13, 2019, defendant Argonaut filed a timely petition for reconsideration asserting that Commercial Cooling Par Engineering is not an employer with joint and several liability with Pathway in respect to workers' compensation coverage and benefits as the issue of liability is addressed by statute and is the subject of a binding contract.

III.

DISCUSSION

A. Petitioner Pathway contends that: applicant was a joint employee of Solvis Staffing Services, Inc. by contract with Pathway and Commercial Cooling Par Engineering, Inc.

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. The contractual relationship is not controlling in these circumstances, arbitration as to coverage is not at issue before the court.

It appears the parties are in agreement that Solvis was acting as Pathway's Professional Employer Organization (PEO) at the time of applicant's injury on July 21, 2016.

According to Wikipedia, a PEO "is a firm that provides a service under which an employer can outsource employee management tasks, such as employee benefits, payroll and workers' compensation, recruiting, risk/safety management, and training and development. The PEO does this by hiring a client company's employees, thus, becoming their employer of record for tax purposes and insurance purposes." It is generally accepted that a PEO is an employer for purposes of workers' compensation liability (see, e.g., *PES Payroll v. WCAB* (2007) 72 Cal. Comp. Cases 696 (writ den.); *Serrano v. Exact Staff et. al.* (2016) 81 Cal. Comp. Cases 777 (Appeals Board panel decision)). The present case involves the legal basis for that generally accepted proposition.

1. COMMON-LAW EMPLOYMENT

In cases involving dual or joint employment relationships, California courts have set forth possible alternative definitions (or tests) that can be applied to determine whether an entity was a legal employer (see generally *Curry v. Equilon Enterprises* (2018) 49 Cal. 4th 35 [75 Cal Comp. Cases 430]. In summary, an entity that exerts control over wages, hours and working conditions can be an employer; an entity that engages an employee's services can be an employer; and an entity that suffers or permits a person to work can be that person's employer.

a. Control Over Wages, Hours and Working Conditions. In almost all disputes regarding whether or not there is an employer-employee relationship, the question of control over the person's work is the primary factor to consider in determining whether such relationship exists. In the present case, there was a traditional general-special employment relationship between temporary staffing agency Pathway and the assigned work location Commercial Cooling, in which both Pathway and Commercial Cooling exerted some measure of control over applicant's wages, hours and working conditions. However, there is no evidence that Solvis had any input at all,

much less any control, over the applicant's wages, hours, working conditions, or anything else related to applicant's employment.

Although David Osborne, President of Pathway testified Solvis was to take over the employment functions and to manage the employees, and that Pathway only finds locations for persons like applicant to work, "a skilled recruiting firm." However, when compared to the overall record, Mr. Osborne's testimony was not determined to be credible by the WCJ. The evidence shows Pathway did more than finding locations for persons like applicant to work. The record shows Pathway was in control of the hiring and placement of the applicant and in charge of the applicant when he was injured. Osborne testified Pathway used "Pathway" envelopes in some cases to pass out Solvis checks as they had run out of blank envelopes. However, the Pathway envelope, Exhibit 2, indicates "Congratulations, 206 Days Without injury! Week 26 Safety Tip". Thus, it appears the envelope was specifically printed for use at Commercial Cooling, not just some envelopes laying around the office at Pathway as they ran out of blank envelopes. Further, most of the personnel file was prepared on Pathway documentation, not Solvis. Pathway was the only contact and applicant did not even know who Solvis was. Therefore, the testimony of Mr. Osborne was not found to be credible.

b. Engaging Applicant's Services. "To engage" has no other apparent meaning than its plain, ordinary sense of "to employ," that is, to create a common law employment relationship (*Martinez*, 49 Cal 4th. 64). The common law test focusses on the issue of whether a worker is an employee or independent contractor (*Curry*, 23 Cal. App. 5th at 304 [Citation omitted] The *Curry* Court goes on to discuss the various factors that forms that determination; those factors are familiar in workers' compensation cases from *S.G. Borello & Sons, Inc. v. Dept of Industrial Relations* (1989)

48 Cal. 3d. 341, [54 Cal. Comp. Cases 80]. In the present case, applicant testified that his friend told him about working at Commercial Cooling. Applicant went to Commercial Cooling and was told that he had to go to Pathway to be hired. On applicant's first day of work, March 2016, he first went to Pathway where he met with the office manager completed paperwork and drug testing. (MOH/SOE 2/20/19, p. 4, lines 10-18).

Exhibit Y *EAMS Document ID#69487933* is applicant's personnel file located at Pathway which includes Pathway's Employment Application, Background and Drug Screening Authorization, Form W-4, Proof of Receipt of Employee Handbook, Data Input Sheet, Form I-9, signed by Pathway and Employee Pay History Pathway.

