

STATE OF CALIFORNIA  
WORKERS' COMPENSATION APPEALS BOARD

Case No. ANA 0347151

JOSE SANDOVAL,

*Applicant,*

vs.

SELECT PERSONNEL SERVICES;  
CALIFORNIA INSURANCE GUARANTEE  
ASSOCIATION (CIGA), administered by  
CAMBRIDGE INTEGRATED SERVICES  
GROUP, INC., for LEGION INSURANCE  
COMPANY, in liquidation, and NIKE  
USA/NIKE, INC., and LUMBERMENS  
MUTUAL CASUALTY COMPANY,

*Defendants.*

**FINDINGS AND AWARD  
AND ORDER**

Winters & Banks  
By: Michael Banks  
Attorneys for Applicant

Maher, Renzi & Maher  
By: Sahron Renzi  
Attorney for Defendant Select Personnel Services,  
Now known as Select Remedy

Veatch Carlson  
By: Allen Tanita  
Attorney for Defendants Nike USA/Nike, Inc. and  
Lumbermens Mutual Casualty Company

Heggeness & Sweet  
By: Arlene Cota-Perla  
Attorney for Defendant California Insurance  
Guarantee Association

The above-entitled matter, having been heard by and submitted for decision to the HONORABLE JOANNE M. COANE, Workers' Compensation Judge, decision is made as follows:

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**FINDINGS OF FACT**

1. The applicant, **JOSE SANDOVAL**, born August 26, 1964, while employed on May 30, 2000, as a shipping and receiving clerk, by **SELECT PERSONNEL SERVICES**, the general employer, insured for workers' compensation by **LEGION INSURANCE COMPANY**, now in liquidation and now being represented by the **CALIFORNIA INSURANCE GUARANTEE ASSOCIATION (C.I.G.A.)**, administered by **CAMBRIDGE INTEGRATED SERVICES GROUP, INC.** and by **NIKE USA/NIKE INC.**, the special employer, insured for workers' compensation by **LUMBERMENS MUTUAL CASUALTY COMPANY**, sustained injury arising out of employment and in the course of employment to his spine, but not to his psyche.

2. The applicant has orthopedic permanent disability of 27%, which equates to 107.75 weeks of disability, which is payable at a weekly rate of \$170.00, in the total sum of \$18,317.50, commencing October 9, 2000, less credit for sums previously paid.

3. There is apportionment concerning the causation of the injury, but there is no apportionment concerning the overall orthopedic permanent disability.

4. The applicant is in need of further medical treatment.

5. Pursuant to Labor Code Section 4600, the defendant is only liable for reimbursing the applicant for all reasonable and necessary self-procured medical treatment expenses.

6. The parties presented the following lien claims for adjudication:

Associated Reproduction Services: - Amount unknown.

Griffin Medical Group: - \$15,548.76 outstanding balance.

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Dr. Curtis: ----- - Amount unknown.

Whilshire Roxbury Medical Pharmacy: - Amount unknown.

E. D. D. ----- \$4,414.00, for the period from 12-28-01  
through 6-13-02.

Dr. Barri: ----- Amount unknown.

The Trial Court defers making the lien claim compensability determinations, until such time as the Trial Court is presented with the actual liens and itemizations, and with any documentary evidence, which either supports the allowance or the disallowance of the lien claims.

7. The applicant's attorneys are entitled to a reasonable attorney's fee, based upon the efforts expended in litigating this case. This fee is set at 15% of the awarded permanent disability.

8. The lien claimant Griffin Medical objects to all defense exhibits and documents which were not served on Griffin Medical prior to trial proceedings, and in addition, requests a penalty and statutory interest, based upon the defendants' alleged failure to pay for medical treatment. While the Trial Court notes this objection for the record, the Trial Court makes no formal finding or determination concerning it, since the request for exclusion of exhibits is too generally plead, and since the allegation concerning the failure to provide treatment, is likewise too generally plead. The Trial Court will hold a further evidentiary hearing on this matter.

9. The defendants' claim that the applicant has no viable psyche injury claim, pursuant to Labor Code Section 3208.3, based upon the applicant's alleged less than six (6) months of employment, is without merit. The applicant's un rebutted testimonial evidence indicates that the applicant commenced work for Select Personnel Services and Nike USA/Nike Inc. in

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December 1999, and that he continued to work up to September 5, 2000. Therefore, more than six (6) months of employment is established, and the applicant's claim of psyche injury arising out of employment and in the course of employment is not barred by application of Labor Code Section 3208.3.

