



LEXSEE 73 CAL COMP CAS 1084

CALIFORNIA COMPENSATION CASES
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Fireman's Fund Insurance Company, Petitioner v. Workers' Compensation Appeals Board, Film Payment Services, Inc., California Insurance Guarantee Association, administered by Broadspire, on behalf of Legion Insurance Company, in liquidation, Kelley Productions, Inc., (**Robert Giles**), Respondents

Civil No. B202721--

Court of Appeal, Second Appellate District, Division Three

73 Cal. Comp. Cas 1084; 2008 Cal. Wrk. Comp. LEXIS 193

Writ of Review Denied May 29, 2008

SUBSEQUENT HISTORY: [1]**

Subsequent History: Review Denied July 23, 2008

Disposition: Petition for writ of review denied

PRIOR HISTORY: *Prior History:* W.C.A.B. No. LBO 339165--WCJ John Payne (LBO); WCAB Panel: Commissioners O'Brien, Brass, Cuneo [*see Giles v. Film Payment Services, 2007 Cal. Wrk. Comp. P.D. LEXIS 75* (Appeals Board panel decision)]

HEADNOTE: [*1085]

California Insurance Guarantee Association--Covered Claims--Other Insurance--Collateral Estoppel--WCAB rescinded WCJ's decision and held that court of appeal's decision in *General Casualty Insurance v. W.C.A.B. (Miceli)* (2005) 70 Cal. Comp. Cases 953 (court of appeal opinion not published in official reports) did not apply to collaterally estop California Insurance Guarantee Association from contending that special employer's insurance constituted "other insurance" under *Insurance Code § 1063.1(c)(9)* available to applicant with 1/7/2002 back and right lower extremity injuries, when WCAB found that only California Insurance Guarantee Association was party in *Miceli* and there was no privity among parties in this case, [2] and that *Miceli* was litigated differently from instant case in that facts on which *Miceli* court of appeal relied in making its decision were different from facts in instant case.** [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 2.84[3][a].]

Applicant sustained industrial injuries to his back and right lower extremity on 1/7/2002 while employed as a driver by general employer Film Payment Services (FPS), insured by Legion Insurance Company (Legion), now in liquidation, with its covered claims being handled by CIGA, and while performing services for special employer Kelley Productions, Inc. (Kelley), insured by Fireman's Fund Insurance Company (Fireman's Fund). After Legion became insolvent, CIGA contended that Applicant's workers' compensation claim was not a "covered claim" because Fireman's

Fund workers' compensation policy issued to Kelley, constituted "other insurance" available to Applicant pursuant to *Insurance Code § 1063.1(c)(9)(i)*.

The matter proceeded to a trial on 6/6/2006 on issues regarding the liabilities of the defendants. At trial, it was stipulated that Kelley and FPS [**3] entered into a "Personnel Services Agreement" that was in effect on the date of injury, and that Kelley and FPS each had separate workers' compensation policies. The parties agreed that no "Alternate Insured Endorsement" was issued to Kelley by Legion as allowed by *Labor Code § 3602(d)* and that no endorsement excluding temporary (special) employees was issued by Fireman's Fund on its policy with Kelley. The Personnel Services Agreement between Kelley and FPS was entered into evidence, as was Kelley's workers' compensation policy with Fireman's Fund, the deposition testimony of three witnesses, and various other documents.

One of the issues at trial was Fireman's Fund's claims that CIGA was "collaterally estopped" by the decision in *General Casualty Insurance v. W.C.A.B. (Miceli) 70 Cal. Comp. Cases 953* (court of appeal opinion not published in official reports) from contending that workers' compensation policies are "unlimited" in coverage unless they contain a separate exclusionary form endorsement and was also "collaterally estopped" by *Miceli* from contending that the Fireman's Fund policy covered [**4] Kelley's special employees.

The WCJ issued an F&O on 8/15/2006, concluding that CIGA was "collaterally estopped" by *Miceli* from contending that workers' compensation policies are "unlimited" in coverage unless they contain a separate exclusionary form endorsement, [**1086] but was not collaterally estopped by that case from contending that the Fireman's Fund policy covered Kelley's special employees. The WCJ further found that the Fireman's Fund policy was not "other insurance" available to Applicant pursuant to *Insurance Code § 1063.1(c)(9)*. Based on this finding, the WCJ dismissed Fireman's Fund as a party defendant and denied CIGA's petition for dismissal.

CIGA filed a Petition for Reconsideration, contending in relevant part that Applicant's claim was not a "covered claim" under *Insurance Code § 1063.1(c)(9)* because Kelley's workers' compensation policy with Fireman's Fund was "other insurance" available to Applicant. CIGA specifically challenged the WCJ's finding that it was "estopped from asserting that workers' compensation insurance policies issued before the court of appeals [**5] decision in *Miceli* are unlimited in coverage unless they contain a separate exclusionary form endorsement."