Upon arriving at Commercial Cooling, Commercial Cooling's supervisor assigned him the job of an assembler. Another Commercial Cooling supervisor advised him of his job duties, hours, and would assign any required overtime. Applicant's tools were provided by Commercial Cooling. (MOH/SOE 2/20/19, p. 4 line 21- p. 5 line 3) *EAMS Document ID#69487969*. Applicant testified he does not know who Solvis is.

With the possible exception of Solvis paying the applicant at some point, there is no evidence of any relationship at all between applicant and Solvis, and no evidence that any *Borello* factors existed that would weigh in favor of Solvis as applicant's employer. However, there is substantial evidence that *Borello* factors exist between applicant and both Pathway and Commercial Cooling.

c. Suffers or Permits to Work. The use of this language stems from child labor laws in the early 20th century that were designed to prevent evasion of liability by claiming that a person was not employed in a traditional master/servant relationship (*Martinez* at 58). In essence, it means that an employer "shall not . . . permit by acquiescence, nor suffer by a failure to hinder" someone from

doing work to the employer's benefit without any liability (*Id.*) In the present case, there is not any substantial evidence that Solvis had knowledge of applicant performing any activities on Solvis' behalf such that Solvis could be said to have suffered or permitted the activities. The only exception is a post injury, August 11, 2016, correspondence by Mr. Carr which this WCJ gives its due weight. ***(Exhibit B)***

Accordingly, it is found that Solvis did not meet any of the common-law tests that would support a determination that Solvis was applicant's employer.

2. *STATUTORY EMPLOYMENT*

Labor Code §3357 provides that "the person rendering service for another, other than as an independent contractor, or unless especially excluded herein, is presumed to be an employee." In the present case, applicant rendered services for Pathway and Commercial Cooling. There is no evidence that the applicant rendered any services at all for Solvis.

Unemployment Insurance Code §606.5 addresses in detail the employer-employee relationship with regard to temporary agencies employee leasing companies (i.e. PEOs). Subdivision (a) provides that, "whether an individual or entity is the employer of specific employees shall be determined under common law rules applicable in determining the employer-employee relationship, except as provided in subdivision (b) and (c)." Since it was determined that the applicant was not a common law employee of Solvis, the court turned to use §606.5, subdivisions (b) and (c), to determine whether any exceptions applied.

UIC §606.5, subdivision (b) provides as follows:

"As used in this section, a 'temporary services employer' and a 'leasing employer' is an employing unit the contracts with clients or customers to supply workers to perform services for the client or customer and performs *all* of the following functions [emphasis added]:

(1) Negotiate with clients or customers for such matters as time, place, type of work, working conditions, quality, and price of the services.
(2) Determines assignments or reassignments of workers, even though workers retain the right to refuse specific assignment.
(3) Retains the authority to assign or reassign a worker to other clients or customers when a worker is determined unacceptable by a specific client or customer.
(4) Assigns or reassigns the worker to perform services for a client or customer.
(5) Sets the rate of pay of the worker, whether or not through negotiation.
(6) Pays the worker from its own account or accounts.
(7) Retains the right to hire and terminate workers."

Section 606.5 subdivision (b) defines a "leasing employer" (which it appears the parties believe Solvis to be in the present case) as one that performs *all seven* of the listed functions. In this case, Solvis arguably performed *only one* of the listed functions (paying the worker from its own account), although even that is debatable. There is no evidence that Solis performed any of the other functions with regard to applicant's employment at Pathway/ Commercial Cooling.

Section 606.5, subdivision (c) provides that an entity contracts to supply an employee to perform services for a customer or client and meets the definition of "leasing employer" set forth in subdivision (b), then that entity is the employer of the employee performing services. On the other hand, if the entity contracting to supply an employee to perform services for a customer or client does *not* meet the definition of "leasing employer" set forth in subdivision (b), then the client or customer is the employer of the employee performing the services. Subdivision (c) further provides that if an entity that contracts to supply an employee to perform services for a customer

or client pays the employee's wages but does not meet the definition of "leasing employer" set forth in subdivision (b), then the contracting entity pays the wages *as the agent of the employer*.

In the present case, Solvis is the contracting entity, Pathway is the customer or client, and the applicant is the employee. Because Solvis does not meet the statutory definition of a "leasing employer" set forth in subdivision (b), to the extent that Solvis paid any of the applicant's wages, Solvis did so *as Pathway's agent* and *not* as applicant's employer, as expressly provided in section 606.5(c).

Accordingly, it was found that Solis did not meet any applicable statutory definition that would support a determination that Solvis was applicant's employer.