Nevertheless, the Trial Court has already otherwise determined that the applicant did not sustain an industrial psyche injury, based upon the submitted medical evidence. This is already indicated in Findings of Fact No. 1.

10. The defendants' defense of post termination claim is without merit. The unrebutted evidence shows that the applicant filed his claim for workers' compensation injury with Select Personnel Services on June 2, 2000, which was well in advance of his last day of work, which was September 5, 2000.

11. Defendant California Insurance Guarantee Association has reserved its right to request and to seek contribution, with regard to benefits which C. I. G. A. has previously paid to the applicant. At this time, the Trial Court acknowledges these reservations, but makes no further determination regarding them. The Trial Court will hold a further evidentiary hearing regarding this contribution matter, since the Trial Court can not presently determine what benefits have been previously paid, since California Insurance Guarantee Association has not presented any evidence concerning what payments have been made.

12. The parties stipulated to the existence of a general and a special employment relationship between Select Personnel Services, the general employer, and Nike USA/Nike Inc., the special employer, at trial proceedings on March 19, 2007. Therefore, the Trial Court finds that there is a general and a special employment relationship between Select Personnel Services, the general employer and Nike USA/Nike Inc., the special employer.

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13. In addition, the parties further stipulated that Select Personnel Services' May 2000 invoices and attachments, as are contained in Defense Exhibit U, represent the only evidence of what the agreement or contract was, between Select Personnel Services and Nike USA/Nike Inc., as it concerns workers' compensation liability.

14. Having reviewed the evidence submitted, and having considered the law as it concerns the liability of general and special employers, the Trial Court preliminarily notes that both general and special employers and their insurers are both liable for the work related injuries of their common employees, since general and special employers have joint and several liability.

15. However, pursuant to the dictates of Insurance Code Section 1063.1 (c) (9), the Trial Court can only impose liability against the special employer Nike USA/Nike Inc., and its insurer Lumbermens Mutual Casualty Company, and not against the general employer Select Personnel Services and its insurer Legion Insurance Company now in liquidation, and now being represented by the California Insurance Guarantee Association (C. I. G. A.), because pursuant to Section 1063.1 (c) (9), C.I.G.A. is not statutorily obligated to "cover" or to pay for any workers' compensation injury claims in circumstances, such as the present one, where there is other insurance, which is available to "cover" or to pay for a pending claim. In this instance, the Trial Court finds that Lumbermens Mutual Casualty Company provided other workers' compensation insurance, which was available to the applicant.

16. Pursuant to the dictates of Insurance Code Section 1063.1 (c) (9), the California Insurance Guarantee Association (C.I.G.A.), administered by Cambridge Integrated Services Group, Inc., for Legion Insurance Company, in liquidation, and Select Personnel Services, are dismissed as parties defendant from this action.

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**AWARD**

**AWARD** is made in favor of **JOSE SANDOVAL** against **NIKE USA/NIKE, INC.,**  
**and LUMBERMENS MUTUAL CASUALTY COMPANY** , as follows:

- (a) Permanent disability per Findings of Fact No. 2.
- (b) Further medical treatment per Findings of Fact No. 4.
- (c) Reimbursement for self-procured medical treatment per Findings of Fact No.5.
- (d) Lien claim reimbursement per Findings of Fact No. 6.
- (e) Attorney's fee per Findings of Fact No. 7.

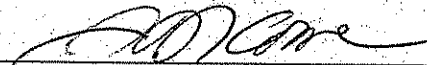
**ORDER**

**IT IS HEREBY ORDERED THAT:**

(a) The California Insurance Guarantee Association (CIGA), administered by Cambridge Integrated Services Group, Inc., for Legion Insurance Company, in liquidation, and Select Personnel Services, are dismissed as parties defendant.

(b) All other deferred matters, remain deferred, until such time as a party or the parties, make a formal request for adjudication by filing a Declaration of Readiness to Proceed.

