Filed 10/20/04

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

GENERAL CASUALTY INSURANCE et al., Petitioners, v. WORKERS' COMPENSATION APPEALS BOARD and THE CALIFORNIA INSURANCE GUARANTEE ASSOCIATION, Respondents.	No. B167017 (W.C.A.B. No. POM 0248928)
AMERICAN HOME ASSURANCE COMPANY, Petitioner, v. WORKERS' COMPENSATION APPEALS BOARD and THE CALIFORNIA INSURANCE GUARANTEE ASSOCIATION, Respondents.	No. B167540 (W.C.A.B. No. POM 0248928)

REMEDYTEMP, INC., Petitioner, v. WORKERS' COMPENSATION APPEALS BOARD and THE CALIFORNIA INSURANCE GUARANTEE ASSOCIATION, Respondents.	No. B167541 (W.C.A.B. No. POM 0248928)
JACUZZI INCORPORATED, Petitioner, v. WORKERS' COMPENSATION APPEALS BOARD and THE CALIFORNIA INSURANCE GUARANTEE ASSOCIATION, Respondents.	No. B167542 (W.C.A.B. No. POM 0248928)

PROCEEDINGS to review a decision of the Workers' Compensation Appeals Board. Affirmed.

Hogarth & Associates and Larry D. Hogarth; Benedon & Serlin, Douglas G. Benedon and Gerald M. Serlin for Petitioners General Casualty Insurance and Regent Insurance.

Robert Wheatley and Yvette A. Boehnke; Ropers, Majeski, Kohn & Bentley, Mark G. Bonino and Erica L. Hermatz for Petitioner American Home Assurance Company.

Latham & Watkins, G. Andrew Lundberg, Stephen J. Newman and Kay L. Tidwell; Barger & Wolen, John C. Holmes and Bryan C. Crawley; Sharon M. Renzi for Petitioner RemedyTemp, Inc.

Seyfarth Shaw, Robert E. Buch, Peter E. Romo and Dennis C. DePalma for Petitioner Jacuzzi Incorporated.

Guilford Steiner Sarvas & Carbonara and Richard E. Guilford for Respondent California Insurance Guarantee Association.

No appearance for Respondent Workers' Compensation Appeals Board.

American Staffing Association and Edward A. Lenz; Thelen Reid & Priest and Robert Spagat for Amicus Curiae American Staffing Association.

McCormick, Barstow, Sheppard, Wayte & Carruth, James P. Wagoner and Todd W. Baxter for Amicus Curiae Pridestaff.

Finnegan, Marks, Hampton & Theofel and Ellen Sims Langille for Amicus Curiae California Workers' Compensation Institute.

INTRODUCTION

RemedyTemp, Inc. (RemedyTemp), a general employer which provides workers or special employees to special employers, agreed to provide Mark Miceli to Jacuzzi, Inc. (Jacuzzi), pursuant to a Service Agreement. RemedyTemp further agreed to keep Miceli on payroll and provide workers' compensation insurance through Reliance National Indemnity Co. (Reliance), which named Jacuzzi as an additional insured under an Alternate Employer Endorsement. Jacuzzi also obtained a California standard workers' compensation insurance policy for its own workers through American Home Assurance (Assurance).

Miceli admittedly sustained an industrial injury while working for Jacuzzi as a shipper and receiver on March 1, 2000. Miceli filed for workers' compensation benefits. However, on October 3, 2001, Reliance was ordered liquidated and the California Insurance Guarantee Association (CIGA) was joined to cover the claim.[1] CIGA then requested to be dismissed under Ins. Code section 1063.1, subdivision (c)(9),[2] contending

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[1] CIGA is an unincorporated association of insurers licensed in California, and every insurer is required to participate. (*Isaacson v. California Ins. Guarantee Assn.* (1988) 44 Cal.3d 775, 786 (*Isaacson*).) CIGA provides insolvency insurance and pays claims of insolvent member insurers, but only as set forth by Insurance Code (Ins. Code) section 1063 et seq. (*Isaacson, supra,* 44 Cal.3d at pp. 786-787; *R. J. Reynolds Co. v. California Ins. Guarantee Assn.* (1991) 235 Cal.App.3d 595, 598 (*R. J. Reynolds*).)

Ins. Code section 1063.1, subdivision (c)(1) states in relevant part: '"Covered claims' means the obligations of an insolvent insurer . . . (i) imposed by law and within the coverage of an insurance policy of the insolvent insurer; (ii) which were unpaid by the insolvent insurer; (iii) which are presented as a claim . . . (v) for which the assets of the insolvent insurer are insufficient to discharge in full; (vi) in the case of a policy of workers' compensation insurance, to provide workers' compensation benefits under the workers' compensation law of this state . . . ."

[2] Ins. Code section 1063.1, subdivision (c)(9) states in relevant part: '"Covered claims' does not include (i) any claim to the extent it is covered by any other insurance of a class covered by this article available to the claimant or insured . . . ."

that the Assurance policy provided other available insurance which covered Miceli's claim. RemedyTemp, Jacuzzi and Assurance alleged that their agreements qualified under Ins. Code section 11663[3] and Labor Code section 3602, subdivision (d),[4] which

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[3] Ins. Code section 11663 states: "As between insurers of general and special employers, one which insures the liability of the general employer is liable for the entire cost of compensation payable on account of injury occurring in the course of and arising out of general and special employments unless the special employer had the employee on his or her payroll at the time of the injury, in which case the insurer of the special employer is solely liable. For the purposes of this section, a self-insured or lawfully uninsured employer is deemed and treated as an insurer of his or her workers' compensation liability."

[4] Labor Code section 3602, subdivision (d) states: "For the purposes of this division, including Sections 3700 and 3706, an employer may secure the payment of compensation on employees provided to it by agreement by another employer by entering into a valid and enforceable agreement with that other employer under which the other employer agrees to obtain, and has, in fact, obtained workers' compensation coverage for those employees. In those cases, both employers shall be considered to have secured the payment of compensation within the meaning of this section and Sections 3700 and 3706 if there is a valid and enforceable agreement between the employers to obtain that coverage, and that coverage, as specified in subdivision (a) or (b) of Section 3700, has been in fact obtained, and the coverage remains in effect for the duration of the employment providing legally sufficient coverage to the employee or employees who form the subject matter of the coverage. That agreement shall not be made for the purpose of avoiding an employer's appropriate experience rating as defined in subdivision (c) of Section 11730 of the Insurance Code. [¶] Employers who have complied with this subdivision shall not be subject to civil, criminal, or other penalties for failure to provide workers' compensation coverage or tort liability in the event of employee injury, but may, in the absence of compliance, be subject to all three."

Labor Code section 3700 states in relevant part: "Every employer except the state shall secure the payment of compensation by one or more of the following ways:

"(a) By being insured against liability to pay compensation in one or more insurers duly authorized to write compensation insurance in this state.

"(b) By securing from the Director of Industrial Relations a certificate of consent to self-insure . . . ."

Labor Code section 3706 states: "If any employer fails to secure the payment of compensation, any injured employee or his dependents may bring an action at law against such employer for damages, as if this division did not apply."

limited liability to Reliance and therefore CIGA.[5]

The Workers' Compensation Appeals Board (WCAB) in banc concluded that RemedyTemp and Jacuzzi were jointly and severally liable to Miceli for workers' compensation benefits, which was not extinguished by the contractual agreements. In addition, the WCAB determined that Ins. Code section 11663 was limited to insurers, which does not include CIGA whose liability is strictly statutory. The WCAB reasoned further that section 3602, subdivision (d) precludes tort liability and not alternative workers' compensation insurance. Although the contracting parties may not have expected Assurance to provide coverage because it did not collect premium for special employees like Miceli, the WCAB explained, the Assurance policy is a standard workers' compensation insurance policy that provides unlimited coverage absent an expressed exclusion. The WCAB concluded that the Assurance policy is other available insurance under Ins. Code section 1063.1, subdivision (c)(9), and granted CIGA dismissal.

RemedyTemp, Jacuzzi, Assurance and Casualty petition for writ of review. Petitioners argue that the contractual agreements comply with Ins. Code section 11663 and section 3602, subdivision (d), which extinguishes Jacuzzi's joint and several liability and excludes insurance coverage for special employees such as Miceli under the Assurance policy. Moreover, the WCAB agreed this was the intent of the contracting parties, which should be enforced. Thus, an expressed exclusion is unnecessary, and the Assurance policy is not other available insurance under Ins. Code section 1063.1, subdivision (c)(9). The WCAB's decision is not only contrary to the intent of the contracting parties, but the Legislature's purpose for enacting section 3602, subdivision (d) to avoid duplicate insurance coverage and premium.

All further references to statute are to the Labor Code unless otherwise stated.

[5] General Casualty Insurance (Casualty), a workers' compensation insurer of a special employer of industrially injured special employees provided by RemedyTemp, joined the proceedings.

CIGA answers that it is not an insurer bound by Ins. Code section 11663, but only pays covered claims according to Ins. Code section 1063.1, subdivision (c). In addition, the Assurance policy is other available insurance under Ins. Code section 1063.1, subdivision (c)(9), because coverage under a standard workers' compensation insurance policy is unlimited unless an endorsement excluding coverage is obtained. CIGA further contends that section 3602, subdivision (d) only precludes tort liability, not joint and several liability, alternative insurance protection or additional premium. Moreover, the Service Agreement and insurance policies involve separate parties, and there is no evidence of any privity or mutual intent under section 3602, subdivision (d).

Based on statutory language, legislative history and judicial decisions, we conclude that employer joint and several liability to employees for workers' compensation benefits is not extinguished by Ins. Code section 11663 or section 3602, subdivision (d). In addition, Ins. Code section 11663 is expressly limited to insurers, which does not include CIGA. In regards to section 3602, subdivision (d), the statute allows general and special employers to avoid duplicate insurance coverage and premium by agreeing to insure for workers' compensation with a single insurer. In this case, however, Jacuzzi obtained workers' compensation coverage from two separate insurers, and Jacuzzi and Assurance failed to follow the statutory scheme by excluding coverage for special employees like Miceli under a proper endorsement. Thus, the Assurance policy provides coverage under the circumstances, and the policy is other available workers' compensation insurance within the meaning of Ins. Code section 1063.1, subdivision (c)(9). The WCAB's dismissal of CIGA is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

The parties stipulated to the basic facts which are as follows. Pursuant to a Service Agreement, RemedyTemp, a general employer, provided Mark Miceli, a special

employee, to work as a shipper and receiver for Jacuzzi, the special employer.[6] The Service Agreement further provided that RemedyTemp would retain special employees such as Miceli on payroll, provide workers' compensation insurance and hold Jacuzzi harmless from claims. On or about July 22, 1997, RemedyTemp secured a workers' compensation insurance policy through Reliance, which contained an Alternate Employer Endorsement naming Jacuzzi as an additional insured. Jacuzzi also insured its own workers through Assurance, which issued a California standard form workers' compensation insurance policy, April 1992 edition, for the period of May 31, 1999, through May 31, 2000.

