Filed 7/25/05; opn. on rehearing

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. Reversed and remanded with directions.

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 special employers with workers or special employees, 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. RemedyTemp obtained a California form workers' compensation insurance policy from Reliance National Indemnity Co. (Reliance), which included an Alternate Employer Endorsement that specifically extended insurance coverage to special employers like Jacuzzi as an additional insured. Jacuzzi also obtained a California form workers' compensation insurance policy for its own employees 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 and Reliance provided benefits. However, on October 3, 2001, Reliance was ordered into liquidation and the California Insurance Guarantee Association (CIGA) was joined to cover the claim.[1] CIGA requested to be dismissed under Ins. Code section 1063.1, subdivision

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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 . . . ."

(c)(9),[2] contending that the Assurance policy provided other available insurance which covered Miceli's claim. RemedyTemp, Jacuzzi and Assurance alleged before the Workers' Compensation Appeals Board (WCAB) that their agreements complied with Ins. Code section 11663[3] and Labor Code section 3602, subdivision (d),[4] which limited liability and

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[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 . . . ."

[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.

insurance coverage to the Reliance policy, and CIGA's request for dismissal should be denied.[5]

The WCAB in banc determined that RemedyTemp and Jacuzzi were jointly and severally liable to Miceli for workers' compensation, which was not changed by the agreements or statutes cited. The WCAB reasoned that Ins. Code section 11663 was limited to insurers, which does not include CIGA whose liability is strictly statutory. The WCAB explained further that compliance with section 3602, subdivision (d) precludes civil liability and not alternative workers' compensation insurance. While the contracting parties may not have intended Assurance to provide coverage (and Assurance did not collect premium for special employees like Miceli), the Assurance policy provides unlimited insurance coverage absent a separate exclusionary form endorsement obtained under the statutory scheme. The WCAB concluded that the Assurance policy is other available insurance under Ins. Code section 1063.1, subdivision (c)(9), and dismissed CIGA.

RemedyTemp, Jacuzzi, Assurance and Casualty petition for writ of review. Petitioners contend that their agreements satisfied the requirements of Ins. Code section 11663 and section 3602, subdivision (d), which extinguished joint and several liability and acts as exclusion of insurance coverage for special employees like Miceli under the Assurance policy. Petitioners also assert, and the WCAB determined, that the coverage provided to Jacuzzi by Assurance was not intended to include special employees such as

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"(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."

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 with an industrially injured special employee provided by RemedyTemp, joined the proceedings.

Miceli. The WCAB's finding is supported by substantial evidence and should be enforced. Thus, a separate exclusionary form endorsement is not required, and CIGA should not be dismissed.

Based on statutory language, legislative history and judicial precedent, we agree with the WCAB that employer joint and several liability to employees for workers' compensation is not extinguished by compliance with Ins. Code section 11663 or section 3602, subdivision (d). We further agree with the WCAB that Ins. Code section 11663 is expressly limited to insurers, which does not include CIGA.

In regards to whether insurance coverage for special employees can be excluded by compliance with section 3602, subdivision (d), the Legislature intended to avoid duplicate insurance and premium by authorizing insurance coverage solely by the general employer's policy. As pointed out by the WCAB, however, the statute does not preclude the special employer from obtaining alternative insurance protection.

The WCAB resolved the apparent conflict as to what was intended under the Assurance policy and section 3602, subdivision (d), by finding unlimited insurance coverage absent a separate exclusionary form endorsement that is approved by the Workers' Compensation Insurance Rating Bureau (WCIRB) and Department of Insurance (DOI) under the statutory scheme. However, the WCIRB and DOI indicate in responses to questions from this court that such endorsements have not been used for this purpose. While the WCIRB and DOI state that they would approve such an endorsement, they add that "a careful description of the excluded special employees" is also required. Even though this is not expressly required by the statutory scheme, CIGA contends the added requirement is routine and reasonable. Nevertheless, prior notice of this requirement was not provided, and we agree with petitioners that it is too uncertain for practical guidance under the statutory scheme. Therefore, we conclude that the general requirement of an exclusionary form endorsement under the statutory scheme is not applicable under the circumstances of this case.

We further conclude that alternative insurance protection for special employees like Miceli was not intended under the Assurance policy and section 3602, subdivision (d), which is incorporated into the policy as explained hereafter. Otherwise, petitioners would have intended duplicate insurance protection that specifically insures Jacuzzi as an additional insured under the Alternate Employer Endorsement and as a named insured under the Assurance policy. Accordingly, we hold the Assurance policy is not other available insurance under Ins. Code section 1063.1, subdivision (c)(9); and the dismissal of CIGA by the WCAB is reversed.

FACTUAL AND PROCEDURAL BACKGROUND

The parties stipulated to the basic facts. Pursuant to a Service Agreement, RemedyTemp, a general employer, agreed for a fee to provide special employees to Jacuzzi, the special employer.[6] The Service Agreement further provided that RemedyTemp would retain the special employees on payroll, provide workers' compensation insurance and hold Jacuzzi harmless from claims. On or about July 22, 1997, RemedyTemp secured a California form workers' compensation insurance policy through Reliance. The Reliance policy contained an Alternate Employer Endorsement, which specifically extended the insurance coverage to contracted special employers such as Jacuzzi. Jacuzzi also insured its own workers through Assurance, which issued to Jacuzzi a California form workers'

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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.)

compensation insurance policy, April 1992 edition, for the period of May 31, 1999, through May 31, 2000.

On March 1, 2000, Mark Miceli, a special employee provided by RemedyTemp, admittedly sustained a cut injury to his left minor ring finger while working for Jacuzzi. 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 conducted discovery, which included the deposition of Vincent Catapano, the regional underwriting manager of Assurance. Catapano testified 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

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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."

allows retroactive premium since this is also based on Jacuzzi's payroll. However, Catapano conceded that he was not familiar with California law, Ins. Code section 11663 or section 3602, subdivision (d).

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. The admitted evidence included the legislative histories of Ins. Code section 11663[8] and section 3602, subdivision (d),[9] the Service Agreement, insurance policies, and Catapano's deposition.

