WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JESUS ORTEGA GONZALEZ, *Applicant*

vs.

MAJOR TRANSPORTATION SERVICES, INC., A CALIFORNIA CORPORATION, BALJINDER S. GILL, INDIVIDUALLY, AND DBA MAJOR EXPRESS LOGISTICS, PEOPLEASE LLC; NATIONAL INTERSTATE RICHFIELD., *Defendants*

Adjudication Number: ADJ11968759
Fresno District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

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

An employee may have more than one employer. The characteristics of such dual employment are: 1) that the employee is sent by one employer (the general employer) to perform labor for another employer (the special employer); 2) rendition of the work yields a benefit to each employer; and 3) each employer has some direction and control over the details of the work. (*See Kowalski v. Shell Oil Co*. (1979) 23 Cal.3d 168 [44 Cal.Comp.Cases 134]; *Meloy v. Texas Co*. (1953) 121 Cal.App.2d 691 [18 Cal.Comp.Cases 313]; *Ridgeway v. Industrial Acc. Com*. (1955) 130 Cal.App.2d 841 [20 Cal.Comp.Cases 32]; *Doty v. Lacy* (1952) 114 Cal.App.2d 73 [17 Cal.Comp.Cases 316]; *Caso v. Nimrod Prods*. (2008) 163 Cal.App.4th 881.)

A Professional Employer Organization (PEO) acts as a general employer and typically is an entity that leases back employees to another employer, provides payroll services, and agrees to obtain workers' compensation coverage for joint employees. If an employer leases all of its employees to the PEO and then leases all of those employees back, the special employer will have all of its liability insured through a "client policy" which is a policy issued to the PEO that insures

leased back employees for that particular client. Pursuant to Labor Code section 3602(d), both employers are insured for workers' compensation claims for their joint employees under that single policy.

In this case, there is no dispute that applicant was employed by both Peoplease and Major Transportation Services before and after his date of injury. Defendant Peoplease argues that, because it did not issue applicant's paycheck covering applicant's date of injury, applicant became the sole employee of Major Transportation Services on that date. A PEO can only purchase workers' compensation insurance for leased employees if it agrees to be an employer of the leased employees. In determining these issues, the context of this type of dual employment arrangement is important. Peoplease employed applicant in order to be able to obtain insurance for the employees of Major Transportation services and, agreed to obtain insurance pursuant to a Labor Code section 3602(d) agreement. The Peoplease insurance policy is the only available insurance. The facts in this case do not support finding a temporary suspension of the employment relationship between applicant and his general employer because applicant's special employer issued a paycheck.

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 13, 2023

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

JESUS ORTEGA GONZALEZ
LAW OFFICES OF VALDEZ & VALDEZ
PEARLMAN, BROWN & WAX, L.L.P
UNINSURED EMPLOYERS' BENEFIT TRUST FUND-OAKLAND
OFFICE OF THE DIRECTOR, LEGAL-OAKLAND

MWH/mc

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

REPORT AND RECOMMENDATION ON DEFENDANT'S PETITION FOR RECONSIDERATION

I

INTRODUCTION

1. Applicant's occupation	:	Truck Driver/Occasional Loader
Age at Date of Injury	:	27-years-old
Part(s) of Body Injured	:	Lumbar Spine
2. Manner of injury	:	Slip and fall
Identity of Petitioner	:	**Defendant Peoplease LLC** is the petitioner.
Timeliness	:	The petition is timely after adjusting for additional time pursuant to Title 8, Cal. Code of Regs
3. Verification	:	The Petition is verified.
Decision and Issuance Date	:	Findings and Award of January 31, 2023
Part of Decision Challenged	:	The Finding that Peoplease co-employed the applicant on the date of injury.
4. Petitioner's Contentions	:	I. The Trial Judge misapplied the presumption of employment; II. The applicant failed to prove Peoplease employed him on the date of injury; III. The Findings of Fact is not supported by substantial evidence and is based on conjecture and testimony that "defies all logic or reason."

