

CALIFORNIA COMPENSATION CASES
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Nike USA (Nike Inc.), Lumberman's Mutual Casualty Company, Petitioners v. Workers' Compensation Appeals Board, Select Personnel Services, California Insurance Guarantee Association, administered by Cambridge Integrated Services Group, Inc., on behalf of Legion Insurance Company, in liquidation, (**Jose Sandoval**), Respondents

Civil No. G039449--

Court of Appeal, Fourth Appellate District, Division Three

2008 Cal. Wrk. Comp. LEXIS 43; 73 Cal. Comp. Cases ***(advanced posting;subject to change)

Writ of Review Denied February 7, 2008

SUBSEQUENT HISTORY: [*1]

Subsequent History: Petition for Review Filed February 19, 2008

PRIOR HISTORY: *Prior History:* W.C.A.B. No. ANA 347151--WCJ Joanne M. Coane (ANA); WCAB Panel: Commissioners O'Brien, Brass, Cuneo

DISPOSITION: *Disposition:* Petition for writ of review denied

HEADNOTE: **California Insurance Guarantee Association--General and Special Employers--Other Insurance--WCAB held that California Insurance Guarantee Association, on behalf of general employer's insolvent insurance carrier, had no liability for applicant's 5/30/2000 spinal injury pursuant to Insurance Code § 1063.1(c)(9), since special employer's solvent carrier constituted "other insurance," that solvent carrier could not deny coverage of special employees absent evidence indicating that special employees were specifically excluded from coverage, and that business agreement between general and special employers, wherein they agreed that general employer would provide workers' compensation coverage to their common employees, could not deprive applicant of his right to obtain benefits from either his general or his special employer under theory of joint and several liability.** [See generally Hanna, Cal. [*2] Law of Emp. Inj. and Workers' Comp. 2d § 2.84[3][a].]

Applicant sustained an industrial injury to his spine on 5/30/2000, while working as a shipping and receiving clerk for Defendant Nike USA/Nike, Inc. (Nike). Applicant was placed with Nike on a temporary basis pursuant to a contract between Nike and Defendant Select Personnel Services (Select Personnel). The parties stipulated that, on the date of Applicant's injury, Nike was Applicant's special employer and Select Personnel was Applicant's general employer, and that Nike was insured for workers' compensation by Lumbermens Mutual Casualty Company (Lumbermens) and Select Personnel was insured by Legion Insurance Company (Legion), now in liquidation with its covered claims being assumed by California Insurance Guarantee Association (CIGA). It was also stipulated that certain invoices sent to Nike by Select Personnel billing for Applicant's services, as well as the portion of the business agreement between Nike and Select Personnel wherein Select Personnel agreed to maintain workers' compensation insurance for their common employees, represented the only existing evidence regarding the parties' actual agreement.

On 7/12/2007, [*3] the WCJ issued an FA&O, in which she recognized that Nike and Select Personnel were jointly and severally liable for Applicant's injury, and dismissed CIGA as a party defendant pursuant to *Insurance Code § 1063.1(c)(9)*, on the basis that Lumbermens, Nike's solvent carrier, constituted "other insurance" available to Applicant. Nike filed a Petition for Reconsideration, contending in relevant part that the WCJ erred in finding that Lumbermens constituted "other insurance" available to cover Applicant's claim because: (1) Select Personnel and Nike entered into a business agreement under which they agreed that Select Personnel would provide workers' compensation coverage for

their common employees; and (2) Lumbermens covered only Nike's regular employees, not its special employees, and, therefore, Nike was not insured with respect to special employees.

The WCJ recommended that reconsideration be denied. In her report, the WCJ pointed out that Select Personnel and Nike, as Applicant's general and special employers, respectively, had joint and several liability for Applicant's injuries. Thus, unless Nike could demonstrate that Lumbermens' [*4] workers' compensation insurance policy specifically excluded special employees, Lumbermens would constitute "other insurance" under *Insurance Code § 1063.1(c)(9)*, thereby relieving CIGA of liability for benefits pursuant to *Miceli v. Jacuzzi, Inc. (2006) 71 Cal. Comp. Cases 599* (Appeals Board en banc opinion). According to the WCJ, the business agreement between Select Personnel and Nike, under which they agreed that Select Personnel would provide workers' compensation coverage for their common employees, could not act to deprive Applicant of his right to obtain workers' compensation benefits from either his general employer (Select Personnel) or his special employer (Nike) inasmuch as these employers had joint and several liability. Moreover, the WCJ pointed out, there was no evidence showing that Nike's special employees were excluded from Lumbermens' coverage. Under these circumstances, the WCJ concluded that Lumbermens' insurance constituted "other insurance" within the meaning of *Insurance Code § 1063.1(c)(9)* and that CIGA had no liability with respect to Applicant's [*5] claim.

The WCAB denied reconsideration and adopted and incorporated the WCJ's report, without further comment on the issues raised.

Nike and Lumbermens filed a Petition for Writ of Review, contending in essence that the WCAB's finding that Lumbermens constituted "other insurance" was not supported by substantial evidence.

CIGA filed an Answer, contending in relevant part that the WCAB properly found that Lumbermens constituted "other insurance" and, therefore, that CIGA had no statutory liability for Applicant's claim.

WRIT DENIED February 7, 2008.

COUNSEL: *Counsel:* For petitioners--Veatch Carlson, by Allen K. Tanita
For respondent CIGA--Guilford, Steiner, Sarvas & Carbonara, by Richard E. Guilford; Heggeness, Sweet, Simington & Patrico, by Albert N. Delzeit