Date: 7-12-07

  
\_\_\_\_\_  
JOANNE M. COANE

Workers' Compensation Administrative Law Judge

Served on parties listed on the official  
Address Record.  
Date: 7-12-07  
By: JM

STATE OF CALIFORNIA  
DEPARTMENT OF INDUSTRIAL RELATIONS  
WORKERS' COMPENSATION APPEALS BOARD

CASE NO.: ANA 0347151

JOSE SANDOVAL, vs. SELECT PERSONNEL SERVICES;  
CALIFORNIA INSURANCE  
GUARANTEE ASSOCIATION  
(CIGA), administered by  
CAMBRIDGE INTEGRATED  
SERVICES GRP. INC., for LEGION  
INSURANCE CO., in liquidation, and  
NIKE USA/NIKE, INC. and  
LUMBERMENS MUTUAL  
CASUALTY CO.,

D.O.I.: 5-30-00

JOANNE M. COANE  
Workers' Compensation  
Administrative Law Judge

OPINION ON DECISION

INJURY: EMPLOYMENT:

INSURANCE COVERAGE BACKGROUND:

CONFIRMATION OF STIPULATIONS OF THE PARTIES:

The applicant, Jose Sandoval, born August 26, 1964, while employed on May 30, 2000, as a shipping and receiving clerk, by Select Personnel Services, the general employer, insured for workers' compensation by Legion Insurance Company, now in liquidation and now being represented by the California Insurance Guarantee Association (C.I.G.A.), administered by Cambridge Integrated Services Group, Inc. and by Nike USA/Nike, Inc. the special employer, insured for workers' compensation by Lumbermens

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Mutual Casualty Company, sustained injury arising out of employment and in the course of employment to his spine, but not to his psyche.

It is noted that for the record that the parties stipulated to all of the above factual matters, with the exception of injury arising out of employment and in the course of employment concerning the applicant's psyche. Therefore, on this basis, the Trial Court confirms the stipulations of the parties, as they concern injury to the spine, the general and special employment relationship, and the insurance coverage information.

PSYCHE INJURY AOE/COE:

Regarding the Trial Court's finding concerning no injury arising out of employment and in the course of employment regarding the applicant's psyche, the Trial Court ultimately determined that the applicant did not sustain a psyche injury arising out of employment and in the course of employment, based upon the medical reporting of Dr. Leckart. In the Trial Court's view, Dr. Leckart provides the most reasonable and most rational medical analysis concerning the applicant's psychological state. In sum, Dr. Leckart opined that while the applicant did experience some unhappiness and dissatisfaction concerning his underlying physical problems, that the applicant did not develop a psychological disorder, which resulted in an industrial psyche injury.

According to Dr. Leckart:

“The results of our complete evaluation of Mr. Jose Sandoval are very clear and explicit in indicating that Mr. Sandoval is not a psychologically disordered person. When we examined Mr. Sandoval, we find no psychological disorder and no psychiatric disabilities. We also find no history of any psychological disorders or psychiatric disabilities. During the course of our evaluation, Mr. Sandoval had complaints of back pain, numbness in the right extremity, buttocks pain, insomnia and depression. However, despite these multiple subjective complaints, Mr. Sandoval presented with a completely normal Mental Status Examination. He showed normal cognitive functioning and absolutely no behavioral and no emotional dysfunction. Moreover, during the course of our evaluation, we had the opportunity to give Mr. Sandoval a battery of objective psychological tests. On the MMPI, Mr. Sandoval presented as an individual who was not being honest and straightforward in his responses. Additionally, on the Cattell Sixteen Personality Factor Test he was most likely attempting to portray himself in an unrealistically negative manner. Overall, Mr. Sandoval’s subjective complaints were not consistent with his clinical presentation. In particular, considering solely his complaint of depression, we expected to find a depressed gentleman. However, Mr. Sandoval presented during the Mental Status Examination and the remainder of the clinical interview, with no evidence of

any psychological disorders. Moreover, there were no credible data in his medical records of a psychological disorder at any point in time. In short, despite Mr. Sandoval's subjective complaints, all of the available evidence indicates that he is a psychologically normal gentleman who has never had any psychological disorders or psychiatric disabilities at any time during his life.