On March 1, 2000, Miceli admittedly sustained a cut injury to his left minor ring finger while working for Jacuzzi, and Reliance provided workers' compensation benefits including surgery. However, Reliance was ordered into liquidation on October 3, 2001, and CIGA began administering Miceli's claim. CIGA also petitioned for dismissal arguing that Assurance provided other available insurance under Ins. Code section 1063.1, subdivision (c)(9). Since there were approximately 540 similar cases involving RemedyTemp, Reliance, and special employers and employees, the WCAB consolidated the cases and issued a stay order pending a test case regarding CIGA's liability. Miceli's case was chosen.

The parties proceeded with discovery, which included the deposition of Vincent Catapano, the regional underwriting manager of Assurance. Catapano testified

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[6] Typically, the general employer provides a special employee to the special employer and both employers have control over the special employee's work. (*Marsh v. Tilley Steel Co.* (1980) 26 Cal.3d 486; *Kowalski v. Shell Oil Co.* (1979) 23 Cal.3d 168 (*Kowalski*).) Both employers are jointly and severally liable to the special employee for workers' compensation benefits. (*County of Los Angeles v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 391, 405 (*County of Los Angeles*); *McFarland v. Voorheis-Trindle Co.* (1959) 52 Cal.2d 698, 702 (*McFarland*).) An injured worker is barred from maintaining a civil action against either employer properly insured for workers' compensation. (*Kowalski, supra,* 23 Cal.3d at p. 175; *McFarland, supra,* 52 Cal.2d at p. 702.)

repeatedly that Miceli was not covered by the Assurance policy because premium had not been collected which is based on Jacuzzi's payroll.[7] Miceli was not covered even though the Assurance policy allows retroactive premium since this is also based on Jacuzzi's payroll. However, Catapano conceded he was not familiar with California law, Ins. Code section 11663 or section 3602, subdivision (d). Catapano also stated that he did not handle claims, but had previously testified regarding insurer intent.

The parties proceeded to trial and stipulated to the basic facts. The issues included whether CIGA or Assurance was liable considering Ins. Code sections 1063.1 and 11663, section 3602, subdivision (d) and the contractual agreements involved. The joint exhibits included the legislative histories of Ins. Code section 11663[8] and section 3602,

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[7] The Assurance workers' compensation policy, attached to Catapano's deposition as an exhibit, in part provides:

"Part Five - Premium

"C. Remuneration

"Premium for each work classification is determined by multiplying a rate times a premium basis. Remuneration is the most common premium basis. This premium basis includes payroll and all other remuneration paid or payable during the policy period for the services of :

"1. All your officers and employees engaged in work covered by this policy; and

"2. All other persons engaged in work that could make us liable under Part One (Workers Compensation Insurance) of this policy. If you do not have payroll records for these persons, the contract price for their services and materials may be used as the premium basis. This paragraph 2 will not apply if you give us proof that the employers of these persons lawfully secured their workers compensation obligations."

[8] The legislative history of Ins. Code section 11663 indicates that the statute was enacted in 1947 to avoid civil litigation between liable general and special workers' compensation insurers under *American Motorists Ins. Co. v. Industrial Acc. Com.* (1937) 8 Cal.2d 585 (*American Motorists*) (general and special employers jointly and severally liable for workers' compensation benefits) and *State Compensation Ins. Fund v. Industrial Acc. Com.* (1942) 20 Cal.2d 264 (*State Compensation Ins. Fund*) (civil courts and not Industrial

subdivision (d),[9] the Service Agreement and the insurance policies.

The workers' compensation administrative law judge (WCJ) determined that RemedyTemp and Jacuzzi, as general and special employers of Miceli, are jointly and severally liable for workers' compensation benefits, which is not extinguished by the agreements under Ins. Code section 11663 or section 3602, subdivision (d). The WCJ concluded further that the Assurance policy is other insurance under Ins. Code section 1063.1, subdivision (c)(9), and dismissed CIGA.

In the opinion on decision, the WCJ explained that joint and several liability of general and special employers for workers' compensation benefits is well established. In addition, the plain language of Ins. Code section 11663 limits the statute to insurers, Reliance became insolvent and was no longer an insurer, and CIGA only pays per statute

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Accident Commission have jurisdiction to decide controversy between liable general and special insurers). The history indicates further that selection of the insurer to pay compensation was equitably based on the insured's payroll which determined premium, and the rights of the injured worker were not affected.

[9] The legislative history of section 3602, subdivision (d) indicates that the Assembly originally sought to amend section 3700, but then amended the exclusive remedy provisions of section 3602. The legislative history further indicates that section 3602, subdivision (d) was intended to save general and special employers duplicate workers' compensation coverage and premium in order to avoid tort liability, as suggested by the Court of Appeal in *Douglas Oil Co. v. Western Asphalt Service* (1993) 21 Cal.App.4th 631 (nonpub.) (*Douglas Oil*) (special employer uninsured under section 3700 and not immune from tort liability, even though workers' compensation coverage provided under contract with general employer). Note, *Douglas Oil* may not be cited or relied upon as precedent under California Rules of Court, rule 977, and reference to *Douglas Oil* in this opinion is historical only. The legislative history also indicates that the temporary service industry involves many businesses, jobs and revenue, and *Douglas Oil* increased tort liability, costs and incentive for businesses to leave California.

Senate amendments addressed employers contracting to avoid experience rating, and subjecting employers to civil, criminal, penalty or tort liability for noncompliance. Concern was also expressed that leasing arrangements could be used in violation of workers' compensation laws or insurance would not be obtained, which could increase claims against the Uninsured Employers Fund.

and is not an insurer according to *Isaacson, supra,* 44 Cal.3d at pages 785-787 (claims handling by CIGA not subject to Ins. Code Unfair Practices Act). In regards to section 3602, subdivision (d), the WCJ reasoned that the statute was enacted to preclude civil liability and there was no language extinguishing joint and several liability or preventing additional insurance. Since the Assurance policy contained no exclusions for special employees, the policy covered Miceli and is other insurance under Ins. Code section 1063.1, subdivision (c)(9), whether or not Assurance chose to collect premium. The WCJ also noted that there is no policy exclusion of special employees in California.

RemedyTemp, Jacuzzi, Assurance and Casualty petitioned the WCAB for reconsideration. RemedyTemp agreed with the WCJ that joint and several liability applied. Nevertheless, argued RemedyTemp, the WCJ's decision is contrary to the intent of the parties and the Legislature to avoid duplicate coverage and premium under Ins. Code section 11663 and section 3602, subdivision (d). RemedyTemp also alleged that the legal obligations of the parties which determines CIGA's liability is established when the agreements are made, and is not changed by the subsequent insolvency of Reliance.

Jacuzzi's contentions included that joint and several liability ended when workers' compensation insurance was secured with Reliance. In addition, the Assurance policy includes Ins. Code section 11663, which means there is no coverage for special employees like Miceli who are not on payroll. Similarly, section 3602, subdivision (d) is also part of the Assurance policy, and by securing workers' compensation insurance through Reliance Jacuzzi satisfied its liability and Assurance only provides coverage for Jacuzzi's liabilities. Catapano also testified Assurance is not other insurance under Ins. Code section 1063.1, subdivision (c)(9). CIGA's status does not rewrite the insurance policies, nor change its statutory obligations to the insureds of Reliance. Moreover, Jacuzzi paid the premium through RemedyTemp, and CIGA collected premium from the

insurers.[10]

Assurance agreed with Jacuzzi that compliance with section 3602, subdivision (d) extinguished joint and several liability and in effect excluded coverage for Miceli. Even if joint and several liability remains, Assurance argued, Reliance insured Jacuzzi and covered Miceli. Insolvency by Reliance and CIGA's status is insufficient reason to reform the express provisions of the contracts and ignore statutes.

Casualty claimed CIGA is an insurer of insolvency, and thus an insurer under Ins. Code section 11663. Casualty also contended that there was no other applicable insurance based on Ins. Code section 11663 and section 3602, subdivision (d), and the WCJ's decision is contrary to the intent of the parties and the Legislature.

In the report on reconsideration, the WCJ added that Jacuzzi did not directly pay premium to Reliance, and choosing insurers that fail and whether to indemnify are business decisions. In any event, CIGA's fund are available only if there is no other applicable insurance and the Assurance policy covered Miceli.

The WCAB affirmed the WCJ in banc.[11] The WCAB pointed out that general and special employers are jointly and severally liable to special employees for workers' compensation benefits under *Kowalski* and *McFarland*. Although Reliance as an insurer would have been solely liable under Ins. Code section 11663 had it remained solvent, the WCAB reasoned, CIGA is not an insurer and its obligations are not the same as the

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[10] See *Isaacson, supra,* 44 Cal.3d at page 786 and Ins. Code section 1063.5, which states in relevant part: "Each time an insurer becomes insolvent then, to the extent necessary to secure funds for the association for payment of covered claims of that insolvent insurer and also for payment of reasonable costs of adjusting the claims, the association shall collect premium payments from its member insurers sufficient to discharge its obligations."

[11] The decision states that the matter was assigned to the entire body of the WCAB in order to achieve uniformity regarding an important legal issue. WCAB in banc decisions are binding on all WCJ and WCAB panels. (Cal. Code Regs., tit. 8, § 10341; *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6.)

insolvent carrier according to case law such as *Industrial Indemnity Co. v. Workers' Comp. Appeals Bd.* (1997) 60 Cal.App.4th 548, 556-558 (*Industrial Indemnity*)[12] and *Denny's, Inc. v. Workers' Comp. Appeals Bd.* (2003) 104 Cal.App.4th 1433, 1438, 1441-1442 (*Denny's*).[13] Instead, CIGA's obligations are controlled by Ins. Code sections 1063.1 et seq. and not by Ins. Code section 11663.

The WCAB also interpreted section 3602, subdivision (d) as shielding properly insured employers from civil, criminal or other penalties, while allowing alternative ways of securing required workers' compensation insurance. The WCAB reasoned that, ". . . AHA (Assurance) did not collect premiums from Jacuzzi for the employees supplied by RemedyTemp, and it is fair to say that Jacuzzi, AHA, RemedyTemp and Reliance did not expect that the AHA policy would cover the temporary employees supplied to Jacuzzi by RemedyTemp. Nevertheless, the AHA policy contains no explicit exclusion of the

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[12] In *Industrial Indemnity*, workers' compensation insurers including the insolvent insurer had coverage for separate parts of a cumulative injury period. The court held that the solvent insurers are other available insurance under Ins. Code section 1063.1, subdivision (c)(9), because the employers and thus the insurers are jointly and severally liable for cumulative injury under section 5500.5. Section 5500.5, subdivision (a) in relevant part states: "[L]iability for occupational disease or cumulative injury claims . . . shall be limited to those employers who employed the employee during a period of . . . [one year] immediately preceding either the date of injury, as determined pursuant to Section 5412, or the last date on which the employee was employed in an occupation exposing him or her to the hazards of the occupational disease or cumulative injury, whichever occurs first."