Fireman's Fund also sought reconsideration, substantially contending that the WCJ erred in stating that the parties did not contest that joint and several liability was extinguished by compliance with *Insurance Code § 11663* and *Labor Code § 3602(d)*.

The WCJ recommended that Fireman Fund's petition be dismissed and CIGA's petition be denied on its merits. The WCJ also recommended that the WCAB issue an en banc opinion or significant panel decision to give guidance to the workers' compensation community on the issues raised in this case.

The WCAB granted both petitions, rescinded the WCJ's F&O, and returned the matter to the trial level for the WCJ to address whether the Fireman's Fund policy constituted "other insurance" available to Applicant under *Insurance Code § 1063.1(c)(9)*. As noted by the WCAB, the WCJ opined that the agreement between Kelley and FPS, the nature of the industry, and the testimony of the witnesses established that Fireman's [**6] Fund policy was not intended to cover Kelley's special employees and, therefore, was unavailable to Applicant as "other insurance" within the meaning of *Insurance Code § 1063.1(c)(9)*. In making this determination, the WCJ relied on his conclusion that CIGA was collaterally estopped from contending that the Fireman's Fund policy was unlimited because there was no exclusionary endorsement that stated otherwise. The WCAB, however, did not agree that CIGA was precluded by collateral estoppel from contending that the Fireman's Fund policy was unlimited.

The WCAB explained that the party asserting collateral estoppel in a workers' compensation case must prove that the issue was the same in both cases and was litigated to a final judgment, that the party against whom estoppel is asserted

had a full and fair opportunity to adjudicate the issue, and that the parties to the action are in privity. In the instant case, the WCAB explained in relevant respects:

" Only CIGA was a party in *Miceli* and there is no privity among the other parties in the case. Moreover, the circumstances under which the Court of Appeal reached its decision in [**7] *Miceli* do not support the application of collateral estoppel in this case. In *Miceli*, much of the [*1087] information relied upon by the Court of Appeal in considering whether an exclusionary endorsement was available to the special employer's insurer was not offered by the parties in the course of an evidentiary hearing at the trial level, and was not part of the trial record. The information was developed by the Court of Appeal pursuant to its own inquiry and factual/legal conclusions were made by the appellate court in the first instance. [Footnote by WCAB: We also note that the facts in *Miceli* and this case are also different in that there was no *Labor Code section 3602(d)* endorsement on FPS's policy with Legion.] Thus, the determinations of the Court of Appeal in *Miceli* are not binding upon CIGA in this case under the doctrine of collateral estoppel. Instead, the issue of the parties' liabilities in this case must be evaluated on the individual facts of the case, including the parties [*sic*] intent and the effect of the various insurance policies involved in order to determine if the Fireman's Fund policy is other [**8] insurance "available" to applicant within the meaning of *Insurance Code section 1063.1(c)(9)*. (*Miceli v. Jacuzzi, Inc. (2006) 71 Cal.Comp.Cases 599* (Appeals Board en banc).)"

Additionally, the WCAB noted that Kelley's workers' compensation policy with Fireman's Fund, which was in evidence, provided on its face for workers' compensation coverage for employees of Kelley and that there was no express exclusion for special employees. Therefore, CIGA had met its initial burden of showing that there was "other insurance" available to Applicant pursuant to *Insurance Code § 1063.1(c)(9)*.

Although the WCAB did not find a basis for applying collateral estoppel based on the *Miceli* decision, the WCAB noted that the WCJ also considered other evidence in concluding that there was an ambiguity, such as the agreement between FPS and Kelley, the fact that Applicant was not on Kelley's payroll, testimony about Kelley not paying premiums to Fireman's Fund to cover special employees, and industry practice. The WCAB found that it was appropriate to look beyond the language of [**9] the Fireman's Fund policy to evaluate the coverage provided, even though none of these factors alone was sufficient to support a finding that the Fireman's Fund policy was not "other insurance" available to Applicant.

Fireman's Fund filed a Petition for Writ of Review, contending in relevant portion that CIGA was collaterally estopped from re-litigating the issues that: (1) workers' compensation policies are unlimited unless there is a separate exclusionary for endorsement; (2) the intent of the parties to exclude special employees cannot prove the absence of other insurance; and (3) there is other available insurance when the intent of the parties to exclude coverage has already been established. Fireman's Fund further contended that compliance with the requirements set forth in *Labor Code § 3602(d)* extinguished the special employer's obligation to secure workers' compensation insurance for special employees. [*1088]

CIGA filed an Answer, essentially contending that there was no legal support to apply the doctrine of collateral estoppel to CIGA as urged by Fireman's Fund.

WRIT DENIED May 29, 2008.

COUNSEL: *Counsel:* For petitioner--Gray [**10] & Prouty, by Daniel Brown; Hayes, Davis, Bonino, Ellingson, McLay & Scott, by Mark G. Bonino, Phuong N. Fingerman
For respondent CIGA--Guilford, Steiner, Sarvas & Carbonara, by Richard E. Guilford; Stockwell, Harris, Widom & Woolverton, by Joseph E. Zuckerman