The result of the current evaluation shed some light on events leading up to Mr. Sandoval being referred to our office. Mr. Sandoval reported that he has worked as a shipping and receiving clerk at Nike sports, through Select Personnel Services, in Mission Viejo, California since January 2000. He stated that he was injured on May 30, 2000, when he began having pain in his back and numbness and weakness in his right lower extremity. He reported his injury, but he kept working until he was placed on disability leave by Dr. Freeman in September 2000. . . . He has not returned back to work since then but has undergone extensive conservative orthopedic, neurological and medical treatment. He also indicated that Dr. Freeman referred him to Dr. Thomas Curtis, a psychiatrist, who saw him between August and December, 2001. Obviously, we are unable to determine precisely what occurred at Select Personnel Services. However, what seems quite clear is that Mr. Sandoval has not suffered any psychological disorders or psychiatric injuries as a result of his

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**employment at Select Personnel Services. It is our impression that at most Mr. Sandoval has had understandable and normal dissatisfaction and unhappiness about his underlying physical difficulties. However, his responses have been in no way characteristic of a psychological disorder. Overall, there was nothing in Mr. Sandoval's presentation to indicate that he has ever had a psychological disorder or a psychiatric injury, as those concepts are defined by the DSM-IV-TR and the workers' compensation laws.**

**The results of our examination indicate that Mr. Sandoval can perform all of the normal eight work functions of a shipping and receiving clerk as those functions are described in the Psychiatric Protocols. . . ."**

(Dr. Leckart's March 11, 2002 report, page 23, paragraph 2 through page 24, paragraph 3, Defendant Legion Insurance Company's Exhibit D.)

**ORTHOPEDIC PERMANENT DISABILITY:**

The applicant has orthopedic permanent disability of 27%, which equates to 107.75 weeks of disability, which is payable at a weekly rate of \$170.00 in the total sum of \$18,317.50, commencing October 9, 2000, less credit for sums previously paid.

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The permanent disability finding is based upon the permanent and stationary orthopedic medical reporting of Dr. Rothi. The Trial Court decided to rely upon Dr. Rothi's permanent disability findings, because in the Trial Court's view Dr. Rothi's medical analysis more fairly and more reasonably describes the applicant's overall level of permanent disability.

The parties have been previously served with copies of the Trial Court's formal rating instructions, as well as with the Disability Evaluation Specialists formal permanent disability rating, on June 12, 2007. These documents are incorporated herein by reference.

According to Dr. Rothi, the applicant is precluded from heavy lifting, repeated bending, stooping and lifting. (Dr. Rothi's February 11, 2002 report, page 7, paragraph 8, Defendant Legion Insurance Company's Exhibit C.) Dr. Rothi based his work restriction determination on his objective evaluation of the applicant, wherein he found that the applicant has "two level degenerative lumbar disk prolapse at L4 and L5 as noted on the MRI test." In addition, Dr. Rothi noted: "Limited mobility of the low back." (Id., page 7, paragraph 5-6.)

In Dr. Rothi's follow-up report of May 22, 2002, he further opined that:

**“. . . I remain of the opinion that the patient is permanent and stationary and that he became permanent and stationary by October 9, 2000. He maximized conservative medical treatment**

by that time. He was evaluated by the surgeon, Dr. Thomas Meyer, and Dr. Meyer noted that the patient had "essentially made maximal medical improvement" and should either learn to live with the discomfort or have the surgery. The patient declined to have surgery.

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The patient has much greater capability of performing work than as described by Dr. Freeman. It is my opinion that the patient precluded from heavy lifting, repeated bending and twisting and stooping as noted.

Dr. Freeman has a different estimation as to the patient's work capacity. However, the applicant's greater work capabilities are documented well by the patient's resumption of work after his injury while going to the industrial clinic, and the performance of what he describes as his normal duties with the exception of the heavier lifting."

(Dr. Rothi's May 22, 2002 report, page 2, paragraph 4 through page 5 paragraph 2, Defendant Legion Insurance Company's Exhibit B.)

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APPORTIONMENT:

There is apportionment concerning the causation of the injury, but there is no apportionment concerning the overall orthopedic permanent disability.

This finding is based upon the medical opinions of Dr. Rothi. While Dr. Rothi finds apportionment concerning the causation of the injury, in that he opines that the applicant has "degenerative lumbar disc disease which was aggravated by the specific injury of May 30, 2000," he goes on to conclude that this pre-existing condition does not effect the applicant's overall residual orthopedic permanent disability since there is "no evidence for pre-existing impairment. (Dr. Rothi's February 11, 2002 report, page 8, paragraph 5, Defendant Legion Insurance Company's Exhibit C.)