[13] Denny's was self-insured for 80 percent of a cumulative injury period, and the insolvent insurer had coverage for 20 percent. Since Denny's is jointly and severally liable for the cumulative injury under section 5500.5, the court concluded that self-insurance by Denny's is other insurance under Ins. Code section 1063.1, subdivision (c)(9), which absolved CIGA of liability. The court also rejected the argument by Denny's that the definition of insurance under Ins. Code sections 22 and 23, which did not include self-insurance, controlled. Instead, the court relied on the definition in section 3211 which included self-insured employers as insurers, since "A statute dealing expressly with a particular subject controls and takes priority over a general statute." (*Denny's, supra,* 104 Cal.App.4th at p. 1441.)

temporary employees, and the fact that AHA collected no premium for them does not prevent AHA from becoming liable for their workers' compensation benefits."[14] The WCAB also rejected Catapano's opinion that coverage was not intended without premium, since insurers never intend to cover claims of insurers which become insolvent. In addition, the WCAB disputed that the legal position of the parties prior to Reliance's insolvency is determinative, since CIGA's liability arises after insolvency. The WCAB concluded that the Assurance policy is other available insurance within the meaning of Ins. Code section 1063.1, subdivision (c)(9), and affirmed dismissal of CIGA. The WCAB noted that any adverse consequences to the agreements or business of the contracting parties is best addressed by the Legislature.

RemedyTemp, Jacuzzi, Assurance and Casualty petition for writ of review.

RemedyTemp contends that even though joint and several liability was not extinguished, the contracting parties intended only Reliance to provide coverage for Miceli under Ins. Code section 11663 and section 3602, subdivision (d). The WCAB found that this was the intent of the parties, which is supported by substantial evidence such as the Service Agreement, Alternate Employment Endorsement and Assurance policy. And since Ins. Code section 11663 and section 3602, subdivision (d) are included

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[14] The WCAB cited Ins. Code section 11654 which states: "Every such contract or policy shall contain a clause to the effect that the insurer will in all things be bound by and subject to the orders, findings, decisions or awards rendered against the employer under the provisions of the law imposing liability for compensation, subject to the provisions, conditions and limitations of the policy. The insurance contract shall govern as between the employer and insurer as to payments by either in discharge of the employer's liability for compensation."

The WCAB also cited *American Motorists* (joint and several liability between general and special employers despite contrary terms in agreement; insurer receiving premium should pay benefits) and *Fyne v. Industrial Acc. Com.* (1956) 138 Cal.App.2d 467 (*Fyne*) (standard workers' compensation policy, without endorsements approved by Insurance Commissioner under Ins. Code sections 11657-11660 and California Code of Regulations, title 10, sections 2252-2268, covers all employees and is not limited to location or operations shown in declarations).

in the Assurance policy language under Part-Five Premium, an express exclusion of special employees is not required. Moreover, Catapano testified Miceli was not intended to be covered by Assurance considering premium based on payroll. Premium is a basis for coverage according to *R.J. Reynolds* (excess or secondary insurer which received premium liable; retroactive premium covering first $200,000 of loss not CIGA covered claim), *Ross v. Canadian Indemnity Ins. Co.* (1983) 142 Cal.App.3d 396 (*Ross*) (CIGA not an insurer relieving liability of secondary insurer, which received premium), and *Industrial Indemnity* (CIGA not liable for part of cumulative injury period for which other insurers jointly and severally liable and received premium).

RemedyTemp alleges further that the intent of the parties and their contractual agreements are also consistent with the custom and practice of staffing agencies in providing workers' compensation insurance and indemnifying clients. Enforcement of the agreements as intended avoids duplicate coverage and premium, which is also consistent with the Legislature's intent in enacting Ins. Code section 11663 following *American Motorists* and *State Compensation Ins. Fund*, and enacting section 3602, subdivision (d) following *Douglas Oil*.

Despite the Assurance policy language and the undisputed intent of the parties and the Legislature, RemedyTemp argues further, the WCAB mistakenly requires an express exclusion of special employees. The WCAB's redundant requirement is also inconsistent with *Hess v. Ford Motor Company* (2002) 27 Cal.4th 516 (*Hess*), where the Supreme Court interpreted a personal injury insurance release according to the intent of the signing parties not to include Ford, despite language releasing all corporations.[15] Like Ford,

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[15] Hess was a passenger in a Ford pick-up truck and became a paraplegic after there was a collision with another vehicle. In settling with the insurer of the other vehicle for $15,000, Hess signed a boiler-plate release which released all other persons, firms and corporations. When Hess sued Ford Motor Company (Ford), Ford claimed it was released. At trial, Hess's attorney and the settling insurance adjuster testified that Hess intended to sue Ford, and Ford was not the corporation intended to be released.

CIGA was not an intended beneficiary, acquired no rights for value or in reliance, and there is no public policy reason to relieve CIGA of liability since injured workers will be covered and receive benefits.

Jacuzzi similarly contends that the WCAB misinterpreted the Assurance policy by finding coverage became available by the insolvency of Reliance. Unlike all the insurers which covered the employee's cumulative injury period in *Industrial Indemnity*, Miceli's injury was not covered by the Assurance policy. The insuring part of the policy does not expressly state whether temporary employees are covered, and thus coverage is determined by the intent of the parties. The WCAB found that the Assurance policy was not intended to provide coverage, which is supported by Catapano's testimony. Since the insuring part of the policy did not provide coverage for Miceli, an expressed exclusion is not required and the WCAB's reasoning is contrary to the analysis in *American Motorists* and *Fyne*. Moreover, Ins. Code section 11663 and section 3602, subdivision (d) are part of the Assurance policy, and the statutes limit coverage to Reliance which is not changed by insolvency or CIGA's status.

Jacuzzi argues further that compliance with section 3602, subdivision (d) extinguishes its joint and several liability to special employees such as Miceli, and also ends any continuing obligation under Division Four of the Labor Code. Jacuzzi cites the legislative history and introductory broad language of the statute, "For purposes of this division, including Sections 3700 and 3706 . . ." Jacuzzi also claims that section 3602, subdivision (d) modifies all workers' compensation law, such as expanding the excluded

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The Supreme Court concluded that the objective and uncontroverted extrinsic evidence established that the language literally releasing all corporations was not intended to release Ford, and was an excusable mutual mistake. The Supreme Court explained further that Ford was not a party to the release, acquired no rights for value and was an intermeddler to the agreement.

employees under section 3352[16] to include special employees like Miceli. Finally, Jacuzzi alleges that under *Denny's*, section 3602, subdivision (d), which specifically addresses the issues, controls over Ins. Code section 1063.1, subdivision (c)(9) which is a more general statute.

Assurance agrees with Jacuzzi that joint and several liability is extinguished by the agreements under section 3602, subdivision (d). By securing workers' compensation insurance under section 3700 through Reliance, Jacuzzi satisfied its obligation to provide benefits to special employees like Miceli according to *La Jolla Beach And Tennis Club, Inc. v. Industrial Indemnity Co.* (1994) 9 Cal.4th 27, 36 (*La Jolla Beach And Tennis Club*) (no coverage or duty to defend under workers' compensation policy for civil suit alleging wrongful termination in violation of public policy) and *Employers Mutual Liability Ins. Co. v. Tutor-Saliva Corporation* (1998) 17 Cal.4th 632, 638 (*Employers Mutual*) (remanded to determine whether subcontract provided for attorney's fees between subcontractor's workers' compensation insurer and defendant general contractor). Assurance also points out that the joint and several liability cases cited by the WCAB pre-date section 3602, subdivision (d), and no case has held that joint and several liability remains.

Since Jacuzzi was no longer liable for benefits under workers' compensation law, Assurance argues further, there is no coverage under the insuring part of the policy. If the policy language is perceived by the court as ambiguous, the intent of the parties controls. Only Reliance was intended to cover Miceli, as confirmed by the Alternate Employer Endorsement, agreement to indemnify Jacuzzi and Catapano's testimony. Assurance is also prevented from collecting premium under the policy and excluding special employees. In contrast, CIGA collected premiums and is obligated to fulfill

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[16] Section 3352 excludes certain individuals as employees such as persons performing services without compensation or for aid, persons who are involved in recreational or sporting activities, or those who have residential duties and do not meet statutory minimum hours and wages.

Reliance's contractual obligations, while spreading the risk. Upholding the WCAB's decision is also contrary to the intent of the parties and the Legislature to avoid duplicate coverage and premium under *Douglas Oil*.

Casualty contends that CIGA is an insurer for insolvency, and Ins. Code section 11663 applies broadly between insurers which includes CIGA and not narrowly to insurance companies. CIGA is also liable under section 3602, subdivision (d), which is part of the Reliance policy as is Ins. Code section 11663. Casualty further alleges that without premium, the Assurance policy is not other available insurance under Ins. Code section 1063.1, subdivision (c)(9), unlike the premium received for other insurance in *American Motorists*, *Ross*, *Denny's*, and *Industrial Indemnity*. Since CIGA received premium, the WCAB's decision gives CIGA a windfall while Assurance is doubly burdened. Moreover, the WCAB concluded that the parties did not intend for Assurance to cover Miceli.

Amicus curiae briefs were also filed. The amicus briefs emphasize the business and economic advantages provided by temporary staffing agencies, which typically provide the workers' compensation coverage. Moreover, CIGA and not Assurance received premium to spread the risk. The WCAB's decision undermines these goals, and the Legislature's intent in enacting Ins. Code section 11663 and section 3602, subdivision (d) in response to *Douglas Oil*. If the court affirms the WCAB, the court's decision should be limited prospectively to avoid petitions to reopen prior awards, pursuant to *Atlantic Richfield Co. v. Workers' Comp. Appeals Bd.* (1982) 31 Cal.3d 715, 727-728 (*Atlantic Richfield*), *Sumner v. Workers' Comp. Appeals Bd.* (1983) 33 Cal.3d 965, 972 (*Sumner*) and *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234, 246 (*LeBoeuf*).

CIGA answers that it is not a licensed insurer of employers[17] bound by contracts and in business to make profit, but pays only covered claims on behalf of insolvent insurers to protect the public, as set forth by Ins. Code section 1063.1 and *Industrial Indemnity*. Since Ins. Code section 11663 is expressly limited to the liability of insurers, the statute does not apply to CIGA.

CIGA responds further that Ins. Code section 11663 does not address or extinguish joint and several liability of general and special employers, as stated in *McFarland* at pages 702 and 703. Although section 3602, subdivision (d) addresses employer liability, the statute is expressly limited to relieving civil liability and penalties. Since the language regarding the statute's purpose is clear, legislative history should not be considered.[18] Even if considered, there is no discussion of employer joint and several liability for workers' compensation benefits and *Douglas Oil* concerned only tort liability. Therefore, Jacuzzi is jointly and severally liable to Miceli for workers' compensation benefits.

CIGA also disputes the contractual arguments made by petitioners. CIGA points out that the Service Agreement and insurance policies involve different parties and dates, and there is no evidence Assurance was aware of the other agreements or of RemedyTemp employees. Instead of a limited policy with endorsements under Ins. Code

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[17] Section 3211 defines "insurer" as including: " . . . the State Compensation Insurance Fund and any private company, corporation, mutual association, reciprocal or interinsurance exchange authorized under the laws of this State to insure employers against liability for compensation and any employer to whom a certificate of consent to self-insure has been issued."

[18] See *DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387-388 (*DuBois*).

section 11657 et seq.[19] and California Code of Regulations, title 10, sections 2252 to 2268,[20] Assurance issued Jacuzzi a policy with unlimited coverage under *Fyne* and Ins.