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[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 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'

The workers' compensation administrative law judge (WCJ) determined that RemedyTemp and Jacuzzi, as general and special employers of Miceli, were jointly and severally liable for workers' compensation, 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 available 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 is well established. In addition, the plain language of Ins. Code section 11663 is limited to insurers, Reliance became insolvent and was no longer an insurer, and CIGA only pays per statute 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 exclusion 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 insurance policy exclusion for special employees in California.

RemedyTemp, Jacuzzi, Assurance and Casualty petitioned the WCAB for reconsideration. The contentions included that joint and several liability and insurance coverage for special employees like Miceli under the Assurance policy ended upon compliance with Ins. Code section 11663 and section 3602, subdivision (d), which is not changed by the subsequent insolvency of Reliance or CIGA's status. Moreover, Jacuzzi paid premium through RemedyTemp and CIGA collected premium from the insurers.[10]

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compensation laws or insurance would not be obtained, which could increase claims against the Uninsured Employers Fund (renamed Uninsured Employers Benefits Trust Fund).

[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

Catapano also testified that the Assurance policy was not intended to be other available insurance under Ins. Code section 1063.1, subdivision (c)(9), 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 funds are unavailable if there is other applicable insurance, and the Assurance policy provided unlimited coverage.

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

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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.)

[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 provided 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."

(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 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]

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[13] Denny's was self-insured for 80 percent of a cumulative injury period, and the insolvent insurer had coverage for 20 percent. The court concluded that Denny's is jointly and severally liable for the cumulative injury under section 5500.5, and 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 includes 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.)

[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

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. The WCAB questioned whether the legal relationship of the parties prior to Reliance's insolvency is determinative, since CIGA's liability arises after insurer 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 CIGA's dismissal. The WCAB reasoned 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.

Jacuzzi, Assurance and Casualty contend that joint and several liability was extinguished by compliance with Ins. Code section 11663 and section 3602, subdivision (d). In regards to Ins. Code section 11663, Casualty argues that CIGA is an insurer for insolvency, and the statute applies broadly between insurers including CIGA. Insurer joint and several liability also does not extend to employers under *County of Los Angeles* (self-insured general employer solely liable under Ins. Code section 11663).

In regards to section 3602, subdivision (d), Jacuzzi argues that compliance ends any continuing employer obligation under Division Four of the Labor Code. Based on the introductory broad language of the statute, "For purposes of this division, including Sections 3700 and 3706 . . .", employees excluded from workers' compensation under section 3352[15] is expanded to include special employees such as Miceli. Employers are similarly relieved of workers' compensation obligations under sections 3755,[16] 3757[17] and

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Regulations, title 10, sections 2252-2268, covers all employees and is not limited to location or operations shown in declarations).

[15] 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.

[16] 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

3759.[18] Assurance adds that by securing workers' compensation insurance through Reliance, Jacuzzi satisfied its obligation to special employees like Miceli under section 3700 according to *La Jolla Beach & Tennis Club, Inc. v. Industrial Indemnity Co.* (1994) 9 Cal.4th 27, 36 (*La Jolla Beach & 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 litigation attorney's fees between subcontractor's workers' compensation insurer and defendant general contractor).

Petitioners further contend that Ins. Code section 11663 and section 3602, subdivision (d) are contained in the Assurance policy under Part - Five Premium, pursuant to Ins. Code section 11650[19] et seq. and *City of Torrance v. Workers' Comp. Appeals Bd.* (1982) 32 Cal.3d 371, 378 (*City of Torrance*) (contract to provide workers' compensation

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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."

[17] 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."

[18] 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."

[19] 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."

insurance intended to incorporate changes in applicable law including future amendment of section 5500.5). Petitioners argue that their compliance with the Assurance policy terms acts as an exclusion of coverage, so that another expressed exclusion of special employees as required by the WCAB is redundant. The WCAB also found that the contracting parties intended only Reliance to cover special employees like Miceli, which should be enforced since it is supported by substantial evidence such as Catapano's testimony, the Service Agreement, Alternate Employment Endorsement and Assurance policy. Even if the Assurance policy language is ambiguous, the intent of the parties controls.[20]

In addition, Catapano testified that Assurance did not intend coverage because premium based on payroll is precluded for special employees like Miceli under the policy. Premium determines 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 that relieves 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). CIGA collected premium for Reliance's insolvency, and thus is obligated to fulfill the contractual obligations of the insolvent insurer while spreading the risk. The WCAB's decision gives CIGA a windfall while Assurance is doubly burdened.

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[20] RemedyTemp also alleges that the WCAB's requirement of another expressed exclusion despite the intent of the parties is inconsistent with *Hess v. Ford Motor Company* (2002) 27 Cal.4th 516 (*Hess*). In *Hess,* 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. The Supreme Court concluded that the uncontroverted and objective extrinsic evidence established that the language literally releasing all corporations was not intended to release Ford, and was an excusable mutual mistake. (*Hess, supra,* 27 Cal.4th at pp. 527, 529.) 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. (*Hess, supra,* 27 Cal.4th at p. 528.)

Amicus curiae briefs were also filed in support of petitioners. Amici emphasize the business and economic advantages provided by temporary staffing agencies, which typically provide workers' compensation insurance for special employees. The WCAB's decision undermines industry and the intent of the parties and Legislature under Ins. Code section 11663 and section 3602, subdivision (d). If the court affirms the WCAB, the decision should be limited prospectively to avoid petitions to reopen prior awards.[21]

CIGA answers that Ins. Code section 11663 is expressly limited to insurers, and it is not a licensed insurer of employers for profit,[22] but pays only covered claims on behalf of insolvent insurers and the public as set forth by Ins. Code section 1063.1. Ins. Code section 11663 also does not address joint and several liability of employers as stated by the Supreme Court in *McFarland* at pages 702 to 703. Although section 3602, subdivision (d) addresses employer liability, the statute and legislative history limit the relief provided to civil and criminal liabilities.