SYNOPSIS

The crux of this case revolves around whether the applicant was employed by both Major Transportation (a trucking company) and Peoplease (a Professional Employer Organization "PEO") on his date of injury. If so, then Peoplease may be contractually obligated to provide workers compensation insurance coverage for Major Transportation. If not, then Major Transportation was uninsured for the alleged injury.

Defendant Peoplease claims the Judge's ruling they co-employed the applicant on the date of injury is not supported by substantial evidence because the applicant failed to carry their burden of proving employment, the presumption of employment did not apply, and the testimony of Major Transportation's key witness (Mr. Bhupinder Gill) is unreliable.

II

FACTS

The applicant is a long-haul truck driver/occasional loader who suffered a slip and fall injury to his lumbar spine in Illinois on 9/2/2018 while driving a truck for Major Transportation. (See Minutes of Hearing 8/16/2023 p.2, lns. 4-7.)

At the time of injury, a contract existed between Major Transportation and Peoplease wherein Major Transportation was obligated to run payroll through Peoplease, and Peoplease was obligated to provide workers compensation coverage, issue checks, and provide other services. (See Exhibit Cat p.1, sect. III at subsec. A, through p.2, sect. IV at subsec. F; Minutes [O]of Hearing and Summary of Evidence I0/18/22 at p.20, lns. 20-24.) The contract defined a co- employee as "those employees for whom [Peoplease] has received fully completed [Peoplease] Employment Packets and who have been accepted and approved by [Peoplease]." (Exhibit Cat p.1, sect. III A.)

The contract did not explicitly state any other terms or conditions for co-employment, and it also did not state co-employees could gain or lose their co-employment

status based on whether payroll was run through Peoplease. (Id.) The applicant completed the requisite paperwork, and the parties agreed the applicant was jointly employed by both companies for the periods Major Transportation ran payroll through Peoplease. (Exhibit C at p.l, sect. III A; Minutes [O]of Hearing and Summary of Evidence 10/18/22 at p.2, Ins. 18-25; Peoplease's Trial Brief dated 12/15/2022 p.2, Ins. 3-5; and Petition for Reconsideration p.3, lns 21-22.) The contract was executed on 7/21/2014, and it was not terminated until 12/2/2018, several months after the applicant's alleged injury of 9/2/2018. (See Exhibit C and Exhibit 2.)

The matter proceeded to a multi-day trial wherein Peoplease contended they did not jointly employ the applicant at the time of his injury because Major Transportation did not run payroll through them for the day of injury. (See Defendant Peoplease's Trial Brief dated 12/15/22 at p.2, Ins. 1-2.) Peoplease was the only party contending they did not jointly employ the applicant. (Applicant's Trial Brief dated 6/20/2022 at p.3, Ins. 21-27; UEBTF Post-Hearing Brief dated 12/16/2022 at p.3, lns. 13-21; Major Transportation Services, Inc.'s Post Trial Brief dated 12/16/2022 at p. 1, Ins. 22-27.)

In pertinent part, the applicant testified at Trial he believed he was jointly employed by both companies, and he signed paperwork with both companies. (See Minutes [O]of Hearing and Summary of Evidence 10/18/22 at p.2, Ins. 18-25; see also Applicant's Exhibit 7 entitled "Notice and Agreement of Co-Employment".) He also initially testified he believed Peoplease contacted him regarding his trucking route, and they wanted him to use the shortest routes. (See p.3, lns. 5-1O; p.4, lns. 21-25; p.5 lns. 1-6; p.7, lns.10-17.) However, he later testified he was not completely sure if the people contacting him were from Peoplease, but he assumed they were from both companies. (See Id at p.5, lns. 1-6; and p.7, lns. 2-10.) The applicant also testified he returned on 9/6/2018, and he did not continue working due to pain. (Summary of Evidence 10/18/2022 at p.3, Ins. 17-24, and p.14, Ins. 8-11. Note: the applicant also provided conflicting testimony his last day worked was 9/9/2018, but the Judge noted this was a Sunday and interpreted this testimony to mean 9/9/2018 was the last day he was physically present on the job site or the last pay period he worked in rather than this actual last day worked.) Regarding the applicant's paychecks, he was sometimes

issued paychecks from both companies for the same pay period, and he was sometimes given checks from a previous week. (See Minutes [O]of Hearing and Summary of Evidence 10/18/22 at p.4, Ins. 12-18.)

