



California Workers' Compensation Institute

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September 27, 2019

Court of Appeal
Second Appellate District
300 South Spring Street, 2nd Floor North Tower
Los Angeles, CA 90013

Re: Travelers v. Workers' Compensation Appeals Board (Mastache) B292915

TO THE HONORABLE CHIEF JUSTICE AND THE HONORABLE ASSOCIATE JUSTICES OF THE
SECOND DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA:

On behalf of the membership of the California Workers' Compensation Institute (acting as *amicus curiae* herein) and pursuant to California Rules of Court 8.1120, I am writing to request that this Honorable Court order publication of the decision in this case, dated September 18, 2019.

CWCI is a private non-profit research, information, and educational organization dedicated to improving the California workers' compensation system. Institute members include insurers writing 81% of California's workers' compensation premium, and self-insured employers with \$72.1B of annual payroll (31.7% of the state's total annual self-insured payroll). The Institute publishes research that is typically based on claims data collected from member companies, offers analyses and practical expertise on issues and trends affecting California workers' compensation, spotlights problems and concerns within the system, helps build consensus for workable solutions, and is often used to evaluate the impact of various legislative and regulatory proposals. CWCI further serves as a liaison with employer, labor, medical, regulatory, and legal communities within the workers' compensation system, and frequently provides written and oral input at legislative and regulatory hearings. Based upon its recognized expertise in workers' compensation, the Institute has been judicially permitted to join in multiple cases as *amicus curiae* before the California Supreme Court and Courts of Appeal – including this one.¹

¹ CWCI has been granted amicus status in the cases of *Christian v. WCAB* (1997); *State Compensation Insurance Fund v. WCAB (Stuart)* (1998); *Avalon Bay Foods v. WCAB* (1998); *Rosales v. Depuy Ace Medical Company* (2000); *Lockheed Martin v. WCAB (McCullough)* (2002); *Wal-Mart v. WCAB (Garcia)* (2003); *Honeywell v. WCAB*

All parties and this Court recognized that the question of liability as between CIGA and Travelers turned on whether the endorsement in the Travelers policy was valid.² Travelers contended that a countersignature was not required in order to form a valid and enforceable contract, and that the labor agreement itself constituted written affirmation as required.³

This Court agreed, finding that there were at least two separate documents that provided the requisite affirmation: the labor agreement between Jessie Lord Bakery and StaffChex, and the contract between Jessie Lord Bakery and Travelers that included the specific representation that Jessie Lord had entered into a contract with the general employer under which the latter would insure special employees.⁴ Using a common-sense view, the decision held:

Nullifying a three-sided, sophisticated contractual structure, under which all three parties performed their obligations in good faith over the absence of a signature on an *endorsement* to a contract **disregards reality and is inequitable**.⁵

The WCAB's position that Travelers must obtain a countersignature on the endorsement constitutes a hyper-technical reading of the law – one that the WCAB is bound to repeat unless constrained by publication of this decision.

CWCI contends that this decision qualifies for publication under **Rule 8.1105(c)(1)** by establishing a new rule of law. That this case meets this particular criterion may be self-evident from the fact that the parties would certainly have cited any binding precedent to support their positions. They could not.

(Wagner) (2005); *Green v. WCAB* (2005); *Rio Linda School District v. WCAB (Scheftner)* (2005); *Nabors v. WCAB* (2006); *Yeager Construction v. WCAB (Gatten)* (2006); *Chang v. WCAB* (2007); *Vaira v. WCAB* (2007); *Brodie v. WCAB* (2007); *Babbitt v. Ow Jing* (2007); *Pendergrass v. Duggan Plumbing* (2007); *Tanimura & Antle v. WCAB (Lopez)* (2007); *Palm Medical Group v. State Compensation Insurance Fund* (2007); *Smith & Amar v. WCAB* (2007); *Facundo-Guerrero v. WCAB* (2008); *Smith & Amar v. WCAB* (2009); *Benson v. WCAB* (2009); *Boughner v. WCAB* (2009); *Aguilar v. WCAB* (2009); *El Aguila Food Products v. WCAB (Cervantes)* (2010); *Almaraz & Guzman v. WCAB* (2011); *Baker v. WCAB (X.S.)* (2011); *Ogilvie v. WCAB* (2011); *Valdez v. WCAB* (2012); *Pacific Compensation v. WCAB (Nilsen)* (2013); *Southern California Edison v. WCAB (Martinez)* (2013); *Stevens v. Outspoken Enterprises* (2014); *CIGA v. WCAB (Elite Surgery Centers)* (2014); *South Coast Framing v. WCAB (Clark)* (2014); *Angelotti Chiropractic v. Baker* (2014); *Contra Costa County v. WCAB (Dahl)* (2015); *State Compensation Ins. Fund v. WCAB (Margaris)* (2016); *Ramirez v. WCAB (Calif. Dept. of Health Care Services)* (2017); *State Compensation Insurance Fund v. WCAB (Guzman)* (2017); *Co. of San Diego v. WCAB (Pike)* (2017); *Zuniga v. WCAB* (2018); *State Compensation Insurance Fund v. WCAB (Guzman)* (2018); *Co. of San Diego v. WCAB (Pike)* (2018); *King v. CompPartners* (2018); *First Foursquare Church v. WCAB (Austin)* (2018); *City of Petaluma v. WCAB (Lindh)* (2018); *Co. of Santa Clara v. WCAB (Justice)* (2019); *Universal Furniture v. WCAB (Morales)* (2019); and *Travelers v. WCAB (Mastache)* (2019).