CIGA also contends that Assurance and Jacuzzi intended unlimited coverage by entering into a standard California form workers' compensation insurance policy under *Fyne* and Ins. Code section 11651 et seq.[23] A limited policy contains an exclusionary form

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[21] See *Atlantic Richfield Co. v. Workers' Comp. Appeals Bd.* (1982) 31 Cal.3d 715, 727-728; *Sumner v. Workers' Comp. Appeals Bd.* (1983) 33 Cal.3d 965, 972; *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234, 246.

[22] 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."

[23] 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*.

endorsement under Ins. Code section 11657 et seq.[24] and California Code of Regulations, title 10, sections 2252 to 2268.[25] Limited coverage was not intended because the Service

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[24] 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."

[25] 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."

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.

Agreement and insurance policies involved different parties and dates, and Assurance was not aware of the other agreements or of the RemedyTemp employees. The WCAB also correctly found Catapano's testimony of intent and coverage unreliable, because he did not know California law and was incompetent to establish Jacuzzi's intent.

CIGA also denies that compliance with Ins. Code section 11663 or section 3602, subdivision (d) acts as an exclusion of insurance coverage under the Assurance policy. Insurance policy exclusions must be conspicuous, plain and clear,[26] and the premium part of the Assurance policy does not meet any of these requirements. Ins. Code section 11663 is also not an exclusion contained in the Assurance policy because Ins. Code section 11650 only incorporates Ins. Code sections 11651 to 11654, which begin by stating that "Every such contract or policy shall contain a clause . . ." In addition, section 3602, subdivision (d) permits Jacuzzi to acquire alternative insurance protection under the Reliance policy.

CIGA also disputes that premium determines outcome. Assurance chose not to charge premium for business reasons, and insurers are liable regardless of premium in cases involving cumulative injury under section 5500.5,[27] a trainee before being hired and paid,[28] an independent contractor ruled an employee as a matter of law,[29] coverage by estoppel,[30] or the insured's inability to pay due to bankruptcy.[31] Employers can avoid such results by self-

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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."

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

[27] CIGA cites *Denny's* and *Industrial Indemnity*.

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

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

[30] See Ins. Code sections 676.8 and 11664.

[31] See Ins. Code section 11655.

insuring or insuring with State Compensation Insurance Fund.[32] Nor should this court's decision be limited prospectively, since the issues are of first impression and the existing rights of employees and employers are not affected so that petitions to reopen will be filed.

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?

RemedyTemp responds that special employees can be excluded from insurance coverage by endorsement under the notice statutes of title 10 and section 2259, subdivision (e).[33] The parties complied with the notice statutes and section 3602, subdivision (d) since

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[32] See Ins. Code sections 11770 et seq.

[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)."

Jacuzzi affirmed coverage through Reliance. A separate exclusionary endorsement is unnecessary because Jacuzzi knew it was protected and Miceli will receive benefits. The Assurance policy also precludes premium where there is proof of insurance coverage for special employees not on payroll, and the Reliance policy is the proof.

Jacuzzi responds that coverage for special employees like Miceli cannot be excluded under any circumstances, which includes the procedures under title 10, sections 2259 and 2265, subdivision (a).[34] On the other hand, Assurance could have charged premium under Ins. Code section 11730 et seq.,[35] but did not do so.

Assurance answers that only a properly completed California Approved Form Endorsement No. 11 (Form No. 11) under title 10, section 2269.11[36] could have been used

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[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 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:

to exclude insurance coverage for RemedyTemp employees. However, 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. A form endorsement can also exclude employees by name, but this would require thousands of forms. There is no form endorsement that allows modification of the premium part of the Assurance policy.

Casualty adds that a limiting endorsement presumably could be drafted and approved pursuant to title 10, sections 2257[38] and 2262. If coverage is extended to special employees

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> "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 _____
>
> "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*.)

such as Miceli, Assurance is entitled to charge additional premium under Ins. Code sections 11730 et seq.

CIGA replies that 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:", routine 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 DOI must approve the completed form pursuant to title 10, section 2266.[39] In order to charge premium for special employees like Miceli, Part Five - Premium of the Assurance policy must be modified, such as by 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."

The court granted petitioners review and issued a decision affirming the WCAB's dismissal of CIGA. The court explained that under the statutory scheme and *Fyne*, unlimited insurance coverage was provided by the Assurance policy, absent an approved

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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."

form endorsement excluding coverage for special employees like Miceli. Thus, the Assurance policy was other available insurance under Ins. Code section 1063.1, subdivision (c)(9).

Petitioners timely petitioned for rehearing alleging that Assurance attempted to use Form No. 11 to exclude insurance coverage for special employees of another insured, which was rejected by the WCIRB.[40] This court vacated its decision, granted rehearing and requested additional information from the WCIRB and DOI.

RESPONSES TO QUESTIONS POSED BY THIS COURT

In connection with rehearing of this matter, the court wrote the WCIRB and DOI and requested written responses to the following questions.

1. Where general and special employers are insured for workers' compensation under separate policies: Can special employees be excluded from coverage under the special employer's workers' compensation insurance policy? If so, can Form No. 11 be used to exclude coverage for special employees? What information should Form No. 11 provide?

2. Is there another endorsement form that should be used to exclude coverage for special employees, and what information should the form provide?

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[40] After the words "this policy DOES NOT INSURE:" in Form No. 11, Assurance added the words, "ANY EMPLOYEE OF A GENERAL EMPLOYER WHEREBY YOU ARE CONSIDERED SPECIAL EMPLOYER IN ACCORDANCE WITH LOCAL LAW". The WCIRB contacted Assurance and requested an explanation regarding the form. Assurance responded that Form No. 11 is being used to exclude coverage under the policy for leased and temporary workers, as "These workers are covered under the WC polices of their employers." The WCIRB replied that, "Please be advised that the CAF-11 endorsement would be used inappropriately for this purpose. Accordingly, the CAF-11 endorsement does not apply to the insured and should be removed form this policy."