FURTHER MEDICAL TREATMENT:

The applicant is in need of further medical treatment.

This finding is based upon the medical opinions of Dr. Rothi.

According to Dr. Rothi:

**"I do not recommend surgery. The patient in my opinion is not reasonably expected to be cured or alleviated and is likely to be worsened by surgical intervention in view of his lack of any response to treatment up until this point and his own reluctance to pursue surgery.**

**He does not require additional chiropractic or physical therapy.**

**He would be a candidate for oral anti-inflammatory medication and pain medication on an as-needed basis as the only form of treatment.”**

(Dr. Rothi’s February 11, 2002 report, page 8, paragraph 4, Defendant Legion Insurance Company’s Exhibit C.)

APPLICATION OF LABOR CODE SECTION 4600:

Pursuant to Labor Code Section 4600, the defendant is only liable for reimbursing the applicant for all reasonable and necessary self-procured medical treatment expenses.

LIENS:

The parties presented the following lien claims for adjudication:

Associated Reproduction Services: - - - - Amount unknown.

Griffin Medical Group: - - - - - \$15,548.76 outstanding balance.

Dr. Curtis: - - - - - Amount unknown.

Wilshire Roxbury Medical Pharmacy: - - - - Amount unknown.

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E. D. D.:----- \$4,414.00 for the period  
from 12-28-01 through  
6-13-02.

Dr. Barri.:----- Amount unknown.

The Trial Court defers making the lien claim compensability determinations, until such time as the Trial Court is presented with the actual liens and itemizations, and with any other documentary evidence, which either supports the allowance or the disallowance of the lien claims.

ATTORNEY'S FEE:

The applicant's attorneys are entitled to a reasonable attorney's fee, based upon the efforts expended in litigating this case. This fee is set at 15% of the awarded permanent disability.

This fee is awarded in compliance with the Workers' Compensation Appeals Board Guidelines which are set forth in the Policy and Procedure Manual Index No. 1.140.

GRIFFIN MEDICAL: OBJECTIONS TO EXHIBITS & DOCUMENTS:

The lien claimant Griffin Medical objects to all defense exhibits and documents which were not served on Griffin Medical prior to trial proceedings, and in addition, requests a penalty and statutory interest, based upon the defendants' alleged failure to pay for medical treatment. While the Trial Court notes this objection for the record, the Trial Court makes no

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formal finding or determination concerning it, since the request for exclusion of exhibits is too generally plead, and since the allegation concerning the failure to provide treatment, is likewise too generally plead. The Trial Court will hold a further evidentiary hearing on this matter.

APPLICATION OF LABOR CODE SECTION 3208.3:

The defendants' claim that the applicant has no viable psyche injury claim, pursuant to Labor Code Section 3208.3, based upon the applicant's alleged less than six (6) months of employment, is without merit. The applicant's unrebutted testimonial evidence indicates that the applicant commenced work for Select Personnel Services and Nike USA/Nike Inc. in December 1999, and that he continued to work up to September 5, 2000. Therefore, more than six (6) months of employment is established and the applicant's claim of psyche injury arising out of employment and in the course of employment is not barred by application of Labor Code Section 3208.3.

Nevertheless, the Trial Court has already otherwise determined that the applicant did not sustain an industrial psyche injury, based upon the submitted medical evidence. This is already indicated in Findings of Fact No. 1.

POST TERMINATION DEFENSE:

The defendants' defense of post termination claim is without merit. The unrebutted evidence shows that the applicant filed his claim for

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workers' compensation injury with Select Personnel Services on June 2, 2000, which was well in advance of his last day of work, which was September 5, 2000.

The Employer's First Report of Occupational Injury or Illness, dated June 9, 2000, and which was prepared by the general employer Select Personnel Services, states that the applicant reported his May 30, 2000 injury on May 31, 2000, and that Select Personnel Services provided the applicant with his claim form on June 2, 2000. (Employer's First Report, Defense Exhibit E.)

According to the applicant's un rebutted trial testimony, he last worked for Select Personnel Services and Nike USA/Nike Inc. on approximately September 5, 2000. (March 22, 2006 Minutes of Hearing, Summary of applicant's trial testimony, page 3, lines 4 through 6.)