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[19] Ins. Code section 11657 states: "Subject to the provisions of Sections 11659 and 11660, limited workers' compensation policies may be issued insuring either the whole or any part of the liability of any employer for compensation, provided that the policy is previously approved, as to substance and form, by the commissioner. Subject to those provisions, the policy may restrict or limit the insurance in any manner whatsoever."

Ins. Code section 11658 states in relevant part: "(a) A workers' compensation insurance policy or endorsement shall not be issued by an insurer to any person in this state unless the insurer files a copy of the form or endorsement with the rating organization pursuant to subdivision (e) of Section 11750.3 and 30 days have expired from the date the form or endorsement is received by the commissioner from the rating organization without notice from the commissioner, unless the commissioner gives written approval of the form or endorsement prior to that time. [¶] . . . [¶] (d) This section shall not apply to limited polices submitted for approval to the commissioner pursuant to Section 11657."

Ins. Code section 11659 states: "Such approved form of policy, limited pursuant to Section 11657, shall not be otherwise limited except by indorsement thereon in accordance with a form prescribed by the commissioner or in accordance with rules adopted by the commissioner. Such indorsement form shall not be subject to Section 11658. Before prescribing such indorsement form or adopting such rule, the commissioner shall consult concerning it with the Workers' Compensation Appeals Board."

Ins. Code section 11660 states: "Failure to observe the requirements of Sections 11658 and 11659 shall render a policy issued under Section 11657, and not complying therewith, unlimited."

Under Ins. Code section 11750.3, subdivision (e), a rating organization may ". . . examine policies, daily reports, endorsements or other evidences of insurance for the purpose of ascertaining whether they comply with the provisions of law and to make reasonable rules governing their submission."

Under Ins. Code section 11751.4, every insurer must be a member of a rating organization.

[20] Title 10, section 2252 states in part: "Limitation or restriction of coverage for liability under the workers' compensation laws of the State of California shall be governed by Sections 2253 to 2268, inclusive."

Code section 11651 et seq.[21] Since the unlimited Assurance policy is unambiguous, extrinsic evidence of intent should not be considered.[22] Even if considered, Catapano's testimony of intent is unreliable, as the WCAB concluded. Catapano conceded not knowing California law, he was incompetent to establish Jacuzzi's intent, and the parties admitted Miceli was Jacuzzi's special employee whether or not on payroll.

CIGA contends further that the arguments Ins. Code section 11663 and section 3602, subdivision (d) are part of the Assurance policy and exclude coverage are without merit. Insurance policy exclusions must be conspicuous, clear and plain, and are narrowly construed.[23] The premium part of the Assurance policy does not meet any of the requirements of an exclusionary clause or endorsement, and the WCAB correctly found Miceli was covered. Moreover, the plain language of section 3602, subdivision (d)

Title 10, section 2261 states: "Each insurer must submit its California Approved Form limiting and restricting endorsement forms to the Workers' Compensation Insurance Rating Bureau of California in duplicate for examination by the Bureau."

Title 10, section 2262 provides: "All other limiting or restricting endorsement forms must be drafted in accordance with and subject to the specifications enumerated in Section 2257, and must be submitted in duplicate to the Workers' Compensation Insurance Rating Bureau of California for its examination and transmittal to the Insurance Commissioner. After consultation with the Workers' Compensation Appeals Board as required by law, the insurer will be notified of approval or disapproval of any such form."

[21] Ins. Code section 11651 states: "Every such contract or policy shall contain a clause to the effect that the insurer will be directly and primarily liable to any proper claimant for payment of any compensation for which the employer is liable, subject to the provisions, conditions and limitations of the policy."

See also Ins. Code section 11654, footnote 14, *ante*.

[22] See Civil Code section 1638.

[23] See *Ponder v. Blue Cross of Southern California* (1983) 145 Cal.App.3d 709, 719 (*Ponder*).

permits an employer to have back-up insurance, and Jacuzzi is an insured under the Alternate Employer Endorsement of the Reliance policy and the Assurance policy. Since coverage under the Assurance policy is unlimited, the Assurance policy is other available insurance under Ins. Code section 1063.1, subdivision (c)(9).

CIGA also denies that premium determines the outcome. CIGA claims that it is not an insurer for profit which collects premium, while Assurance charges premium but chose not to for business reasons. Moreover, the WCAB did not order Jacuzzi to pay duplicate premium. In addition, insurers have been held liable regardless of premium in cases involving cumulative injury under section 5500.5,[24] a trainee before being hired and paid,[25] an independent contractor being an employee as a matter of law,[26] coverage by estoppel,[27] or the insured's inability to pay due to bankruptcy.[28]

CIGA also disputes there is evidence that the growth and profit of staffing agencies after enactment of section 3602, subdivision (d) will end. CIGA alleges that businesses can avoid the situation by self-insuring or insuring with State Compensation Insurance Fund. Finally, CIGA asserts that the decision should not be limited prospectively, since the issues are of first impression and the rights of employees and employers are not affected so that petitions to reopen will be filed.

RemedyTemp replies that the intent of the parties under section 3602, subdivision (d), as confirmed by the WCAB, should be given affect based on substantial evidence and *Hess*. In addition, Ins. Code section 11657 et seq. are notice statutes, Reliance provided

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24 CIGA cites *Denny's* and *Industrial Indemnity*.

25 See *Laeng v. Workmen's Comp. Appeals Bd.* (1972) 6 Cal.3d 771.

26 See section 2750.5 and *State Compensation Ins. Fund v. Workers' Comp. Appeals Bd.* (1985) 40 Cal.3d 5.

27 See Ins. Code sections 676.8 and 11664.

28 See Ins. Code section 11655.

notice of coverage and Assurance is not required to give notice of an expressed exclusion when there is no coverage.

Jacuzzi replies that according to the introductory language of section 3602, subdivision (d), compliance with the statute relieved Jacuzzi of joint and several liability and Labor Code obligations. Sections 3755,[29] 3757[30] and 3759[31] are examples of employers being relieved of liability. Since Jacuzzi is not liable, coverage under the insuring terms of the Assurance policy or Ins. Code section 11651 does not arise, and an express exclusion is not required under the analysis of *Fyne*. Insolvency by Reliance or the status of CIGA does not change coverage or the intent of the parties.

Assurance similarly argues in its reply that compliance with section 3602, subdivision (d) satisfied Jacuzzi's liability for securing payment of compensation under section 3700. Thus, there is no obligation under the policy to provide benefits to RemedyTemp special employees like Miceli. In addition, the premium part of the Assurance policy precludes liability or coverage if there is proof of other insurance, and

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[29] Section 3755 states: "If the employer is insured against liability for compensation, and if after the suffering of any injury the insurer causes to be served upon any compensation claimant a notice that it has assumed and agreed to pay any compensation to the claimant for which the employer is liable, such employer shall be relieved from liability for compensation to such claimant upon the filing of a copy of such notice with the appeals board. The insurer shall, without further notice, be substituted in place of the employer in any proceeding theretofore or thereafter instituted by such claimant to recover such compensation, and the employer shall be dismissed therefrom."

[30] Section 3757 states: "If it thereafter appears to the satisfaction of the appeals board that the insurer has assumed the liability for compensation, the employer shall thereupon be relieved from liability for compensation to the claimant. The insurer shall, after notice, be substituted in place of the employer in any proceeding instituted by the claimant to recover compensation, and the employer shall be dismissed therefrom."

[31] Section 3759 provides: "The appeals board may enter its order relieving the employer from liability where it appears from the pleadings, stipulations, or proof that an insurer joined as party to the proceeding is liable for the full compensation for which the employer in such proceeding is liable."

an additional exclusion is redundant. Such an interpretation is consistent with the intent of the parties and Legislature to avoid duplicate coverage and premium, and with CIGA spreading the risk for premium received.

Casualty's reply adds that Ins. Code section 11663 and section 3602, subdivision (d) are part of the Assurance policy pursuant to Ins. Code section 11650[32] et seq. and *City of Torrance v. Workers' Comp. Appeals Bd.* (1982) 32 Cal.3d 371, 378 (*City of Torrance*) (workers' compensation insurance contract intended to incorporate subsequent changes in applicable law including future amendment of section 5500.5). Since Reliance is solely liable and Assurance has no coverage under these policy provisions, CIGA is solely liable. Employer joint and several liability is irrelevant because it does not extend to insurers under *County of Los Angeles* (self-insured general employer solely liable under Ins. Code section 11663).

ADDITIONAL BRIEFING REQUESTED BY THE COURT

This court requested additional briefing from the parties in order to address the following questions.

1. Could American Home Assurance have excluded special employees such as Miceli from coverage under the workers' compensation insurance policy by endorsement or other means? If so, by what legal authority or regulation, e.g., California Code of Regulations, title 10, section 2252 et seq.?

2. Could American Home Assurance have charged premium in the event there is coverage for special employees such as Miceli by endorsement or other modification to the workers' compensation insurance policy? If so, by what legal authority or regulation?

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[32] Ins. Code section 11650 states: "Every contract insuring against liability for compensation and every compensation policy is conclusively presumed to contain all of the provisions required by this article."

RemedyTemp's response to the first question is that special employees like Miceli can be excluded, otherwise the parties could not comply with section 3602, subdivision (d). Special employees can be excluded by endorsement under title 10, section 2259, subdivision (e),[33] or under the premium section of the Assurance policy since Jacuzzi in effect affirmed coverage through Reliance. A separate endorsement serves no purpose, RemedyTemp argues further, because Jacuzzi knew it was protected and Miceli will receive benefits. The WCAB's technical enforcement of strict compliance regulations such as title 10, section 2259 only negates the intent of the parties and the Legislature under section 3602, subdivision (d), and benefits CIGA, a stranger to the agreements.

In regards to the court's second question, RemedyTemp answers that the Assurance policy precludes premium for special employees not on payroll when the insured provides proof workers' compensation obligations have been secured. The Reliance policy with the Alternate Employer Endorsement is the proof.

Jacuzzi responds that since the WCAB incorrectly concluded that complying with section 3602, subdivision (d) does not satisfy the obligation to secure compensation under section 3700, special employees like Miceli cannot be excluded under any circumstances. Thus, there can be no exclusion under title 10, section 2259 or title 10, section 2265, subdivision (a).[34] Jacuzzi also contends that Assurance could have charged premium under Ins. Code section 11730 et seq.,[35] but did not do so.

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[33] Title 10, section 2259 states in relevant part: "A limiting and restricting endorsement other than California Approved Form Endorsement No. 11 may be used only under one or more of the following circumstances:

"(e) Where the endorsement seeks to exclude only such liability of the employer for compensation as the latter affirms to the insurer in writing is otherwise secured or is lawfully uninsured (e.g., liability of the State and its political subdivisions and institutions)."

[34] Title 10, section 2265 provides in relevant part: "California Approved Form Endorsement No. 11 may be used only in those cases where other California Approved Form Endorsements are not applicable or may not be used. It shall accurately and unambiguously state the limitations or restriction and shall bear an appropriate side note

Assurance responds that none of the seven form endorsements pre-approved by the Insurance Commissioner could have been used to eliminate coverage for special employees such as Miceli. Although title 10, section 2262 allows for creation of a special endorsement, it must be submitted to the Workers' Compensation Insurance Rating Bureau and the Insurance Commissioner for approval. Only California Approved Form Endorsement No. 11 (Form No. 11) under title 10, section 2269.11[36] could have

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descriptive of the limitations or restriction. It may be used only under one or more of the following circumstances:

"(a) Where use of the Form No. 11 Endorsement is in accordance with one or more of the guiding standards set forth in Section 2259 of these rules."