The WCIRB responded that Form No. 11 has been rarely used in the past, but a properly completed Form No. 11 potentially could be used to exclude insurance coverage for special employees. The form must indicate that the special employer affirmed in writing compensation was secured through the general employer's insurer. Form No. 11 should also provide "a careful description of the excluded special employees." An insurer could draft a form endorsement that complies with the applicable regulations, or use California Approved Form Endorsement No. 10 (Form No. 10) that excludes insurance coverage for special employees by name.

The DOI agreed with the WCIRB's response, and added that "the use of limiting and restricting endorsements should be very carefully monitored" to ensure coverage for every employee. The DOI suggested that the WCIRB might draft a generic form to be used by insurers.

Petitioners replied that workers' compensation insurance and notice was provided pursuant to section 3602, subdivision (d), which supercedes the form endorsement requirements of the WCIRB and DOI. The requirements are also impracticable, and "a careful description of the excluded special employees" is vague and provides little guidance. The WCIRB's rejection of Assurance's proposed Form No. 11 shows that the DOI regulations have never been the solution, and the use of the form is uncertain and should be prospective.

CIGA replied that requiring written affirmation of insurance coverage and a careful description of exclusions have been routine requirements by the WCIRB and DOI for years. Thus, the requirements are reasonable and should be judicially noticed by this court.[41]

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[41] Judicial notice is taken by the court of the exhibits submitted by Assurance in petitioning for rehearing, and the briefing by the WCIRB and DOI, pursuant to Evidence Code sections 452 and 459.

DISCUSSION

I. Standards for Review

A. *Factual Findings*

A decision based on factual findings which are supported by substantial evidence is affirmed by the reviewing court.[42] However, an appellate court is not bound by factual findings that are unreasonable, illogical, improbable, or inequitable when viewed in light of the entire record and the overall statutory scheme.[43]

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.[44] When interpreting statutes, the Legislature's intent should be determined and given effect.[45]

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[42] *Western Growers Ins. Co. v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 227, 233 (*Western Growers*).

[43] *Western Growers, supra,* 16 Cal.App.4th at page 233; *Bracken v. Workers' Comp. Appeals Bd.* (1989) 214 Cal.App.3d 246, 254.

[44] *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.

[45] *DuBois, supra,* 5 Cal.4th at page 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.[46] The statute's every word and clause should be given effect so that no part or provision is useless, deprived of meaning or contradictory.[47] In addition, interpretation of the statutory language should be consistent with the purpose of the statute and the statutory framework as a whole.[48]

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.[49] 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.[50] Literal construction does not prevail over legislative intent.[51] In enacting a statute, the Legislature is deemed to have been aware of existing statutes and

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[46] *DuBois, supra,* 5 Cal.4th at pages 387-388; *Lungren, supra,* 45 Cal.3d at page 735; *Moyer, supra,* 10 Cal.3d at page 230; *Young, supra,* 97 Cal.App.4th at page 223.

[47] *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.

[48] *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 223.

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

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

[51] See *Lungren, supra,* 45 Cal.3d at page 735.

judicial decisions interpreting those statutes.[52] Finally, workers' compensation law is generally liberally construed with the purpose of extending benefits to industrially injured workers.[53]

C. *Interpretation of Insurance Policies*

The WCAB is authorized to interpret insurance policies or contracts to determine coverage in workers' compensation.[54] 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.[55] While insurance policies have special features and rules, they are still contracts to which the ordinary rules of contract interpretation apply.[56]

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

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[52] *Young, supra*, 97 Cal.App.4th at page 223.

[53] Section 3202; *Arriaga v. County of Alameda* (1995) 9 Cal.4th 1055, 1065.

[54] Sections 133 and 5275; *California Compensation & Fire Co. v. Industrial Acc. Com.* (1965) 62 Cal.2d 532.

[55] *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 pages 716-717.

[56] *Palmer, supra*, 21 Cal.4th at page 1115; *La Jolla Beach & Tennis Club, supra,* 9 Cal.4th at page 37.

lawful.[57] The mutual intent of the parties is to be ascertained solely from the contract that is reduced to writing, if possible.[58] The contract language controls if clear and explicit.[59] Words are to be given their ordinary and popular meaning, unless used in a special or technical way by the parties.[60] Technical words are interpreted as used by persons in the profession or business to which they relate, unless clearly used differently.[61] The contract is to be interpreted as a whole so as to give effect to every part, if practicable.[62] A contract may be interpreted by reference to the circumstances under which it was made, and the matter to which it relates.[63] Several related contracts may be interpreted together, if between the same parties and substantially part of one transaction.[64]

A contract provision is ambiguous if it is susceptible to two or more reasonable constructions, considering the plain meaning and context.[65] Extrinsic or parol evidence may be used to explain the ambiguity, contract, context or related matter.[66] An ambiguity may be

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[57] 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 & Tennis Club, supra,* 9 Cal.4th at page 37.

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

[59] Civil Code section 1638; *Palmer, supra,* 21 Cal.4th at page 1115; *La Jolla Beach & Tennis Club, supra,* 9 Cal.4th at page 37.

[60] Civil Code section 1644; *La Jolla Beach & Tennis Club, supra,* 9 Cal.4th at page 37.

[61] Civil Code section 1645.

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

[63] Civil Code section 1647; *Hess, supra,* 27 Cal.4th at page 524; *La Jolla Beach & Tennis Club, supra,* 9 Cal.4th at page 37.

[64] Civil Code section 1642.

[65] *E.M.M.I., supra,* 32 Cal.4th at page 470; *Palmer, supra,* 21 Cal.4th at page 1115.

[66] *Kavruck v. Blue Cross of California* (2003) 108 Cal.App.4th 773, 782 (*Kavruck*).

construed against the party which caused the uncertainty, or consistent with the reasonable expectation of the insured in insurance matters.[67]

In addition, written provisions may be disregarded when through fraud, mistake or accident a contract fails to express the real intention of the parties.[68] In determining whether mutual mistake has occurred, a court may consider parol or extrinsic evidence.[69] If the contract requires reformation, it is to effect 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. 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.[70]

2. *Insurance Policy Rules*

Insurance contracts have special features and rules. Insurance policies typically have insuring clauses providing coverage, and if a claim does not fall within the terms of the insuring clauses no coverage exists.[71] An insurance policy may also have specific clauses excluding coverage, which generally follow insuring clauses and are conspicuous, plain and clear.[72] Insurance policy exclusions are construed narrowly, while exceptions to those

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[67] *E.M.M.I., supra,* 32 Cal.4th at page 470; *La Jolla Beach & Tennis Club, supra,* 9 Cal.4th at page 37.