² Sl. Op. at p. 12.

³ Travelers' Reply to WCAB, at p. 15.

⁴ Sl. Op. at p. 14. The Court also references the Ullico policy as separately satisfying the requirement, but noted that the Ullico policy was not in evidence. Sl. Op. 14, 18.

⁵ Sl. Op. at p. 15 (*italics in original*) (**boldface emphasis added**).

This decision holds that the written affirmation required by the regulation then in effect is not limited to a signature from the employer on the policy endorsement. CWCI agrees with the Court's implicit position that the plain language of the law would have stated such a requirement plainly, if that was indeed the intent. Instead, this Court states, the law only requires the special employer to "affirm...in writing" that coverage had been otherwise obtained.⁶

By permitting writings and contracts other than a countersigned policy endorsement to satisfy the "in writing" requirement, this decision establishes a new rule of law under Rule 8.1105(c)(1); alternatively, it advances a new interpretation of existing law under Rule 8.1105(c)(5). Either way, this decision is qualified for publication.

Further, the decision qualifies for publication under **Rule 8.1105(c)(2)** by applying an existing rule of law to a set of facts significantly different from those stated in published opinions. Both parties were forced to refer this Court to *Fireman's Fund v. Workers' Comp. Appeals Bd. (Colomaria)* (2010) 189 Cal. App. 4th 101 – a case which did not include either an endorsement or other language in the policy excluding coverage for special employees.

But this decision itself recognized that "[t]he facts of *Colomaria* are undeniably distinct" from the facts in the instant case "because Travelers and Jessie Lord obtained an endorsement for the express purpose of excluding" special employees from coverage under the Travelers policy.

By highlighting this distinction from *Colomaria*, and by providing a full analysis of the regulatory requirement and the parties' contractual obligations, the decision herein qualifies for certification for publication under Rule 8.1105(c)(2).

Publication of the Court's decision in this case would prevent the WCAB from continuing to require an actual signature on an endorsement when the legal requirement is only that affirmation be made "in writing." As between sophisticated parties in an arms-length contractual transaction, this is both a reasonable and equitable result.

Thank you for your consideration of this request.

Very truly yours,

/s/ Ellen Sims Langille

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⁶ Sl. Op. at p. 15.

PROOF OF SERVICE

*RE: Travelers Property Casualty Company of America v. WCAB,
California Insurance Guarantee Association for Ullico Casualty
Co., Jessie Lord Bakery, and Jose Luis Mastache*

I, Ellen Sims Langille, am a citizen of the United States of America and am employed in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action. My business address is: California Workers' Compensation Institute, 1333 Broadway, Suite 510, Oakland, CA 94612. On the date noted below, I electronically filed and served the attached

REQUEST FOR PUBLICATION

by CALIFORNIA WORKERS' COMPENSATION INSTITUTE

with the Clerk of the Court for the Second District Court of Appeal by using the appellate TrueFiling system. The following case participants were served electronically through the TrueFiling system:

Trinidad & Associates 655 N. Central Avenue, Suite 2000 Glendale, CA 91203	Hayes, Scott, Bonino, et al. 999 Skyway Road, Suite 310 San Carlos, CA 94070
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I certify that all participants in the case are registered TrueFiling users and that service will be accomplished by the appellate TrueFiling system.

Respectfully submitted,

September 27, 2019

/s/ Ellen Sims Langille

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