[35] Ins. Code section 11730 et seq. regulates workers' compensation insurance classification of risks and premium rates.

[36] Title 10, section 2269.11 provides:

"CALIFORNIA
APPROVED FORM NO. 11

"Endorsement Agreement
Limiting and Restricting This Insurance

"The insurance under this policy is limited as follows:
"It is AGREED that, anything in this policy to the contrary notwithstanding, this policy DOES NOT INSURE:

"Nothing in this endorsement contained shall be held to vary, alter, waive or extend any of the terms, conditions, agreements, or limitations of this policy other than as above stated. Nothing elsewhere in this policy shall be held to vary, alter, waive or limit the terms, conditions, agreements or limitations of this endorsement.
Applicable to and forming part of Policy No. _____
Issued by the _____
To _____of_____
Dated at _____this _____day of_____199__
Countersigned _____

been used to exclude coverage for RemedyTemp special employees or specific special employees by name. However, Assurance argues further, Form No. 11 could not be used because the Service Agreement is limited to certain locations and employees,[37] and if another Jacuzzi location hired a RemedyTemp employee there could be exposure to civil liability. Moreover, using Form No. 11 to exclude specific employees by name would require thousands of endorsements and impose an impractical burden of paperwork.

Assurance also alleges that there are no approved form endorsements which allow modification of the premium part of the policy. Moreover, there is no opportunity to collect premium while RemedyTemp is uninsured because even after insolvency RemedyTemp immediately would obtain other insurance.

Casualty responds that Ins. Code section 11663 is part of the Assurance policy under Ins. Code section 11650, *La Jolla Beach And Tennis Club* and *City of Torrance*, and special employees like Miceli are excluded by operation of law. Although none of the pre-approved endorsements under title 10, section 2252 et seq. specifically address special employees, presumably an approved limiting endorsement could have been drafted under title 10, sections 2257[38] and 2262. However, such an endorsement is

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"FAILURE TO SECURE THE PAYMENT OF FULL COMPENSATION BENEFITS FOR ALL EMPLOYEES AS REQUIRED BY LABOR CODE SECTION 3700 IS A VIOLATION OF LAW AND MAY SUBJECT THE EMPLOYER TO THE IMPOSITION OF A WORK STOP ORDER, LARGE FINES AND OTHER SUBSTANTIAL PENALTIES
(Labor Code Section 3710.1, et seq.)."

[37] Appendix "A" of the Service Agreement is entitled "Location List". At the top of the one-page appendix are the words "Remedy shall provide temporary staffing services for client at the following locations:". However, the page is blank and no locations are listed.

[38] Title 10, section 2257 sets forth specifications which must be included in endorsements, such as printed titles, bold-face type or certain warnings. (See Form No. 11, fn. 36, *ante*.)

unnecessary since special employees like Miceli are already excluded from coverage under the Assurance policy.

Casualty also claims Assurance is entitled to charge premium under Ins. Code sections 11730 et seq. if special employees like Miceli are found covered. However, premium has already been paid to Reliance and CIGA, and imposing another charge in order to relieve CIGA of its statutory obligations is contrary to the intent of the parties and Legislature, and adds to the workers' compensation crisis.

CIGA responds that of the seven pre-approved form endorsements, only Form No. 11 can be used to exclude special employees like Miceli under title 10, sections 2259, subdivision (e) and 2265, subdivision (a). CIGA suggests that after the phrase "this policy DOES NOT INSURE:" language could be added such as "Special employees of the named insured whose general employer, RemedyTemp, has secured payment of compensation for those employees pursuant to California Labor Code section 3700." The completed form must then be submitted to the Insurance Commissioner for approval pursuant to title 10, section 2266.[39] Without such an approved endorsement, the Assurance policy coverage is unlimited under *Fyne*.

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[39] Title 10, section 2266 states: "Upon issuance of any completed California Approved Form Endorsement No. 11 the insurer must submit such endorsement in triplicate to the Workers' Compensation Insurance Rating Bureau of California. Upon receipt of such Form No. 11 endorsement, the Bureau shall notify the insured in writing, with duplicate copy to be furnished the Division of Industrial Accidents, of the nature of the limitation or restriction. Such notification shall also inform the insured that in the event of a claim arising within the scope of the limitations, which the Division of Industrial Accidents should hold to be compensable, the employer would be directly liable under the law and not protected by the policy. Such endorsement shall then be transmitted to the Insurance Commissioner. Each such endorsement shall be deemed to be approved by the Insurance Commissioner unless, within 30 days from date of submission by the Workers' Compensation Insurance Rating Bureau of California the Insurance Commissioner shall in writing notify the insurer submitting the endorsement that same is disapproved. If such notification of disapproval is not given within said 30 days, all such endorsements shall be deemed to be approved until 10 days after the date of written notification of disapproval."

In order to charge premium for special employees like Miceli, CIGA contends that Part Five - Premium of the Assurance policy must be modified. CIGA suggests deleting the last sentence of paragraph 2 of subpart Remuneration which states, "This paragraph 2 will not apply if you give us proof that the employers of these persons lawfully secured their workers' compensation obligations."

RemedyTemp replies that CIGA now admits coverage for special employees like Miceli can be excluded by contract. Thus, the undisputed intent of the parties as found by the WCAB should control over technical requirements under *Hess*. Strict compliance is not required to achieve the purposes of workers' compensation. *Fyne* is consistent because the court enforced the intent of the parties based on a standard workers' compensation policy and rejected parol evidence.

Jacuzzi's reply reiterates its prior argument, that an express exclusion is not required since there is compliance with section 3602, subdivision (d) and no coverage under the Assurance policy. In addition, rewriting the policy in order to charge premium as suggested by CIGA is not authorized by law.

Assurance agrees with Jacuzzi that coverage was excluded, and adds there is no evidence the Insurance Commissioner would approve the use of Form No. 11 with the language suggested by CIGA. Moreover, in order for Assurance to charge premium CIGA deletes a policy provision which is approved by the Insurance Commissioner. It is also unlikely the deletion would be approved by the Insurance Commissioner because the provision applies section 3602, subdivision (d).

Casualty again asserts in its reply that coverage is excluded under Ins. Code section 11663. *Fyne* is distinguishable because unlisted operations are not excluded by operation of law, and the insurer's failure to use approved endorsements is evidence of an intent to provide full coverage. In contrast, the WCAB found that the parties did not expect the Assurance policy to cover RemedyTemp employees.

In reply to RemedyTemp's response, CIGA argues further that the language in the premium part of the Assurance policy is not a substitute for the limiting endorsement

required under Ins. Code section 11659 and title 10, section 2259, subdivision (e). In addition, compliance with section 3602, subdivision (d) is not equivalent to a policy exclusion, since the statute applies equally to permissibly self-insureds and the terms of the policy cannot be altered by agreements between insureds and third parties.

Jacuzzi's response, CIGA contends, similarly misinterprests section 3602, subdivision (d) as an exclusionary statute, and then incorrectly concludes Form No. 11 does not apply.

In regards to Assurance's objections to Form No. 11, CIGA replies that the endorsement could be easily limited to exclude RemedyTemp employees working at certain locations. A single Form No. 11 can also be limited to categories of employees rather than by name, and employers identifying special employees by name is not unusual or onerous.

CIGA replies further that Casualty's incorporation of Ins. Code section 11663 as an exclusion into the Assurance policy is incorrect for several reasons. Ins. Code section 11650 incorporates into policies Ins. Code sections 11651 to 11654 only, which statutes begin by stating that "Every such contract or policy shall contain a clause . . ." Ins. Code section 11663 also regulates which insurer of liable employers pays, and is not an exclusion of coverage.

DISCUSSION

I. Standards for Review

A. *Factual Findings*

A decision based on factual findings which are supported by substantial evidence must be affirmed by the reviewing court. (*Western Growers Ins. Co. v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 227, 233 (*Western Growers*).) However, an appellate court is not bound to accept factual findings that are unreasonable, illogical, improbable,

or inequitable when viewed in light of the entire record and the overall statutory scheme. (*Western Growers, supra,* 16 Cal.App.4th at p. 233; *Bracken v. Workers' Comp. Appeals Bd.* (1989) 214 Cal.App.3d 246, 254.)

B. *Interpretation of Statutes*

Interpretation of governing statutes or application of the law to undisputed facts is decided de novo by the appellate court, even though the WCAB's construction is entitled to great weight unless clearly erroneous. (*Boehm & Associates v. Workers' Comp. Appeals Bd.* (1999) 76 Cal.App.4th 513, 515-516; *Ralphs Grocery Co. v. Workers' Comp. Appeals Bd.* (1995) 38 Cal.App.4th 820, 828.) When interpreting statutes, the Legislature's intent should be determined and given effect. (*DuBois, supra,* 5 Cal.4th at p. 387; *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 (*Lungren*); *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230 (*Moyer*); *Young v. Gannon* (2002) 97 Cal.App.4th 209, 223 (*Young*).)

1. *Plain Meaning*

Legislative intent is generally determined from the plain or ordinary meaning of the statutory language, unless the language or intent is uncertain. (*DuBois, supra,* 5 Cal.4th at pp. 387-388; *Lungren, supra,* 45 Cal.3d at p. 735; *Moyer, supra,* 10 Cal.3d at p. 230; *Young, supra,* 97 Cal.App.4th at p. 223.) The statute's every word and clause should be given effect so that no part or provision is useless, deprived of meaning or contradictory. (*DuBois, supra,* 5 Cal.4th at p. 388; *Lungren, supra,* 45 Cal.3d at p. 735; *Moyer, supra,* 10 Cal.3d at p. 230; *Young, supra,* 97 Cal.App.4th 223.) In addition, interpretation of the statutory language should be consistent with the purpose of the statute and the statutory framework as a whole. (*DuBois, supra,* 5 Cal.4th at p. 388;

Lungren, supra, 45 Cal.3d at p. 735; *Moyer, supra,* 10 Cal.3d at p. 230; *Young, supra,* 97 Cal.App.4th at p. 223.)

2. *Legislative History*

Where the statutory language or the Legislature's intent is uncertain, rules of construction or legislative history aid in determining legislative intent and proper interpretation. (*DuBois, supra,* 5 Cal.4th at pp. 387-388, 393; *Lungren, supra,* 45 Cal.3d at p. 735.) Even if the statutory language is clear, a court is not prohibited from considering legislative history in determining whether the literal meaning is consistent with the purpose of the statute. (*Lungren, supra,* 45 Cal.3d at p. 735; *Young, supra,* 97 Cal.App.4th at p. 223.) Literal construction does not prevail over legislative intent. (*Lungren, supra,* 45 Cal.3d at p. 735.) In enacting a statute, the Legislature is deemed to have been aware of existing statutes and judicial decisions interpreting those statutes. (*Young, supra,* 97 Cal.App.4th at p. 223.) Finally, workers' compensation law is generally liberally construed with the purpose of extending benefits to industrially injured workers. (§ 3202; *Arriaga v. County of Alameda* (1995) 9 Cal.4th 1055, 1065.)