[68] Civil Code section 1640; *Hess, supra,* 27 Cal.4th at page 524.

[69] *Hess, supra,* 27 Cal.4th at page 525.

[70] *Hess, supra,* 27 Cal.4th at pages 524, 528.

[71] *Palmer, supra,* 21 Cal.4th at pages 1115-1116.

[72] See *E.M.M.I., supra,* 32 Cal.4th at page 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 pages 718-720 (exclusion of

exclusions are construed broadly in favor of the insured.[73] If an exclusion is consistent with the reasonable expectation of coverage by the policyholder, special rules may not apply.[74]

Incorporation of statutory language

If an insurance policy incorporates statutory language, the language is construed to implement the intent of the Legislature and not against the insurer as if ambiguous.[75]

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.[76] CIGA is also an involuntary unincorporated association of California admitted insurers, and is not an insurer and does not stand in the shoes of the insolvent insurer for all purposes.[77] Nor is CIGA in the business of insurance, which includes issuing

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temporomandibular joint syndrome in sub-part of health policy entitled "General Limitations" not conspicuous, plain or clear to policyholder).

[73] *E.M.M.I., supra,* 32 Cal.4th at page 471.

[74] *Ponder, supra,* 145 Cal.App.3d at pages 720-721.

[75] See *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).

[76] *Isaacson, supra,* 44 Cal.3d at page 786.

[77] *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.

policies, collecting premiums, making profits or assuming contractual obligations.[78] 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.[79] 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.[80]

Other Available Insurance

Although workers' compensation insurance is covered by CIGA statutes,[81] CIGA's liability does not include a claim that is covered by other workers' compensation insurance.[82] Other available workers' compensation insurance includes solvent insurance or self-insurance of an employer that is jointly and severally liable under the Labor Code, such as under section 5500.5.[83]

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[78] *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 page 600.

[79] *Isaacson, supra,* 44 Cal.3d at page 786; *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 page 599.

[80] *Denny's, supra,* 104 Cal.App.4th at pages 1438, 1441.

[81] Ins. Code section 1063, subdivision (a); *Denny's, supra,* 104 Cal.App.4th at page 1439.

[82] Ins. Code section 1063.1, subdivision (c)(9); *Denny's, supra,* 104 Cal.App.4th at pages 1438-1439; *Industrial Indemnity, supra,* 60 Cal.App.4th at page 557; *R. J. Reynolds, supra,* 235 Cal.App.3d at page 600.

[83] *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 is well established.[84] Agreements between general and special employers do not eliminate joint and several liability to employees.[85] Historically, general and special insurers that were liable for payment of a workers' compensation joint and several award resolved disputes over contribution or reimbursement in an independent civil suit.[86] Receipt of premium was an equitable consideration in deciding which insurer was ultimately liable.[87]

A. *Ins. Code Section 11663*

Jacuzzi, Assurance and Casualty contend that employer joint and several liability for workers' compensation is extinguished under 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 that this language was intended to limit the statute to insurers. The statute was enacted to avoid civil litigation between liable general and special insurers under *American Motorists* and *State Compensation Ins. Fund*, without affecting the injured worker's rights.[88] Thus, Ins. Code section 11663 was not

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[84] *County of Los Angeles, supra,* 30 Cal.3d at page 405; *State Compensation Ins. Fund, supra,* 20 Cal.2d at page 272; *American Motorists, supra,* 8 Cal.2d at page 588.

[85] *American Motorists, supra,* 8 Cal.2d at page 588.

[86] *State Compensation Ins. Fund, supra,* 20 Cal.2d at page 272; *American Motorists, supra,* 8 Cal.2d at page 588.

[87] *American Motorists, supra,* 8 Cal.2d at page 588.

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

intended to change joint and several liability of general and special employers to their employees for workers' compensation. As CIGA points out, the Supreme Court reached the same conclusion in *County of Los Angeles* at page 405 and *McFarland* at page 702.

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 liable for workers' compensation. In other words, general and special insurer liability continues until the time of injury, when Ins. Code section 11663 determines which liable insurer provides compensation. The statutory language and legislative history do not indicate insurer liability ends when the policy issues, and then is reinstated should the employee be on the insured's payroll at the time of injury.

Casualty claims that employer joint and several liability 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's earnings at the time of injury.[89] Even if Ins. Code section 11663 ends liability at the time of injury, CIGA is correct that it is not an insurer which is bound by the statute.[90]

B. *Section 3602, subdivision (d)*

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

Jacuzzi argues that the broad language in the beginning of section 3602, subdivision (d) is intended to relieve employers of workers' compensation obligations, similar to

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[89] *County of Los Angeles*, *supra*, 30 Cal.3d at page 406.

[90] 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.

sections 3352, 3755, 3757 and 3759. CIGA counters that the language and legislative history of section 3602, subdivision (d) is limited to relieving employers from civil or criminal liabilities.

Although the introductory language of section 3602, subdivision (d) could be interpreted as Jacuzzi suggests, the statute as a whole indicates that the Legislature did not intend such a broad meaning.[91] The intent of the statute is to allow employees of multiple employers to be insured under a single workers' compensation policy. 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.[92] In addition, the statute lists specific liabilities that an employer avoids for compliance, and joint and several liability is not mentioned.

We also decline to assume that by enacting section 3602, subdivision (d), the Legislature impliedly expanded limiting statutes such as section 3352.[93] Moreover, sections 3755, 3757 and 3759 concern substitution of the insurer for a liable employer by invoking procedures that were not followed in this case.

Assurance similarly argues that joint and several liability is extinguished by securing payment of compensation under section 3602, subdivision (d), since this also satisfies section 3700, *La Jolla Beach & Tennis Club* and *Employers Mutual*. As we have stated previously, securing required workers' compensation insurance does not relieve the employer of liability to the employee for benefits. On the contrary, payment of

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[91] 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.