Clearly, the submitted evidence proves that the applicant reported his May 30, 2000 injury, well in advance of his departure from employment in September 2000. Therefore, the defendants' assertion that the applicant made a post termination claim can not be supported by the evidence.

CALIFORNIA INSURANCE GURANTEE ASSOCIATION: RIGHT TO CONTRIBUTION:

Defendant California Insurance Guarantee Association has reserved its right to request and to seek contribution, with regard to benefits which C.I.G.A. has previously paid to the applicant. At this time, the Trial Court

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acknowledges these reservations, but makes no further determination regarding them. The Trial Court will hold a further evidentiary hearing regarding this contribution matter, since the Trial Court cannot presently determine what benefits have been previously paid since C.I.G.A has not presented any evidence concerning what payments have been made.

GENERAL AND SPECIAL EMPLOYMENT RELATIONSHIP:

The parties stipulated to the existence of a general and a special employment relationship between Select Personnel Services, the general employer and Nike USA/Nike Inc., the special employer, at trial proceedings on March 19, 2007. (March 19, 2007 Minutes of Hearing, page 2, stipulations of parties, lines 15 through 22.) On this basis, the Trial Court confirms that there is a general and a special employment relationship between Select Personnel Services, the general employer, and Nike USA/Nike Inc., the special employer.

SELECT PERSONNEL'S MAY, 2000 INVOICES AND ATTACHMENTS:

In addition, the parties further stipulated that Select Personnel Services' May 2000 invoices and attachments, as are contained in Defense Exhibit U, represent the only evidence of what the agreement or contract was, between Select Personnel Services and Nike USA/Nike Inc., as it concerns workers' compensation liability. (March 19, 2007 Minutes of Hearing, page 2, stipulations of parties, liens 15 through 22.)

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SPECIAL EMPLOYERS: JOINT AND SEVERAL LIABILITY:

Having reviewed the evidence submitted, and having considered the law as it concerns the liability of general and special employers, the Trial Court preliminarily notes that general and special employers and their insurers are both liable for the work related injuries of their common employees, since general and special employers have joint and several liability. (Miller v. Long Beach Oil Development Company, (1959) 167 Cal. App. 2d 546; 334 P2d. 695.)

Therefore in situations where a general and special employment relationship exists, "the injured workman can look to both employers for compensation benefits." (Kowalski v. Shell Oil Company (1979) 23 Cal. 3d 168; 151 Cal. Rptr. 44 CCC 134, citing to Mc Farland v. Voorheis - Trindle Co. (1959) 52 Cal. 2d 698, 702, 343 P. 2d. 923.)

IMPOSITION OF LIABILITY:

Pursuant to the dictates of Insurance Code Section 1063.1, once the California Insurance Guarantee Association (C.I.G.A.) takes over the insurance obligations of an insolvent insurance carrier, C. I. G. A. is only obligated to pay for "covered claims." (Insurance Code Section 1063.1 (c) (1) and (2).

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Pursuant to Insurance Code Section 1063.1 (c) (9), a workers' compensation injury claim is not considered to be a covered claim, "to the extent it is covered by any other insurance" which is "available to the claimant or insured . . . ." In sum, in situations where it is determined that there is other viable workers' compensation insurance, which is available to cover a pending claim, Insurance Code Section 1063.1 (c) (9) precludes C.I.G.A. from paying for or from "covering" that claim.

In the present case, the applicant has two (2) employers: Select is the general and Nike is the special. Select had insurance coverage with Legion, which is now in liquidation. Due to Legion's insolvency, C.I.G.A. has taken over Legion's insurance obligations. Nike has viable insurance coverage with Lumbermens.

The dispute which has arisen between Select and Nike, concerns whether Nike's insurance with Lumbermens is available to the applicant. If Nike's Lumbermens' insurance is available to cover the applicant's presently pending workers' compensation claim, then C.I.G.A. must be dismissed from this action, pursuant to the dictates of Insurance Code Section 1063.1 (c) (9).

For guidance in making this determination, the Trial Court turns to the Workers' Compensation Appeals Board's recent en banc Opinion and Decision After Remittitur, in Mark Miceli v. Jacuzzi, Inc. Remedy Temp.

