

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

CRISPIN BERMUDEZ, *Applicant*

vs.

**ELKHORN PACKING COMPANY, LLC; ZENITH INSURANCE COMPANY,
*Defendant***

**Adjudication Numbers: ADJ18217235; ADJ18217236
San Jose District Office**

**OPINION AND ORDER GRANTING
PETITION FOR RECONSIDERATION
AND DECISION AFTER RECONSIDERATION**

Defendant Zenith Insurance Company seeks reconsideration of an arbitrator's Conclusion of Law & Order of February 10, 2025, wherein it was found, "Crispin Bermudez was covered by The Zenith Insurance Company workers' compensation insurance policy during the period of time that he worked for Elkhorn Packing Company, LLC (hereinafter "Elkhorn"), and claimed injury on 07/24/2022 and cumulatively through 08/04/2023, as although he was a managing member of Elkhorn he lacked the requisite intent to relinquish a known right and thus his signature on the document waiving his rights to workers' compensation cannot effectuate a waiver of his right to workers' compensation benefits as otherwise allowed by California Labor Code section 3352(a)(17)(A)." Applicant claims that while employed as a manager during a cumulative period ending on August 4, 2023 in case ADJ18217235, he sustained industrial injury to his back, ankles and in the form of hearing loss. Applicant also claims that while employed as a manager on July 29, 2022 in case ADJ18217236, he sustained industrial injury to his back and left ankle.

Defendant contends that the arbitrator erred in finding that applicant was covered by the workers' compensation policy, arguing that applicant executed a valid exclusion of coverage. We have received an Answer, and the arbitrator has filed a Report and Recommendation on Petition for Reconsideration.

As explained below, we will grant reconsideration, rescind the arbitrator's decision, and issue a new decision finding that applicant is not covered by Zenith's policy.

Preliminarily, we note that former Labor Code section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, Labor Code section 5909 was amended to state in relevant part that:

(a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.

(b)

(1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.

(2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under Labor Code section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase “Sent to Recon” and under Additional Information is the phrase “The case is sent to the Recon board.”

Here, according to Events, the case was transmitted to the Appeals Board on February 28, 2025 and 60 days from the date of transmission is April 29, 2025. This decision is issued by or on April 29, 2025, so we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Labor Code section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the arbitrator¹, the Report was served on February 28, 2025, and the case was transmitted to the

¹ Other than exceptions not applicable here an arbitrator has the same power as a workers’ compensation administrative law judge and an arbitrator’s decision has the same force and effect as a decision issued by a workers’ compensation administrative law judge. (Lab. Code, § 5270 et seq.) Accordingly, the fact that the decision and the Report and Recommendation was issued by an arbitrator does not alter the applicability of section 5909.

Appeals Board on February 28, 2025. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on February 28, 2025.

Turning to the merits, Cal. Labor Code section 3351(f) states, in pertinent part:

“Employee” means every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed, and includes:

(f) All working members of a partnership or limited liability company receiving wages irrespective of profits from the partnership or limited liability company. **A general partner of a partnership or a managing member of a limited liability company may elect to be excluded from coverage in accordance with paragraph (17) of subdivision (a) of Section 3352.**

(Emphasis added.)

Labor Code section 3352(a)(17) for its part states:

(a) “Employee,” excludes the following:

(17)

(A) An individual who is a general partner of a partnership or a managing member of a limited liability company who executes a written waiver of his or her rights under this chapter stating under penalty of perjury that the person is a qualifying general partner or managing member. The waiver shall be effective upon the date of receipt and acceptance by the partnership’s or limited liability company’s insurance carrier. The insurance carrier, with the consent of the individual executing the waiver, may elect to backdate the acceptance of the waiver up to 15 days prior to the date of receipt of the waiver. The insurance carrier, insurance agent, or insurance broker is not required to investigate, verify, or confirm the accuracy of the facts contained in the waiver. There is a conclusive presumption that a person who executes a waiver pursuant to this subdivision is not covered by workers’ compensation benefits.

(B) A written waiver that is executed pursuant to this paragraph, including, but not limited to, a written waiver that was executed prior to January 1, 2017, and is accepted by the insurance carrier on or before December 31, 2017, may be deemed to be accepted by the insurance carrier as of January 1, 2017. The written

waiver shall remain in effect until the general partner provides the partnership's insurance carrier or the managing member provides the limited liability company's insurance carrier with a written withdrawal of the waiver.