[92] *County of Los Angeles, supra,* 30 Cal.3d at page 405; *State Compensation Ins. Fund, supra,* 20 Cal.2d at page 272; *American Motorists, supra,* 8 Cal.2d at page 588.

[93] 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.

compensation under the policy is based upon Jacuzzi's liability to special employees such as Miceli.

Moreover, *La Jolla Beach & Tennis Club* does not address employer joint and several liability for workers' compensation. 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.[94] 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.

The legislative history also clarifies the scope of section 3602, subdivision (d).[95] The Legislature sought to eliminate duplicate insurance coverage and premium that is required to avoid tort liability under the rationale of *Douglas Oil*. *Douglas Oil* did not involve joint and several liability for workers' compensation.

IV. The Assurance Policy

Petitioners contend further that the Assurance policy is not other available insurance under Ins. Code section 1063.1, subdivision (c)(9), based on the contractual intent of the parties, policy exclusions that include Ins. Code section 11663 and section 3602, subdivision (d), and lack of premium. CIGA concurs with the WCAB that the Assurance

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[94] 2 Witkin, Summary of California Law (9th ed. 1987) Workers' Compensation, section 137, page 708.

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

policy provides unlimited coverage absent an exclusionary form endorsement under the statutory scheme. We shall apply the rules of insurance policy interpretation to determine whether the Assurance policy provides other available insurance coverage within the meaning of Ins. Code section 1063.1, subdivision (c)(9).

A. *The Mutual Intent of Jacuzzi and Assurance*

Briefly, the insurance policy should be interpreted so as to give effect to the mutual intent of the parties at the time of entering into the contract.[96] Policy language normally determines the meaning of the policy and mutual intent of the parties.[97] If the language is ambiguous, extrinsic evidence may be used to clarify the ambiguity.[98]

1. *Part One of the Assurance 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 language would normally be construed to provide insurance coverage for workers' compensation that Jacuzzi legally owes its industrially injured employees according to workers' compensation law.[99] As a special employer, Jacuzzi is

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[96] 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 & Tennis Club, supra,* 9 Cal.4th at page 37.

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

[98] *Kavruck, supra,* 108 Cal.App.4th at page 782.

[99] *La Jolla Beach & Tennis Club, supra,* 9 Cal.4th at page 36.

jointly and severally liable to its special employees for workers' compensation,[100] which, as we have stated, is unchanged by Ins. Code section 11663 or section 3602, subdivision (d).

2. *Part Five of the Assurance Policy*

Petitioners argue that Part Five – Premium of the Assurance policy contains Ins. Code section 11663 and section 3602, subdivision (d) according to Ins. Code section 11650 and *City of Torrance*. Even if language in Part One of the Assurance policy would normally extend insurance coverage to special employees, their compliance with these provisions acted as an exclusion of such coverage. Therefore, the additional expressed exclusion required by the WCAB is unnecessary. CIGA responds that Ins. Code section 11650 applies only to Ins. Code sections 11651 through 11654, and the premium part of the Assurance policy is not an expressed exclusion of coverage that is conspicuous, plain and clear.

Literally, Part Five of the Assurance policy addresses premium.[101] Subpart Remuneration, paragraph 1 permits premium based on payroll of the insured's officers and employees. Paragraph 2 allows premium for all other persons whose work could result in liability under Part One of the policy. 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 persons lawfully secured workers' compensation.

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

The Assurance policy language in Part Five – Premium, subpart Remuneration, appears to be based, at least in part, on Ins. Code section 11663. If the employee whose

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[100] *County of Los Angeles, supra*, 30 Cal.3d at page 405; *McFarland, supra,* 52 Cal.2d at page 702.

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

work could result in Part One liability is on the payroll of the general employer at the time of injury, the general insurer would be liable under Ins. Code section 11663. In such a case, there would be no exposure to the special insurer or need for premium.

Considering this policy language and Ins. Code section 11650, we conclude that Ins. Code section 11663 is part of the Assurance policy. Inclusion by Ins. Code section 11650 does not appear to be limited to Ins. Code sections 11651 through 11654. The Assurance policy provides under Part One, subpart F, that the insured is responsible for payment 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 mean CIGA is liable.

The intent under Ins. Code section 11663

Petitioners argue that their compliance with Ins. Code section 11663 under Part Five – Premium of the Assurance policy acted as an exclusion of insurance coverage for special employees like Miceli. However, parties to a contract are presumed to have applied existing laws as well as judicial interpretations of those laws.[102] The same is true where insurance policy provisions incorporate statutory language that is required by law.[103] Thus, the policy provisions pertaining to Ins. Code section 11663 include the meaning that employer joint and several liability to employees for workers' compensation is not extinguished. Moreover, exclusions of insurance coverage should be conspicuous, plain and clear,[104] and Part Five of the Assurance policy addresses how premium is computed and

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[102] See *La Jolla Beach & Tennis Club, supra*, 9 Cal.4th at page 36; *City of Torrance, supra,* 32 Cal.3d at page 378.

[103] See *Prudential-LMI, supra,* 51 Cal.3d at page 684; *Young, supra*, 97 Cal.App.4th at page 223.

[104] See *E.M.M.I., supra,* 32 Cal.4th at page 471; *Ponder, supra,* 145 Cal.App.3d at pages 718-720.

collected. Premium does not necessarily determine coverage.[105] Finally, Ins. Code section 11663 only applies to insurers under *County of Los Angeles* and *McFarland*, and CIGA is not an insurer under *Isaacson*.

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

Petitioners similarly argue that insurance coverage for special employees like Miceli is excluded by their compliance with section 3602, subdivision (d), under Part Five - Premium of the Assurance policy. As we stated before, this language addresses payment of premium, and is not an expressed exclusion of insurance coverage that is conspicuous, plain and clear. In addition, section 3602, subdivision (d) concerns insurance for employees of multiple employers under a single policy. While this policy language may apply to certain scenarios under section 3602, subdivision (d), the reference to payroll and other insurance seems more applicable to Ins. Code section 11663. In addition, the Assurance policy is a 1992 edition and section 3602, subdivision (d) was enacted in 1995.