C. *Interpretation of Insurance Contracts*

The WCAB is authorized to interpret insurance contracts or policies to determine coverage in workers' compensation. (§ 133; § 5275; *California Compensation & Fire Co. v. Industrial Acc. Com.* (1965) 62 Cal.2d 532.) Even though interpretation of a written instrument could be characterized as a question of fact, it is really a question of law and an independent function of the reviewing court, unless interpretation turns on the credibility of extrinsic evidence. (*E.M.M.I., Inc. v. Zurich American Ins. Co.* (2004) 32 Cal.4th 465, 470 (*E.M.M.I.*); *Palmer v. Truck Ins. Exchange et al.* (1999) 21 Cal.4th 1109, 1115 (*Palmer*); *Ponder, supra,* 145 Cal.App.3d at pp. 716-717.) While insurance

contracts have special features and rules, they are still contracts to which the ordinary rules of contractual interpretation apply. (*Palmer, supra,* 21 Cal.4th at p. 1115; *La Jolla Beach And Tennis Club, supra,* 9 Cal.4th at p. 37.)

1. *General Contract Rules*

Contracts are to be interpreted so as to give effect to the mutual intention of the parties at the time of contracting, to the extent the mutual intent is ascertainable and lawful. (Civ. Code § 1636; *E.M.M.I., supra,* 32 Cal.4th at p. 470; *Hess, supra,* 27 Cal.4th at p. 524; *La Jolla Beach And Tennis Club, supra,* 9 Cal.4th at p. 37.) The mutual intent of the parties is to be ascertained solely from the contract that is reduced to writing, if possible. (Civ. Code § 1639; *Hess, supra,* 27 Cal.4th at p. 524; *Palmer, supra,* 21 Cal.4th at p. 1115; *La Jolla Beach And Tennis Club, supra,* 9 Cal.4th at p. 37.) The contract language controls if clear and explicit. (Civil Code § 1638; *Palmer, supra,* 21 Cal.4th at p. 1115; *La Jolla Beach And Tennis Club, supra,* 9 Cal.4th at p. 37.) Words are to be given their ordinary and popular meaning, unless used in a special or technical way by the parties. (Civ. Code § 1644; *La Jolla Beach And Tennis Club, supra,* 9 Cal.4th at p. 37.) Technical words are interpreted as used by persons in the profession or business to which they relate, unless clearly used differently. (Civ. Code § 1645.) The contract is to be interpreted as a whole so as to give effect to every part, if practicable. (Civ. Code § 1641; *La Jolla Beach And Tennis Club, supra,* 9 Cal.4th at p. 37.) A contract may be interpreted by reference to the circumstances under which it was made, and the matter to which it relates. (Civ. Code § 1647; *Hess, supra,* 27 Cal.4th at p. 524; *La Jolla Beach And Tennis Club, supra,* 9 Cal.4th at p. 37.) Several contracts relating to the same matters may be taken together, if between the same parties and made as parts of substantially one transaction. (Civ. Code § 1642.)

A contract provision is ambiguous if it is susceptible to two or more reasonable constructions, considering the plain meaning and context. (*E.M.M.I., supra,* 32 Cal.4th at

p. 470; *Palmer, supra,* 21 Cal.4th at p. 1115.) Extrinsic or parol evidence may be used to explain the ambiguities, contract, context or related matters. (*Kavruck v. Blue Cross of California* (2003) 108 Cal.App.4th 773, 782 (*Kavruck*).) Ambiguities may be construed against the party which caused the uncertainty, or consistent with reasonable expectations of the insured in insurance matters. (*E.M.M.I., supra,* 32 Cal.4th at p. 470; *La Jolla Beach And Tennis Club, supra,* 9 Cal.4th at p. 37.)

In addition, written provisions may be disregarded when through fraud, mistake or accident a contract fails to express the real intention of the parties. (Civil Code § 1640; *Hess, supra,* 27 Cal.4th at p. 524.) In determining whether mutual mistake has occurred, a court may consider parol or extrinsic evidence. (*Hess, supra,* 27 Cal.4th at p. 525.) If reformation is needed, it is limited to conforming the contract to the mutual intent of the parties, so long as there is no prejudice to rights acquired by third persons in good faith and for value. (*Hess, supra,* 27 Cal.4th at p. 524.) A third person who acquired no rights for value and was not intended as a beneficiary, cannot enforce the contract and is not prejudiced from reformation. (*Hess, supra,* 27 Cal.4th at p. 528.)

2. *Insurance Policy Rules*

Insurance contracts also have special features and rules. Insurance policies typically have insuring clauses providing coverage at the beginning of the policy, and if a claim does not fall within the terms of the insuring clauses, no coverage exists. (*Palmer, supra,* 21 Cal.4th at pp. 1115-1116.) An insurance policy may also have specific clauses excluding coverage, which generally follow insuring clauses and should be conspicuous, plain and clear. (*E.M.M.I., supra,* 32 Cal.4th at p. 471 (policy excluding theft of jewelry from vehicle unless insured in or upon vehicle is ambiguous, and covers insured within two feet of vehicle); *Ponder, supra,* 145 Cal.App.3d at pp. 718-720 (exclusion of temporomandibular joint syndrome in sub-part of health policy entitled "General Limitations" not conspicuous, plain or clear to policyholder).) Insurance policy

exclusions are normally construed narrowly, while exceptions to exclusions are construed broadly in favor of the insured. (*E.M.M.I., supra,* 32 Cal.4th at p. 471.) On the other hand, if an exclusion is consistent with the reasonable expectation of coverage by the policyholder, special rules may not be required. (*Ponder, supra,* 145 Cal.App.3d at pp. 720-721.)

Incorporation of statutory language

When an insurance policy incorporates statutory language required by law, the language is construed to implement the intent of the Legislature and not against the insurer as if ambiguous or uncertain. (*Prudential-LMI Commercial Ins. v. Superior Court* (1990) 51 Cal.3d 674, 684 (*Prudential-LMI*) (public policy interpretation of one-year suit provision in California standard form fire policy); *Interinsurance Exchange v. Marquez* (1981) 116 Cal.App.3d 652, 656 (auto policy containing Ins. Code provision allowing offset of workers' compensation benefits against uninsured motorist liability; interpreted to promote Legislative goal against double recovery and shifting cost to motoring public).)

II. CIGA

Certain rules and principles also apply uniquely to CIGA. CIGA is purely statutory and the scope of CIGA's duties, powers and liabilities are governed by Ins. Code section 1063 et seq. (*Isaacson, supra,* 44 Cal.3d at p. 786.) As an involuntary unincorporated association of California admitted insurers, CIGA is not an insurer and does not stand in the shoes of the insolvent insurer for all purposes. (*Isaacson, supra,* 44 Cal.3d at pp. 786-787; *Denny's, supra,* 104 Cal.App.4th at p. 1438; *Industrial Indemnity, supra,* 60 Cal.App.4th at p. 556; *R. J. Reynolds, supra,* 235 Cal.App.3d at pp. 599, 601.) Nor is CIGA in the business of insurance, which includes issuing policies, collecting

premiums from insureds, making profits or assuming contractual obligations of insureds or third parties. (*Isaacson, supra,* 44 Cal.3d at pp. 786-787; *Denny's, supra,* 104 Cal.App.4th at p. 1438; *Industrial Indemnity, supra,* 60 Cal.App.4th at p. 556; *R. J. Reynolds, supra,* 235 Cal.App.3d at p. 600.) Under Ins. Code section 1063.5, CIGA collects premium from its member insurers to the extent necessary to pay statutorily defined "covered claims" on behalf of insolvent insurers under Ins. Code sections 1063.1 and 1063.2. (*Isaacson, supra,* 44 Cal.3d at p. 786; *Denny's, supra,* 104 Cal.App.4th at p. 1438; *Industrial Indemnity, supra,* 60 Cal.App.4th at p. 556; *R. J. Reynolds, supra,* 235 Cal.App.3d at p. 599.) Finally, CIGA was created as a last resort of limited financial protection for insureds and the public, and not as a fund for insurance companies or self-insureds. (*Denny's, supra,* 104 Cal.App.4th at pp. 1438, 1441.)

Other Available Insurance

Workers' compensation insurance is a class of insurance covered by CIGA statutes. (Ins. Code § 1063, subdivision (a); *Denny's, supra,* 104 Cal.App.4th at p. 1439.) Nevertheless, CIGA's liability for covered workers' compensation claims under Ins. Code section 1063.1, subdivision (c) does not include a claim that is covered by other workers' compensation insurance which is available to the claimant or insured under Ins. Code section 1063.1, subdivision (c)(9). (*Denny's, supra,* 104 Cal.App.4th at pp. 1438-1439; *Industrial Indemnity, supra,* 60 Cal.App.4th at p. 557; *R. J. Reynolds, supra,* 235 Cal.App.3d at p. 600.) Other available workers' compensation insurance includes solvent insurance or self-insurance provided by an employer that is jointly and severally liable under the Labor Code such as under section 5500.5. (*Denny's, supra,*104 Cal.App.4th 1433; *Industrial Indemnity, supra,* 60 Cal.App.4th 548.)

III. Joint and Several Liability

The joint and several liability of general and special employers to their employees for workers compensation benefits is well established. (*County of Los Angeles, supra,* 30 Cal.3d at p. 405; *State Compensation Ins. Fund, supra,* 20 Cal.2d at p. 272; *American Motorists, supra,* 8 Cal.2d at p. 588.) Agreements between general and special employers do not eliminate joint and several liability to employees. (*American Motorists, supra,* 8 Cal.2d at p. 588.) Historically, general and special insurers that were liable for payment of a joint and several award of workers's compensation benefits resolved disputes over contribution or reimbursement in an independent civil suit. (*State Compensation Ins. Fund, supra,* 20 Cal.2d at p. 272; *American Motorists, supra,* 8 Cal.2d at p. 588.) Receipt of premium for the coverage is an equitable consideration in deciding which insurer is ultimately liable. (*American Motorists, supra,* 8 Cal.2d at p. 588.)

A. *Ins. Code Section 11663*

The arguments by petitioners include that the joint and several liability of Jacuzzi and Assurance for workers' compensation benefits is extinguished upon compliance with Ins. Code section 11663. We disagree.

Ins. Code section 11663 begins by stating, "As between insurers of general and special employers." The legislative history confirms this statutory language is intended to be applied literally between insurers,[40] since the statute was enacted to avoid subsequent civil litigation between liable general and special insurers under *American Motorists* and *State Compensation Ins. Fund*, without affecting the injured worker's rights. Thus, Ins. Code section 11663 was not intended to change the joint and several

[40] See *Lungren, supra,* 45 Cal.3d at page 735; *Young, supra,* 97 Cal.App.4th at page 223.

liability of general and special employers to their employees for workers' compensation benefits. The Supreme Court stated the same conclusion in *County of Los Angeles* at page 405 and *McFarland* at page 702, which cases were decided after the enactment of Ins. Code section 11663.