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Inc., American Home Assurance Company, California Insurance Guarantee Association for Reliance National Indemnity Company, in liquidation (May 12, 2006), 71 CCC 599; 604-605, 2006 California Workers' Compensation LEXIS 149:

“ . . . With regard to the issue of the application of Insurance Code Section 1063.1 (c) (9), individual consideration of each may require consideration of the particular insurance policies and endorsements in effect in each case. If it is found in a case that “other insurance” within the meaning of Insurance Code Section 1063.1 (c) (9) is available to an applicant, an order dismissing CIGA may be appropriate. If it is found that “other insurance” within the meaning of Insurance Code Section 1063.1 (c) (9) is not available to an applicant, an order dismissing CIGA would not be appropriate, but an order dismissing the general employer may be appropriate. Each case must be addressed on its own facts.” (Micelli, supra, 71 CCC 599, 605.)

ANALYSIS OF THE SPECIFIC FACTS INVOLVED IN THIS CASE:

Nike contends that its workers' compensation insurance coverage with Lumbermens does not constitute other insurance which is available to the applicant, since Nike and Select previously entered into a business liability agreement, wherein they both agreed to shift all liability for workers' compensation injury claims to Select and its workers' compensation insurer.

According to their business liability agreement:

“Select Personnel Services will maintain workers’ compensation insurance and administer all industrial injury claims that arise with respect to each of the employees provided to” Nike. (Business Agreement, Defense Exhibit U.)

C.I.G.A.’s position is that even though Select’s and Nike’s business agreement does shift liability for workers’ compensation injury claims over to Select and its insurer, inasmuch as Nike does in fact have viable insurance coverage with Lumbermens, this insurance is other insurance which is available to the applicant, and as a consequence, the workers’ compensation liability in this matter should be imposed against Nike and Lumbermens, and C.I.G.A. should be dismissed as a party defendant, in compliance with Insurance Code Section 1063.1 (c) (9).

The Trial Court preliminarily observes that general and special employers can enter into various types of business agreements wherein they can shift various responsibilities and liabilities from one to the other. In the present case, this is what Select and Nike agreed to do, with respect to their joint and several liability for any potential workers’ compensation injury claims concerning their common employees.

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However, what is the effect of this type of liability shifting agreement, in a situation such as the present one, where Select no longer has a solvent insurance carrier which can pay for or cover one of the common employee's workers' compensation injury claim?

In sum, can a business liability agreement, entered into by a general and a special employer, alter, change or defeat a general and a special employee's state conferred right, to obtain workers' compensation benefits from either of his employers, inasmuch as these employers have joint and several liability with regard to their common employee?

The answer to this inquiry is no.

This is because private entities, such as Select and Nike, can not, by virtue of a business liability agreement, change or diminish a legal right which the State of California has already conferred upon a general and a special employee.

It has long been the law in the State of California that the common employee of general and special employers is legally permitted to proceed against either the general or the special employer or both, as a result of their joint and several liability as it concerns their common employee. (Miller v. Long Beach Oil Development Company, supra 167 Cal. App. 2<sup>nd</sup> 546; Kowalski v. Shell Oil Company, supra, 23 Cal 3d. 168.)

In the present case, Select no longer has a solvent insurer which can pay for or cover the applicant's workers' compensation injury claim. On the

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other hand, Nike has viable insurance coverage with Lumbermens, which is available to pay for or to cover their employee claims. In the present case, the applicant is clearly one of Nike's employees. In addition, there is no evidence which shows that Nike excluded any of their special employees from their workers' compensation insurance coverage with Lumbermens. Given these circumstances, the Trial Court must conclude that the Nike's Lumbermens insurance coverage constitutes other available insurance, within the meaning of Insurance Code Section 1063.1 (c) (9). As a result, C.I.G.A. has no liability with reference to the applicant's claim.

DISMISSAL OF PARTIES DEFENDANT:

Since Insurance Code Section 1063.1 (c) (9) precludes C.I.G.A. from covering or paying for workers' compensation injury claim, when there is other available insurance which can be utilized to cover the claims, the California Insurance Guarantee Association (C.I.G.A.), administered by Cambridge Integrated Services Group, Inc., for Legion Insurance Company, in liquidation, and Select Personnel Services, must be and are dismissed as parties defendant herein.

Date: 7-12-07

JMC:mcm

Served on all parties listed  
On the Official Address Record.

Date: 7-12-07

By: mcm

  
JOANNE M. COANE

Workers Compensation Administrative Law Judge