In pertinent part, the owner and proprietor of Major Transportation, (Mr. Bhupinder Gill), testified that both organizations did not strictly follow the contract, and he submitted payroll for the alleged date of injury as part of his submission for the following week. (See Minutes [O]of Hearing and Summary of Evidence 10/18/22 at p.12, Ins. 5-11; p.13, Ins. 5-15; p.16, lns. 19-25; and p.18, lns. 7-12.) Peoplease sometimes issued checks that were untimely, and Major Transportation sometimes submitted their payroll late. (Id.) Mr. Gill also testified that he discussed with a Peoplease representative, (Ms. Cherri Farris through her assistant), regarding what the parties should do when Peoplease issued a late check, and he had Peoplease's permission to use the late paycheck for the following week. (See Id. at p.13, Ins. 12-15.) This testimony was not directly rebutted by any other witness. Mr. Gill also testified it was his understanding that Peoplease was providing workers compensation insurance along with payroll practices to Major Transportation in exchange for money. (Minutes [O]of Hearing and Summary of Evidence 10/18/22 at p.11, lns. 22-25; 20; p.19, Ins. 16.)

Mr. Gill also testified that Peoplease issued late checks about once a month in the year the applicant was injured. (Minutes [O]of Hearing and Summary of Evidence 10/18/22 at p.19, lns. 21-25.) He also testified Peoplease' s check for the pay period covering the alleged date of injury was late, and he had to issue a paycheck to the applicant directly as a result. (Minutes [O]of Hearing and Summary of Evidence 10/18/22 at p.18, lns. 2-6.) Mr. Gill testified he submitted the payroll for the applicant's date of injury on 9/2/2018 as part of the payroll for the following week, and he testified the applicant did not work the week after his injury because he was hurt. (Minutes [O]of Hearing and Summary of Evidence 10/18/22 at p.14, lns. 8-17; p.18, Ins. 2-6; p.19, lns. 16-20.)

In pertinent part, the Vice President of Claims Risk Management for Peoplease (Ms. Stephanie Craig), testified that Peoplease was a "PEO" that charges a premium from the payroll submitted to them which is used to pay for Workers' Compensation Insurance and for Peoplease's fees. (Summary of Evidence 11/15/2022 at p.2, lns. 8-1O; p.3, lns.2-6; p.5, Ins. 22- 25; Defendant Peoplease's Trial Brief 12/15/2022 at p.1 lns.20-22.) She also testified that she was "unaware" of Peoplease issuing late checks, and she had not recently reviewed the applicant's file with Peoplease or knew of its contents. (Summary of Evidence 11/15/22 at p.3, lns. 14-16; p.6, lns. 8-13.)

Following Trial, a Finding and Award issued on 1/31/2023 which ruled Peoplease and Major Transportation both employed the applicant on the date of injury, and the parties were ordered to proceed to mandatory arbitration on the issue of coverage if necessary. Peoplease is challenging that ruling.

III

DISCUSSION

A. The Applicant satisfied their initial bu1·den of proving employment, and the presumption of employment applied.

Defendant Peoplease's first argument is the presumption of employment set forth by Labor Code section 3357 did not apply because the applicant failed to satisfy their burden of proof.

However, Mr. Gill testified he submitted payroll intended to cover the applicant's date of injury late as part of the following pay period, and this is corroborated by the evidence. The applicant was injured on the end of a pay period on 9/2/2018, and he only drove for four days in the following pay period during the return trip from 9/3/2018 through 9/6/2018. (Summary of Evidence 10/18/2022 at p.3, lns. 17-24, and p.14, lns. 8-11, See also the Applicant's Trial Brief 6/20/2022 at p.2, lns. 3-4; Major Transportation Services, Inc.'s Post Trial Brief dated 12/15/2022 at p. 3, lns. 24-26.) Despite the fact he only drove for **four** days, the applicant was issued a paycheck through Peoplease with a pay date of 9/14/2018 for a full week of pay including **five** "per diem" units and his base pay. (Exhibit QQ at p.3