3. EMPLOYMENT BY CONTRACT

If no common-law employment relationship exist and there is no applicable statutory employment relationship, then the only remaining way in which Solvis could be held to be applicant's employer would be an express contract creating a valid employer-employee relationship.

Indeed, the existence of a valid and enforceable contract creating an employer-employee relationship is the determining factor in most cases involving a PEO-as-employer for workers' compensation purposes. See generally *PES Payroll* and *Serrano, supra*. However, parties and courts must be careful to distinguish between the issue of *employment* and the issue of *coverage/liability*, which are two different things.

The case of *Serrano,* 81 Cal. Comp. Cases 777, involves 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 directly to Serrano. The parties initially proceeded to trial before the WCJ on the issue of employment. The WCJ found that applicant was *not* an employee of HR Comp.

The parties then proceeded to mandatory arbitration on the issue of insurance coverage/liability. Arbitrator Robert Rassp 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." But then went on to state that "the employment issue for the purpose of insurance coverage is established by contract between Exact Staff and HR Comp." (*Serrano*, 81 Cal. Comp. Cases 781). The arbitrator determined that, in essence, the issues of insurance coverage and employment were inextricably intertwined because both coverage and an employer-employee relationship arose out of the same contract language. He found Exact Staff to be a temporary agency and HR Comp to be a PEO, and that *based upon the contract language between the two*, they were concurrent employers of the applicant on the date of injury. The arbitrator went on to describe the agreement between Exact Staff and HR Comp as a "bizarre hybrid of a general-special employment agreement with three parties involved instead of two," and determined that "this hybrid arrangement placed both Exact

Staff and HR Comp as joint and several employers of the applicant *for the sole purpose of insurance coverage*, legally bound together by their written contract" (emphasis added).

In the present case, the court did consider the contract between Solvis and Pathway in order to determine whether Solvis was an employer by contract. Solvis' very first contractual responsibility (Ex. AA, p.1) *EAMS Document ID#69487879* was that Solvis "is the employer of record for all employees placed with CLIENT [Pathway's] for assignment at CLIENT'S [Pathway's] designated facilities and places of business." The next provision was that Solvis "will have responsibility for hiring and terminating its employees, which may be assigned to CLIENT [Pathway's]."

Because Solvis did not hire the applicant, who was hired directly by Pathway, this judge found that the applicant in this case was *not* Solvis' employee by contract. Solvis did not hire him and did not have responsibility for hiring or terminating him. As a result, applicant did not fall within the parameters of the contract between Solvis and Pathway.

As in *Serrano,* this trial level WCJ found that the PEO, Solvis, was *not* applicant's employer, based upon common-law definition of "employer." Based upon the Unemployment Insurance Code section 606.5, and based upon the applicant's testimony.

This court expresses no opinion about whether Solvis has any contractual liability for applicant's claims, which is a separate issue from whether Solvis was an employer and is beyond the scope of this trial." The issue of insurance coverage and any reliability resulting therefrom is subject to mandatory arbitration in the first instance.

B. **Petitioner Commercial Cooling contends: they are not an employer with joint and several liability with Pathway in respect to workers' compensation coverage and benefits as the issue of liability is addressed by statute and is the subject of a binding contract.**

Commercial Cooling, while agreeing to the general-special employment (Finding of Fact), Commercial Cooling does not agree with the finding that Pathway and Commercial Cooling are equally liable for providing workers' compensation coverage and workers' compensation benefits to applicant.

As discussed above, the only issue before the court was employment and the issue of insurance coverage is an issue for arbitration and not before the court. Therefore, the WCJ recommends that the Findings of Fact be amended to remove the words, "with joint and several liability." The WCJ also recommends that addition of "Commercial" before "Cooling Par Engineering Incorporated" to designate the correct business entity. The recommended changes to paragraph 1 of the Findings of Fact would be as follows:

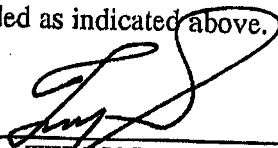
1. Applicant, DENNIS GRAY, was an employee of Pathway Group Incorporated and Commercial Cooling Par Engineering, Incorporated on July 21, 2016, at the City of Industry, California. There was a general-special employment relationship between Pathway Group Incorporated as the general employer and Commercial Cooling Par Engineering Incorporated as the special employer. Applicant was not employed by Solvis Staffing Services Incorporated.

IV.

RECOMMENDATION

It is respectfully recommended that both defendants' Petitions for Reconsideration be denied in their entirety and the Findings of Fact be amended as indicated above.

Dated: 06/26/2019



TERRY L. SMITH
Workers' Compensation Administrative Law Judge