In this matter, the evidence included an application for workers' compensation coverage filled out by the employer's insurance broker which included an exclusion from coverage for the employer's two individual managing members: applicant and co-owner Pete Colburn. (Ex. F.) Applicant executed a waiver of workers' compensation coverage dated October 28, 2020. (Ex. G.) The waiver was a form approximately half a page long in which applicant agreed that he would "not be entitled to workers' compensation benefits ... there will be a conclusive presumption that I will not be covered under the insured's workers' compensation policy with the above-referenced insurer if an employment related-injury occurs." The language of the waiver substantially tracks the language of Labor Code section 3352(a)(17).

At the arbitration, evidence was presented that applicant signed a similar waiver with the previous insurer covering the employer for workers' compensation and that the other individual managing member Pete Colburn signed the same waivers.

Nevertheless, the arbitrator invalidated the waiver because applicant did not have the subjective specific intent of waiving his workers' compensation rights.

"Mutual assent to contract is based upon objective and outward manifestations of the parties; a party's 'subjective intent, or subjective consent, therefore is irrelevant.' (*Beard v. Goodrich* (2003) 110 Cal.App.4th 1031, 1040; see also *Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 811.)" (*Stewart v. Preston Pipeline, Inc.* (2005) 134 Cal.App.4th 1565, 1587.) Applicant appears to argue that he should not be bound to the waiver solely because he did not read it. Failure to read a contract, without more, does not allow a party that entered into it to escape its terms. (*Randas v. YMCA of Metropolitan Los Angeles* (1993) 17 Cal.App.4th 158, 163.) As the *Randas* court wrote:

As Mr. Witkin states: "Ordinarily, one who accepts or signs an instrument, which on its face is a contract, is deemed to assent to all its terms, and cannot escape liability on the ground that he has not read it. If he cannot read, he should have it read or explained to him." (1 Witkin, Summary of Cal. Law (9th ed. 1987) § 120, p. 145.) This is not only the California but the general rule. (3 Corbin, Contracts (1960) § 607, pp. 668-669, fn. omitted ["One who signs an instrument when for some reason, such as illiteracy or blindness, he can not read it, will be bound by its terms in case the other party acts in good faith without

trick or misrepresentation. The signer should have had the instrument read to him.”].)

We note that applicant has not alleged fraud, duress or any other ground for the invalidation of the waiver.

None of the authorities cited by the arbitrator involved an express written waiver. *Lynch v. California Coastal Commission* (2017) 3 Cal.5th 470 involved the issue of whether a party waived its objections to issuance of a construction permit by commencing construction under the permit. *Lynch* did not involve a written express waiver and in any case the Supreme Court did find a waiver in *Lynch*.

While in other scenarios the workers’ compensation system does have procedural safeguards to a worker waiving or settling their rights, the waiver executed by the applicant here is expressly sanctioned by Labor Code section 3352(a)(17) which flatly states that “There is a conclusive presumption that a person who executes a waiver pursuant to this subdivision is not covered by workers’ compensation benefits.”

We find this case similar to *Sanchez v. West Coast Docks, Inc.* (2023) 2023 Cal.Wrk.Comp. P.D. LEXIS 286 (Appeals Bd. panel), where we affirmed the finding that workers’ compensation coverage had been waived pursuant to a Labor Code section 3352(a)(17) waiver. In *Sanchez*, the injured manager also claimed not to have read the waiver, but the arbitrator correctly found that “He is presumed to have read what he signed and he should be bound by its terms.” (*Id.* at p. *8.) Although the arbitrator in *Sanchez* also stated that the manager had the terms of the waiver explained, that additional fact was not essential to the holding.

Applicant filed a valid waiver of workers’ compensation coverage excluding him from the definition of employee. We therefore grant reconsideration, rescind the arbitrator’s decision and issue a new decision finding that applicant was not an employee pursuant to Labor Code section 3352(a)(17) and thus excluded from workers’ compensation coverage. Since applicant’s only argument for not applying the express waiver was the fact that he did not read it, we not need discuss the contours and limits, if any, of the conclusive presumption codified in section 3352(a)(17).

For the foregoing reasons,

IT IS ORDERED that Defendant's Petition for Reconsideration of the Conclusion of Law & Order of February 10, 2025 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Conclusion of Law & Order of February 10, 2025 is **RESCINDED** and that the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Applicant is a managing member of a limited liability company who executed a valid written waiver of his workers' compensation rights on October 28, 2020.

2. Applicant is thus excluded from the definition of employee pursuant to Labor Code sections 3351(f) and 3352(a)(17) and is not subject to workers' compensation coverage under the Zenith Insurance Company policy herein for the injuries alleged in cases ADJ18217235 and ADJ18217236.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ PAUL F. KELLY, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 29, 2025

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

**CRISPIN BERMUDEZ
JOHNSON LAW FIRM
CHERNOW, PINE AND WILLIAMS
STEVEN SIEMERS, ARBITRATOR**

DW/oo

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