entitled "HR Pyramid, Major Transportation Services, Inc. … with a pay date of 9/14/2018".) The extra fifth day of "per diem" pay covers the date of injury and confirms Mr. Gill's testimony. Thus, given the parties agree the applicant was a co-employee for the periods Major Transportation ran payroll through Peoplease, Peoplease co-employed the applicant on the date of injury. (Exhibit C at p.l, sect. III A; Minutes [O]of Hearing and Summary of Evidence 10/18/22 at p.2, lns. 18-25; Peoplease's Trial Brief dated 12/15/2022 p.2, lns. 3-5; and Petition for Reconsideration p.3, Ins 21-22.)

Peoplease also contends Mr. Bhupinder Gill admitted he did not run the payroll for the applicant's date of injury through Peoplease. (Petition For Reconsideration at p.8, lns.7-15.) but this takes Mr. Gill's testimony out of context. When considered as a whole, Mr. Gill's testimony that "if he was concerned, he would have run the payroll through Peoplease", did not mean that he **never** ran the payroll through Peoplease, but rather he would of ran the payroll **on time** as part of the correct pay period instead of late on the following pay period. This testimony also tends to show Mr. Gill relied upon the parties' prior conduct of not strictly following the contract because he did not believe late submission would be a problem.

Furthermore, Peoplease's witness, Ms. Stephanie Craig, testified that Peoplease was compensated for the services they provide by charging an administration fee on top of the submitted payroll, and a fee on top of the Workers' Compensation rate. (Summary of Evidence 11/15/2022 at p.3, lns. 2-6.) Therefore, Peoplease benefited from the payroll Mr. Gill submitted for the pay period intended to cover the applicant's date of injury of 9/2/2018.

Thus, the applicant's initial burden of proving employment was satisfied: the preponderance of evidence shows the applicant worked on the date of injury, Major Transportation submitted payroll to Peoplease covering the date of injury as part of their submission for the following pay period, and Peoplease benefitted from this submission by charging fees as set forth by Ms. Craig's testimony and the contract.

B. Peoplease co-employed the applicant even if their paycheck dated 9/14/2018 did not cover the 9/2/2018 date of injury.

Peoplease also contends they did not co-employ the applicant at the time of injury because the paychecks they issued were not specifically for 9/2/2018. (Petition For Reconsideration at p.6, Ins. 9-10; Applicant's Exhibit 1 at page 25 - Peoplease's check for the pay period 9/3/18 to 9/9/18.) A preponderance of the evidence shows the contrary, but even if Peoplease's contention they did not run payroll for the date of injury were true, the evidence also shows the applicant completed the co-employment process set forth in Peoplease's contract with Major Transportation, and he was not notified his co-employment status could change depending on whether payroll was run through Peoplease. (See Exhibit C and Applicant's Exhibit 7.) There is nothing in the contract stating co-employment status could fluctuate based on the behavior of the contracting pai1ies, and Peoplease did not terminate the applicant's co-employment status until their letter dated 12/2/2018 - three months after his injury. (Applicant's Exhibit 2.)

Peoplease also significantly benefitted from the applicant's co-employment status during their course of business with Major Transportation. Peoplease ran the applicant's payroll at least twelve times during the year of his injury, and this includes the pay period two weeks prior to the injury (8/13/18 to 8/19/18) and immediately after the injury (9/3/18 to 9/9/18). For these pay periods, Peoplease collected fees from Major Transportation as described in the contract and the testimony of their Vice President, Ms. Stephanie Craig. (Exhibit C at p.2, section IV entitled "service fees"; Summary of Evidence 11/15/2022 at p.2, lns. 8-10; p.3, lns.2-6; p.5, lns. 22-25.)