The statutory language further provides that employer payrolls at the time of injury, not the time of entering into the insurance contract, determine whether the general or special insurer is solely liable for workers' compensation benefits. In other words, general and special insurer liability continues until the time of injury, when Ins. Code section 11663 establishes which liable insurer pays compensation. The statutory language and legislative history does not indicate insurer liability is eliminated at the time the policy is issued, and then is reinstated should the employee happen to be on the insured's payroll at the time of injury.

Casualty claims further that the joint and several liability of employers does not extend to insurers according to *County of Los Angeles*. However, the Supreme Court mechanically applied Ins. Code section 11663 in holding the self-insured County solely liable because it had paid the injured worker at the time of injury. (*County of Los Angeles, supra,* 30 Cal.3d at p. 406.) Even if Ins. Code section 11663 ends liability of either the general or special insurer at the time of injury, CIGA correctly points out it is not an insurer.[41] Therefore, CIGA is not bound by the statute before or after Miceli's injury.

B. *Section 3602, subdivision (d)*

Petitioners also argue that compliance with section 3602, subdivision (d) extinguishes joint and several liability. Again, we must disagree.

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[41] See Ins. Code section 1063 et seq; *Isaacson, supra,* 44 Cal.3d at pages 786-787; *Denny's, supra,* 104 Cal.App.4th at page 1438; *Industrial Indemnity, supra,* 60 Cal.App.4th at page 556; *R.J. Reynolds, supra,* 235 Cal.App.3d at pages 599, 601.

Jacuzzi specifically contends that the language in the beginning of the statute, "For the purposes of this division, including Sections 3700 and 3706, an employer may secure the payment of compensation . . .", expresses a legislative intent to relieve complying employers of all workers' compensation liabilities under Division Four of the Labor Code. Jacuzzi argues further that the list of excluded employees under section 3352 is necessarily expanded to include special employees like Miceli. Moreover, sections 3755, 3757 and 3759 provide precedent for relieving employers of liability.

In contrast, CIGA takes the position that section 3602, subdivision (d) is expressly limited to relieving employers from civil, criminal or other penalties. In addition, since the expressed statutory language does not include joint and several liability, legislative history is inapplicable. Even if legislative history is considered, it does not address joint and several liability.

Although the introductory language of section 3602, subdivision (d) could conceivably be interpreted as Jacuzzi suggests, the statute as a whole indicates that the Legislature did not intend such a broad meaning.[42] The statute goes on to provide that under certain conditions multiple employers may be insured with a single insurer for purposes of workers' compensation law. An employer's status of being insured or self-insured does not automatically result in relief from Division Four obligations such as joint and several liability for workers' compensation benefits. (*County of Los Angeles, supra,* 30 Cal.3d at p. 405; *State Compensation Ins. Fund, supra,* 20 Cal.2d at p. 272; *American Motorists, supra,* 8 Cal.2d at p. 588.) In addition, the statute concludes by listing specific liabilities that an employer avoids for compliance, and joint and several liability is not mentioned.

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[42] See *DuBois, supra,* 5 Cal.4th at page 388; *Lungren, supra,* 45 Cal.3d at page 735; *Moyer, supra,* 10 Cal.3d at page 230; *Young, supra,* 97 Cal.App.4th 223.

We also decline to assume that by enacting section 3602, subdivision (d), the Legislature impliedly intended to expand other statutes such as section 3352.[43] Moreover, sections 3755, 3757 and 3759 do not actually support Jacuzzi's argument, because these statutes concern substitution of the insurer for a liable employer by invoking procedures that were not followed in this case.

Assurance similarly argues that Jacuzzi's compliance with section 3602, subdivision (d) extinguished joint and several liability, by securing payment of compensation through Reliance under section 3700, *La Jolla Beach And Tennis Club* and *Employers Mutual*. As we stated previously, securing required workers' compensation insurance does not relieve the employer of liability to the employee for benefits. On the contrary, payment of compensation by Reliance on behalf of Jacuzzi as an insured under the policy and Alternate Employer Endorsement, is based upon Jacuzzi's liability to special employees like Miceli under workers' compensation law. Moreover, *La Jolla Beach And Tennis Club* does not address employer joint and several liability for workers' compensation benefits. The Supreme Court at page 36 simply confirmed that employers can secure payment of compensation under section 3700 by purchasing workers' compensation insurance or self-insuring. While *Employers Mutual* at page 638 adds that employers which comply with section 3700 are relieved of liability for compensation, the topic being addressed by the court is insurer subrogation and Witkin is cited.[44] In the reference cited, Witkin explains that an insurer assumes employer liability under sections 3755, 3757 and 3759, and the employer's rights are then subrogated to the insurer under Ins. Code section 11662. Sections 3755, 3757 and 3759 are not determinative in this case for the reasons we stated previously.

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[43] See *DuBois, supra,* 5 Cal.4th 382; *Lungren, supra,* 45 Cal.3d 727; *Moyer, supra,* 10 Cal.3d 222; *Young, supra,* 97 Cal.App.4th 209.

[44] 2 Witkin, Summary of California Law (9th ed. 1987) Workers' Compensation, section 137, page 708.

The legislative history further clarifies the scope of the statute.[45] The Legislature sought to rectify the duplicate insurance coverage and premium required to avoid tort liability under the rationale of *Douglas Oil*. *Douglas Oil* did not involve joint and several liability for workers' compensation benefits, nor is the issue addressed in the legislative history. Instead, the legislative history and the statute addresses insurance of multiple employers by a single insurer, not extinguishing liability between multiple insurers.

IV. The Assurance Policy

Petitioners contend further that the Assurance policy is not other available insurance to special employees such as Miceli under Ins. Code section 1063.1, subdivision (c)(9). Petitioners base their contentions on the contractual intent of the parties, policy provisions which include Ins. Code section 11663 and section 3602, subdivision (d), and non-payment of premium. We shall apply the rules of contract and insurance policy interpretation to determine whether the Assurance policy is other available insurance to special employees such as Miceli within the meaning of Ins. Code section 1063.1, subdivision (c)(9).

A. *Mutual Intent of Jacuzzi and Assurance*

We begin with the fundamental rule that a contract or insurance policy should be interpreted so as to give effect to the mutual intent of the parties at the time of contracting.[46] Petitioners argue that Jacuzzi and Assurance intended to limit insurance

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[45] *DuBois, supra,* 5 Cal.4th at pages 387-388, 393; *Lungren, supra,* 45 Cal.3d at page 735.

[46] See Civil Code section 1636; *E.M.M.I., supra,* 32 Cal.4th at page 470; *Hess, supra,* 27 Cal.4th at page 524; *La Jolla Beach And Tennis Club, supra,* 9 Cal.4th at page 37.

coverage under the policy to employees for which premium based on payroll could be collected. CIGA contends the Assurance policy is a standard workers' compensation policy, which provides unlimited coverage to all Jacuzzi employees. Where the language of the contract or insurance policy is clear and explicit, the mutual intent of the parties is ascertained solely from the agreement, if possible.[47] The contract should also be interpreted as a whole to give effect to every part.[48]

1. *Part One of the Policy*

Under Part One – Workers' Compensation Insurance, subpart B, the Assurance policy states, "We will pay promptly when due the benefits required of you by the workers' compensation law." This policy language indisputably provides insurance coverage for workers' compensation benefits that the employer must legally provide injured employees according to workers' compensation law. (*La Jolla Beach And Tennis Club, supra,* 9 Cal.4th at p. 36.) Since Jacuzzi is legally obligated to provide workers' compensation benefits to employees under joint and several liability, the Assurance policy language under Part One literally extends coverage for benefits Jacuzzi owes to special employees like Miceli.

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[47] Civil Code sections 1639, 1639; *Hess, supra,* 27 Cal.4th at page 524; *Palmer, supra,* 21 Cal.4th at page 1115; *La Jolla Beach And Tennis Club, supra,* 9 Cal.4th at page 37.

[48] Civil Code section 1641; *La Jolla Beach And Tennis Club, supra,* 9 Cal.4th at page 37.

2. *Part Five of the Policy*

Petitioners argue that the coverage provided for special employees such as Miceli under Part One of the Assurance policy is excluded under Ins. Code section 11663 and section 3602, subdivision (d), which are also part of the policy pursuant to Ins. Code section 11650 and *City of Torrance*. Petitioners claim further that Ins. Code section 11663 and section 3602, subdivision (d) are contained in the Assurance policy language under Part Five – Premium, subpart Remuneration,[49] in the form of a coverage exclusion. Petitioners reason that an additional expressed exclusion of coverage for special employees like Miceli, as required by the WCAB, is therefore redundant and unnecessary.

CIGA contends that Ins. Code section 11650 applies only to Ins. Code sections 11651 through 11654. In addition, the premium part of the Assurance policy is not an insurance coverage exclusion that is conspicuous, plain and clear.

We interpret Part Five – Premium, subpart Remuneration, paragraph 1 as permitting premium based on the payroll of the insured's officers and employees.[50] Paragraph 2 permits premium for all other persons whose work could result in liability under Part One. The premium in paragraph 2 is based on the insured's payroll or the contract price for service and materials, unless proof is given that the employer of these other persons lawfully secured workers' compensation obligations.

3. *The Policy Contains Ins. Code Section 11663*

The policy language in Part Five – Premium appears to be based at least in part on Ins. Code section 11663. If the person whose work could result in Part One liability at

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[49] See footnote 7, *ante*.

[50] See *E.M.M.I., supra,* 32 Cal.4th at page 470.

the time of injury is on the payroll of an insured general employer, the general employer's insurer would be liable under Ins. Code section 11663. We conclude that Ins. Code section 11663 is part of the Assurance policy, considering the policy language under Part Five – Premium and Ins. Code section 11650. Ins. Code section 11650 is not limited to Ins. Code sections 11651 through 11654. The policy also provides under Part One, subpart F, that the insured is responsible for payments due to serious and willful misconduct, and Ins. Code section 11661 prohibits insurance for serious and willful misconduct. Although we conclude that Ins. Code section 11663 is contained in the Assurance policy, it does not necessarily mean CIGA is liable.

The intent expressed under Ins. Code section 11663

Petitioners allege that the contracting parties complied with Ins. Code section 11663 under the Assurance policy, and thus intended only the Reliance policy to cover special employees like Miceli. However, parties to a contract are presumed to have applied existing laws as well as judicial interpretations of those laws. (*La Jolla Beach And Tennis Club, supra,* 9 Cal.4th at p. 36; *City of Torrance, supra,* 32 Cal.3d at p. 378.) The same rule is applicable where insurance policy provisions incorporate statutory language that is required by law. (*Prudential-LMI, supra,* 51 Cal.3d at p. 684; *Young, supra,* 97 Cal.App.4th at p. 223.) Thus, the meaning of the policy provisions pertaining to Ins. Code section 11663 includes that employer joint and several liability to employees for workers' compensation benefits is not extinguished. In addition, Ins. Code section 11663 only applies to insurers under *County of Los Angeles* and *McFarland*, and CIGA is not an insurer under *Isaacson*.