Nevertheless, Part One of the Assurance policy provides insurance coverage for benefits owed under workers' compensation law. The workers' compensation law includes the law in existence at the time the policy issues, or which is subsequently enacted if the policy language indicates this was intended by the parties.[106] The Assurance policy period is after the enactment of section 3602, subdivision (d).

Workers' compensation law also includes Division Four of the Labor Code.[107] Since section 3602, subdivision (d) is contained in Division Four, the statute is part of the workers' compensation law covered under Part One of the Assurance policy.

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[105] See footnotes 27-31, *ante*.

[106] *City of Torrance, supra,* 32 Cal.3d at pages 378-379.

[107] See *La Jolla Beach & Tennis Club, supra*, 9 Cal.4th at page 36.

The intent under section 3602, subdivision (d)

Petitioners also argue that compliance with section 3602, subdivision (d) under the Assurance policy means that only the Reliance policy was intended to cover special employees like Miceli. As pointed out by the WCAB, however, section 3602, subdivision (d) does not preclude alternative insurance. While the contractual agreements appear to comply with section 3602, subdivision (d), Jacuzzi separately obtained the Assurance policy without limiting endorsements.[108]

Petitioners argue further that the WCAB in effect found that none of the contracting parties intended the Assurance policy to provide coverage for special employees like Miceli. Petitioners assert that the WCAB's finding of this intent should be enforced, since it is supported by substantial evidence such as the agreements between the parties and Catapano's testimony.

However, the WCAB's statements regarding the intent of the parties is based on Assurance's inability to collect premium under the policy, and not due to compliance with section 3602, subdivision (d). The WCAB also reasoned that insurers never intend to cover claims of insolvent insurers.

5. *The Statutory Scheme for Excluding Insurance Coverage*

Since the WCAB required an exclusionary form endorsement to establish the intent petitioners claim, and the WCJ indicated such an endorsement is unavailable, the court requested additional briefing from the parties. The responses ranged from exclusionary form endorsements under the statutory scheme, such as Form No. 11 with the information

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[108] See Ins. Code §§ 11657 to 11660; *Fyne*, *supra*, 138 Cal.App.2d at pages 472-474.

required under title 10, section 2259, subsection (e), being applicable to inapplicable or impractical.

Title 10, sections 2253 to 2268 seemed to set forth an established and practical statutory scheme, which could be applied to exclude insurance coverage for special employees like Miceli under section 3602, subdivision (d).[109] Title 10, section 2265 indicates that a Form No. 11 endorsement may be used when another California Approved Form Endorsement is not applicable,[110] in accordance with the criteria set forth by title 10, section 2259. Title 10, section 2259, subdivision (e) provides for a form endorsement that excludes insurance coverage for workers' compensation, which the employer affirms in writing to the insurer is otherwise secured or legally uninsured. The insurer then submits the Form No. 11 endorsement with the required information to the WCIRB, which in turn forwards the endorsement to the DOI for approval within 30 days under title 10, section 2266.

a. The court's initial decision.

The court granted review and after oral argument issued a decision, that the Assurance policy and section 3602, subdivision (d) should be interpreted in light of the established and practical statutory scheme for excluding insurance coverage by form endorsement.[111] We noted that in enacting section 3602, subdivision (d), the Legislature is presumed to have considered the statutory scheme and judicial decisions that may affect implementation, which also applies to insurance policy language that contains the

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[109] Ins. Code §§ 11657 to 11660; tit. 10, § 2252; *Fyne, supra,* 138 Cal.App.2d at pp. 472-474.

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

[111] *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.

enactment as required by law.[112] We found nothing in section 3602, subdivision (d) or the legislative history that indicated the Legislature intended the statute to supercede or change the procedures under Ins. Code sections 11657 to 11660 and title 10, sections 2252 et seq. Instead, the Legislature most likely assumed that applicable procedures would be followed in obtaining insurance under section 3602, subdivision (d).[113]

Since nothing in the record substantiated that exclusionary form endorsements are inapplicable, or impractically require more for WCIRB and DOI approval than Jacuzzi's written affirmation special employees were covered by RemedyTemp's insurer, the court concluded that the Assurance policy provided unlimited coverage under the statutory scheme and *Fyne*.[114] The court also concluded that absent an exclusionary form endorsement under the statutory scheme, the Assurance policy was intended as alternative insurance protection, which is not foreclosed by section 3602, subdivision (d). Thus, the court affirmed the WCAB's decision that the Assurance policy is other available insurance under Ins. Code section 1063.1, subdivision (c)(9), and the dismissal of CIGA.

b. The court vacated the initial decision and granted rehearing.

Petitioners timely requested rehearing based on the WCIRB's rejection of a Form No. 11 endorsement submitted by Assurance in another matter. While the endorsement did not state the insured affirmed in writing that compensation was otherwise secured under title 10, section 2259, subsection (e), Assurance's response to the WCIRB's inquiry indicated

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

[113] *Lungren, supra,* 45 Cal.3d at page 735; *Young, supra,* 97 Cal.App.4th at page 233; *Prudential-LMI, supra,* 51 Cal.3d at page 684.

[114] *Fyne, supra,* 138 Cal.App.2d at pages 471-472.

there was other coverage. Instead of clarifying further, the WCIRB indicated that Form No. 11 was used inappropriately.

Consequently, the court granted rehearing and requested input from the WCIRB and DOI, to address further whether form endorsements such as Form No. 11 are appropriate for excluding insurance coverage for special employees like Miceli. The WCIRB and DOI provided written responses to our questions, and petitioners and CIGA replied.

c. The WCIRB and DOI requirements.

Although limiting or restricting workers' compensation insurance by approved form endorsements is part of the statutory scheme,[115] the WCIRB and DOI indicate that it has not been the practice of industry to use such endorsements to exclude coverage for special employees. Nevertheless, the WCIRB and DOI state that form endorsements such as Form No. 11 could be used in this manner, and would be approved if the required information is provided.