It would be inequitable for Peoplease to collect fees from the applicant's co-employment, fail to notify the applicant his co-employment status could fluctuate, and then deny the applicant workers compensation benefits when he is injured while working to their benefit. The applicant believed he was a co-employee of both companies, and he was unaware Peoplease considered him a non-employee when Major Transportation did not use them for payroll. He also was not a party to the contract and had no control over whether Major Transportation properly ran payroll through Peoplease. Ruling against co-employment

would fairly deprive him of workers' compensation benefits due to circumstances he could not reasonably know or control.

Both Peoplease and Major Transportation were parties to the contract and knew it was not being strictly followed. If Peoplease was concerned about the consequences for late payroll submissions or late checks, they could have terminated the contract or sued Major Transportation for breach. No explanation was provided why this was not done, and they should not be allowed to silently benefit from the applicant's co-employment, do nothing, and then deny co-employment to escape their obligation to provide the applicant workers compensation benefits.

C. Per the case of Gulam v. Patel, it is improper to excuse Peoplease's late checks but not excuse a late payroll submission by Major Transportation. the prior conduct of the parties must be considered.

Presently, the conduct of the pa1ties did not strictly conform with the contract: Peoplease sometimes issued late checks and this was arguably a breach of the contract. (Minutes [O]of Hearing and Summary of Evidence 10/18/22 p.19, Ins. 21-25.) When Peoplease issued a late check, Major Transportation had their permission to hold onto these checks and apply them to a different pay period. (Minutes [O]of Hearing and Summary of Evidence 10/18/22 p.13, Ins. 12-15.) Major Transportation also sometimes did not submit payroll to Peoplease. (See Minutes [O]of Hearing and Summary of Evidence 10/18/22 at p.12, Ins. 5-11; p.13, Ins. 5- 15; p.16, Ins. 19-25; and p.18, Ins. 7-12.)

This is highly similar to the case of Gulam v. Patel, 2022 Cal. Wrk. Comp. P.D. LEXIS 236.

In Gulam v. Patel, the terms of a contract between a PEO and a co-employer did not bar the PEO from being deemed a general employer because the parties' prior conduct deviated from the contract during their course of business together. Specifically, the contract clearly stated the PEO was not a co-employer until a potential employee completed the onboarding process, and the defendant PEO denied employment because the applicant did not complete said process. (Gulam v. Patel, 2022 Cal. Wrk. Comp. P.D. LEXIS 236 at p.4.) The trial judge ruled the PEO

was the applicant's general employer because the conduct of the PEO delayed the onboarding process, and the employer "was never told that workers' compensation coverage was denied if the employee was not onboarded before the date of injury." (Id. at. p.6.) Upon review, a panel of the WCAB affirmed and agreed with the Trial Judge's analysis:

> "[W]here the subsequent conduct of parties is inconsistent with and clearly contrary to provisions of the written agreement, the parties' modification setting aside the written provisions will be implied. (Diamond Woodworks, lnc. v. Argonaut Ins. Co. (2003) 109 Cal.App.4th 1020, 1038; see also Wagner v. Glendale Adventist Medical Center (1989) 216 Cal.App.3d 1379, 1388, 265 Cal. Rptr. 412 ("When one party has, through oral representations and conduct or custom, subsequently behaved in a manner antithetical to one or more terms of an express written contract, he or she has induced the other party to rely on the representations and conduct or custom. In that circumstance, it would be equally inequitable to deny the relying party the benefit of the other party's apparent modification of the written contract."). Id. at p.5

Similar to Gulam v. Patel, Major Transportation and Peoplease regularly deviated from the contract they executed on 7/16/14 - some four years prior to the applicant's injury.

Peoplease occasionally issued untimely checks, and Major Transportation's key witness testified this occurred about once a month during the year the applicant was injured. When a late check was issued, Major Transportation would apply the late check to a different pay period with the permission of Peoplease's representative, (Ms. Cherri Farris through her assistant). Despite this, Peoplease is now arguing Major Transportation's late submission of the payroll for date of injury as part of the next pay period should bar co-employment.

It would be inequitable and illogical to excuse Peoplease's late checks but not excuse a late payroll submission by Major Transportation. Per Gulam v. Patel, Peoplease should not be allowed to use the contract as a shield against employment, and the finding of co-employment was proper.