Petitioners also allege that the language pertaining to Ins. Code section 11663 under Part Five – Premium of the Assurance policy is in the form of an insurance coverage exclusion. However, insurance coverage exclusions should be conspicuous, plain and clear. (*E.M.M.I., supra,* 32 Cal.4th at p. 471; *Ponder, supra,* 145 Cal.App.3d at

pp. 718-720.) Part Five – Premium of the Assurance policy addresses how premium is computed and collected, and exclusion of insurance coverage is never mentioned. The fact that the policy indicates premium will not be charged under certain conditions does not necessarily mean there is no coverage for those circumstances.[51]

4. *The Policy Contains Section 3602, Subdivision (d)*

Petitioners contend further that section 3602, subdivision (d) is also contained in the form of an exclusion within the Assurance policy language under Part Five – Premium, subpart Remuneration, paragraph 2. However, this policy language primarily concerns charging premium unless there is another insurer, and section 3602, subdivision (d) authorizes multiple employers to be insured under a single policy. While this policy language could be read to fit certain situations under section 3602, subdivision (d), the reference to payroll and additional insurance is more applicable to Ins. Code section 11663. In addition, the Assurance policy is a 1992 edition and the statute was enacted in 1995. In any event, this policy language is not in the form of an exclusion, which should be conspicuous, plain and clear. (*E.M.M.I., supra,* 32 Cal.4th at p. 471; *Ponder, supra,* 145 Cal.App.3d at pp. 718-720.)

Nevertheless, Part One of the Assurance policy provides insurance coverage for benefits owed under workers' compensation law. The workers' compensation law under Part One includes subsequent changes that are in effect at the relevant times of enforcement. (*City of Torrance, supra,* 32 Cal.3d at pp. 378-379.) Workers' compensation law includes Division Four of the Labor Code. (*La Jolla Beach And Tennis Club, supra,* 9 Cal.4th at p. 36.) Since section 3602, subdivision (d) is contained in Division Four of the Labor Code, the statute is part of workers' compensation law included in the Assurance policy.

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[51] See footnotes 25-28, *ante*.

The intent expressed under section 3602, subdivision (d)

Petitioners also contend that the contracting parties complied with section 3602, subdivision (d) contained in the Assurance policy, which expresses the intention that only Reliance would cover special employees like Miceli. We disagree.

While the contractual agreements between Jacuzzi, RemedyTemp and Reliance appear to comply with section 3602, subdivision (d), Jacuzzi separately obtained a standard workers' compensation insurance policy without limiting endorsements from Assurance, which under Part One literally extends coverage for benefits to special employees such as Miceli. (Ins. Code §§ 11657 to 11660; *Fyne, supra,* 138 Cal.App.2d at pp. 472-474.) As pointed out by the WCAB, section 3602, subdivision (d) has permissive language, which does not foreclose an employer from securing payment of compensation under alternative insurance.

Petitioners argue further the WCAB nevertheless found that none of the parties expected the Assurance policy to provide coverage for special employees like Miceli. Petitioners contend that the WCAB's finding of their intent should be enforced, since it is supported by substantial evidence such as the agreements between the parties and Catapano's testimony.[52] However, the WCAB's statements regarding the expectations of the parties is based on Assurance's inability to collect premium under the policy, not a lack of coverage due to compliance with section 3602, subdivision (d). There may be coverage without premium, even though an insurer may not anticipate extending coverage.[53] The WCAB also pointed out that insurers never intend to cover claims of insolvent insurers, and the cited cases involving CIGA support the WCAB's comments.

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[52] See *Western Growers, supra,* 16 Cal.App.4th at page 233.

[53] See footnotes 25 to 28, *ante*.

The record also contradicts petitioners' interpretation of the WCAB's statements regarding the expectations of the parties. Although a contract may be interpreted by considering the surrounding circumstances, several contracts relating to the same matters are taken together if the same parties are involved and the transaction is substantially the same.[54] In this case, Assurance was not a party to the Service Agreement, Reliance policy or Alternate Employer Endorsement, and there is no evidence Assurance was informed of these agreements or of the RemedyTemp employees. Moreover, petitioners do not argue the Assurance policy language is ambiguous so that Catapano's testimony as extrinsic evidence should be considered.[55] Even if considered, the WCAB found Catapano's testimony unpersuasive, and Catapano based his opinion of no coverage solely on premium which is inconsistent with the policy terms and California law.

5. *The Statutory Scheme for Limiting Policy Coverage*

Since the Assurance policy indicates there is coverage for special employees such as Miceli, and the WCAB required exclusion of the coverage by endorsement which the WCJ stated is unavailable, the court requested additional briefing. The responses ranged from endorsements under title 10, section 2252 et seq. being applicable to inapplicable, impracticable or unnecessary.

The statutory scheme for limiting or restricting coverage of a standard workers' compensation insurance policy requires California Approved Form Endorsements as set forth by title 10, sections 2253 to 2268. (Ins. Code §§ 11657 to 11660; tit. 10, § 2252; *Fyne, supra,* 138 Cal.App.2d at pp. 472-474.) Under title 10, section 2265, Form No. 11

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[54] Civil Code sections 1642 and 1647; *Hess, supra,* 27 Cal.4th at page 524; *La Jolla Beach And Tennis Club, supra,* 9 Cal.4th at page 37.

[55] *Kavruck, supra,* 108 Cal.App.4th at page 782; *Fyne, supra,* 138 Cal.App.2d at page 471.

may be used where other California Approved Form Endorsements are not applicable,[56] in accordance with the criteria set forth by title 10, section 2259. Title 10, section 2259, subsection (e) provides for a form endorsement that excludes only such liability for compensation as the employer affirms to the insurer in writing is otherwise secured or lawfully uninsured. The insurer must then submit a completed Form No. 11 endorsement to the Workers' Compensation Insurance Rating Bureau, which in turn forwards the proposed endorsement to the Insurance Commissioner for approval within 30 days under title 10, section 2266.

There is no evidence or allegation that Jacuzzi or Assurance attempted to limit coverage under the Assurance policy by following the statutory scheme under title 10, section 2252 et seq. Petitioners collectively argue such a limiting endorsement is unnecessary. CIGA contends that the endorsement is required, and adding certain language to Form No. 11 indicating RemedyTemp employees had other applicable insurance would have been approved by the Insurance Commissioner. Assurance replies that there is no evidence CIGA's version of Form No. 11 would have been approved. However, there is no reason to doubt the Insurance Commissioner would have approved an appropriate endorsement. Title 10, section 2252 et seq. allows for exclusion of coverage that the employer affirms in writing is otherwise insured.

6. *The Policy, Section 3602, Subdivision (d) and the Statutory Scheme*

We conclude that the Assurance policy provisions pertaining to section 3602, subdivision (d) should be interpreted and applied in consideration of the established statutory scheme limiting coverage under Ins. Code sections 11657-11660, title 10,

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[56] See title 10, section 2264 and section 2269.1 et seq.

section 2252 et seq. and *Fyne, supra,* 138 Cal.App.2d at pages 472-474.[57] In enacting section 3602, subdivision (d), the Legislature is presumed to have considered the statutory scheme and judicial decisions that may affect implementation of the statute, which also applies when construing insurance policy language that contains the statute as required by law.[58] Nothing in section 3602, subdivision (d) or the legislative history indicates the statute is intended to change or avoid the procedures under Ins. Code sections 11657-11660 or title 10, section 2252 et seq. Thus, these procedures are not unnecessary or inapplicable because section 3602, subdivision (d) is part of the policy. Instead, the Legislature presumably assumed the same procedures would be followed in securing a single policy in place of duplicate polices under section 3602, subdivision (d).

Moreover, the statutory scheme provided Jacuzzi and Assurance a reasonable means to establish the mutual intent claimed, even if Jacuzzi had separate employees and workers' compensation insurance. However, Jacuzzi and Assurance failed to process the proper endorsement which could exclude coverage under a standard workers' compensation policy, as required by Ins. Code sections 11657-11660, title 10, section 2252 et seq. and *Fyne*. Based on the Assurance policy and the statutory scheme, the court has a duty to hold the parties to the clear language of the contract. (*Fyne, supra,* 138 Cal.App.2d at pp. 471-472.) Therefore, we conclude that under the Assurance policy language, Jacuzzi and Assurance intended to provide coverage for special employees such as Miceli.

RemedyTemp argues further that the WCAB's finding of mutual intent to exclude coverage based on the agreements of the parties should be enforced under *Hess*. As we stated previously in this opinion, the WCAB did not find the mutual intent to exclude

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[57] *DuBois, supra,* 5 Cal.4th at page 388; *Lungren, supra,* 45 Cal.3d at page 735; *Moyer, supra,* 10 Cal.3d at page 230; *Young, supra,* 97 Cal.App.4th at page 233.

[58] *Prudential-LMI, supra,* 51 Cal.3d at page 684; *Young, supra,* 97 Cal.App.4th at page 233.

coverage based on compliance with section 3602, subdivision (d). In addition, *Hess* involves a personal injury insurance release which literally released a third party due to mutual mistake of the releasing parties. RemedyTemp is not alleging mutual mistake by the failure to properly exclude coverage by endorsement under title 10, section 2252 et seq. Instead, RemedyTemp and petitioners allege coverage for special employees like Miceli is excluded under the Assurance policy.

7. *Premium Is Not Determinative*

Petitioners also contend that providing coverage under the Assurance policy without premium is contrary to the intent of the parties and Legislature, and gives CIGA which received premium a windfall. Petitioners further claim that case law such as *R.J. Reynolds, Ross, Denny's and Industrial Indemnity* based coverage on premium.

The WCJ and WCAB concluded that Assurance chose not to charge premium for the coverage provided. CIGA adds that it receives premium statutorily and is not in the profitable business of insurance, and courts have found coverage regardless of premium.

It is unknown whether Assurance could have charged premium under Part Five – Premium of the policy.[59] CIGA suggests that Assurance could have deleted the last sentence of paragraph 2 under subpart Remuneration. We question whether such a deletion to a standard workers' compensation insurance policy would be approved by the Insurance Commissioner.

In any event, coverage is not necessarily based on premium.[60] In addition, while *R.J. Reynolds* held that a retrospective premium endorsement is other available insurance with regards to CIGA, *Denny's* and *Industrial Indemnity* based coverage on joint and several liability under section 5500.5, and *Ross* found applicable secondary coverage and

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[59] See footnote 7, *ante*.

[60] See footnotes 25 to 28, *ante*.

receipt of premium. Regardless, issues of duplicate coverage or premium could have been avoided by proper exclusion of coverage for special employee like Miceli under Ins. Code section 11657-11660, title 10, section 2252 et seq. and *Fyne*.

V. Prospective Application

Finally, petitioners warn there will be significant adverse affects on the temporary staffing industry and business in California if the WCAB's decision is affirmed. The negative impact on the industry and business alleged by petitioners can be avoided by excluding coverage under the statutory procedures provided by title 10, section 2252 et seq. However, in order to mitigate the possible affect on industry, and on similar cases that may have already been adjudicated, our decision is to be applied prospectively. (*Atlantic Richfield, supra,* 31 Cal.3d at pp. 727-728; *Sumner, supra,* 33 Cal.3d at p. 972; *LeBoeuf, supra,* 34 Cal.3d at p. 246.)

DISPOSITION

The Assurance policy is other available insurance within the meaning of Ins. Code section 1063.1, subdivision (c)(9). The decision of the WCAB in banc dismissing CIGA is affirmed.

CERTIFIED FOR PUBLICATION

WOODS, J.

We concur:

PERLUSS, P.J. JOHNSON, J.