D. Peoplease's arguments are actually coverage issues subject to mandatory arbitration and inconsequential to employment.

The true heart of Peoplease's contentions is whether Major Transportation's late submission of payroll for the date of injury as part of the following pay period was a breach of contract excusing them from providing workers compensation coverage. This issue along with Major Transportation's alleged fraud are coverage issues subject to mandatory arbitration and are not germane to employment. (Labor Code§ 5275; Sanchez v. Baron Hr. 2019 Cal. Wrk. Comp. P.D. Lexis 509 at p.7-8.)

E. The presumption of employment was properly applied.

Defendant Peoplease argues the presumption of employment was not properly applied, but the presumption was triggered when the applicant carried their burden of proving employment by showing Peoplease benefitted from the applicant's work on the date of injury and by his co-employment status. This shifted the burden to Peoplease to rebut the presumption. (See generally Sullivan On Comp section 16.16 "Defendant's Burden" citing Labor Code section 5705.) Peoplease failed to do so.

At Trial, the arguments Peoplease pursued largely consisted of attempting to damage Major Transportation's key witness's credibility, allege Major Transportation committed fraud, and argue Major Transportation did not properly submit payroll as part of the correct pay period. However, the pertinent parts of Major Transportation's witness's testimony were corroborated by the applicant and other evidence, and Peoplease's allegations of fraud and breach of contract are not germane to employment.

Instead of offering evidence disproving Peoplease issued late checks, damaging the applicant's credibility, or calling Cherri Faris or her assistant as rebuttal witnesses, Peoplease ineffectively tried to disprove employment by focusing on coverage issues.

F. The Findings of Fact are based on substantial evidence.

Peoplease's final assertion is the Findings of Fact are not based on substantial evidence because the Court significantly relied upon the testimony of Mr. Bhupinder Gill.

But this ignores the fact that the pertinent parts of Mr. Gill's testimony were corroborated by other evidence. Specifically, Mr. Gill testified he submitted payroll covering the date of injury as part of the pay period following the date of injury, and this is corroborated by Peoplease's check of 9/14/2018 as well as the applicant's testimony he did not work after he returned due to his injury. (Exhibit QQ at p.3; Summary of Evidence 10/18/2022 at p.3, Ins.17-24, and p.14, Ins. 8-11.) There was also no effective rebuttal to Mr. Gill's testimony that Peoplease issued late checks or that Peoplease's representative, (Ms. Cherri Fa1is through her assistant), granted permission to deviate from the contract by applying late checks to a different pay period. The Court found Mr. Gill's testimony on this subject credible and persuasive: Mr. Gill promptly and confidently provided Ms. Cherri Faris's name when questioned by Peoplease's counsel, and Peoplease's witness did not directly rebut this testimony. Instead, Peoplease's witness merely testified she was not aware of any instance where checks were issued late. (Summary of Evidence 11/15/22 at p.3, lns. 14-16; p.6, lns. 8-13.)

The existence of late checks was also corroborated by the applicant's testimony that he recalled sometimes receiving checks from both Major Transportation and Peoplease for the same pay period, and that he was sometimes paid with checks from "the previous week". (See Minutes [O]of Hearing and Summary of Evidence 10/18/22 at p.4, Ins. 12-18.) And this makes sense: if Peoplease never issued late checks, then why was Mr. Gill able to believably identify Ms. Cherri Faris at Trial?

In light of the foregoing, it is clear that a preponderance of the evidence supports the Judge's ruling that Peoplease co-employed the applicant on the date of injury.

IV

RECOMMENDATION

For the reasons stated above, it is respectfully requested that the defendant's Petition for Reconsideration be denied in its entirety.

Date: 03/10/2023

HON. BRYCE Y. HATAKEYAMA
Workers' Compensation Judge

FILED AND SERVED ON PARTIES LISTED
ON THE ATTACHED OFFICIAL ADDRESS RECORD
(EXCLUDING EMPLOYER).
DATE: 03/10/2023
BY: WCAB - K. MALAGON