CIGA has suggested that the informational requirements of Form No. 11 could have been met by Assurance, by stating that payment of compensation for named insured special employees is secured by RemedyTemp as the general employer. Assurance attempted to provide such information in another matter. However, the WCIRB responded that "the CAF-11 endorsement would be used inappropriately for this purpose", even though little else seems to be expressly required under title 10, sections 2265 and 2259, subsection (e), except written affirmation of other coverage by the named insured.

Although the WCIRB and DOI acknowledge that Form No. 11 with such information is appropriate for excluding insurance coverage for special employees, they indicate "a careful description of the excluded special employees" is also required. While CIGA asserts

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[115] See Ins. Code sections 11657-11660; title 10, sections 2252 et seq. and *Fyne, supra,* 138 Cal.App.2d 467.

that this added requirement is routine and reasonable, the assertion is not corroborated by the record or information provided by the WCIRB and DOI. In addition, it is not expressly required by title 10, sections 2265 and 2259, subsection (e), and prior notice was not given to petitioners. We also agree with petitioners that "a careful description of the excluded special employees" is vague, and provides little guidance to ensure the practical compliance intended under the statutory scheme.[116] Petitioners cannot be held accountable for a legal requirement that is uncertain and imposed without notice, nor for omission of a form endorsement under a statutory scheme which includes such a requirement.[117]

d. Coverage for special employees like Miceli was not intended.

The WCAB and CIGA do not dispute that insurance coverage for special employees can be excluded by an insurer and a special employer with its own employees. Otherwise, special employers with employees such as Jacuzzi may not benefit from section 3602, subdivision (d). Neither the statutory language or legislative history indicate that the Legislature intended to limit section 3602, subdivision (d) to special employers without employees.

The WCAB concluded and CIGA contends that a form endorsement such as Form No. 11 is required under *Fyne* in order to exclude insurance coverage for special employees like Miceli. For the reasons we stated previously, an exclusionary form endorsement such

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[116] The WCIRB and DOI also suggest that Form No. 10 may be used to exclude coverage for special employees by name. We agree with petitioners that this may be too impractical or burdensome, depending on the number of special employees and turn-over that may be involved.

[117] See *Perez v. Sharp* (1948) 32 Cal.2d 711, 728; *Citizens For Jobs & The Economy v. County of Orange* (2002) 94 Cal.App.4th 1311, 1334-1336; *Bess v. Park* (1956) 144 Cal.App.2d 798, 802-807 (although required reasonable notice and opportunity to be heard implied, last paragraph of Labor Code section and implementing regulations void for uncertainty).

as Form No. 11 is not applicable in this case. Therefore, the WCAB's decision is not based on substantial evidence, and we must determine the intent under the Assurance policy and section 3602, subdivision (d) as if exclusionary form endorsements under the statutory scheme do not apply. This distinguishes *Fyne*.

While section 3602, subdivision (d) expressly authorizes employees of multiple employers to be insured by a single workers' compensation policy, the statutory language does not preclude an employer from obtaining alternative insurance protection.[118] Therefore, Jacuzzi and Assurance could have intended to extend or exclude insurance coverage for special employees like Miceli under the Assurance policy and section 3602, subdivision (d). Since the language and intent of the Assurance policy in this regard is ambiguous,[119] the extrinsic evidence in this case may clarify the ambiguity, policy, context or related matters.[120]

The Service Agreement, Reliance Policy and Alternate Employer Endorsement establish that the intent under the Assurance policy and section 3602, subdivision (d), was not to extend insurance coverage to special employees such as Miceli.[121] In addition to the standard California form workers' compensation insurance policy, which was procured by RemedyTemp pursuant to the Service Agreement and section 3602, subdivision (d), Jacuzzi was directly protected by Reliance as an additional insured under the Alternate Employer Endorsement. Thus, Jacuzzi did not need, nor likely intend, direct protection by Assurance as a named insured under the Assurance policy. This conclusion is consistent with a

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[118] *La Jolla Beach & Tennis Club, supra,* 9 Cal.4th at page 37; *DuBois, supra,* 5 Cal.4th at pages 387-388; *Moyer, supra,* 10 Cal.3d at page 230.

[119] See *E.M.M.I., supra,* 32 Cal.4th at page 470; *Palmer, supra,* 21 Cal.4th at page 1115.

[120] See *Kavruck, supra,* 108 Cal.App.4th at page 782.

[121] See Civil Code § 1647; *Hess, supra,* 27 Cal.4th at page 524; *La Jolla Beach & Tennis Club, supra,* 9 Cal.4th at page 37; *Kavruck, supra,* 108 Cal.App.4th at page 782.

policyholder's reasonable expectation that the same insurance protection will not be duplicated,[122] and the avoidance of duplicate insurance coverage and premium as intended by the Legislature under section 3602, subdivision (d).[123]

For the same reasons, we conclude that Assurance did not intend to extend insurance coverage to special employees such as Miceli under the Assurance policy and section 3602, subdivision (d). CIGA argues that Assurance could not have formed this intent, since there is no evidence Assurance was aware of the other agreements or of RemedyTemp employees. However, the Assurance policy is a boilerplate form that was approved by the DOI.[124] The Assurance policy also provides for circumstances that may qualify under section 3602, subdivision (d) or Ins. Code section 11663. For example, Part One provides coverage for benefits required by workers' compensation law. Under Part Five, an insured is not charged premium where compensation is secured by the employer of employees for which the insurer could be liable.[125] Therefore, we conclude that insurance coverage for

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[122] *Ponder, supra,* 145 Cal.App.3d at pages 720-721.

[123] See *Prudential-LMI, supra,* 51 Cal.3d at page 684.

[124] See Ins. Code sections 11657 et seq.

[125] While receipt of premium may not determine insurance coverage (see footnotes 28 to 31, *ante*), it may be indicative of whether an insurer intended to provide coverage. Petitioners contended that case law such as *R.J. Reynolds, Ross, Denny's and Industrial Indemnity* based coverage and insurer intent on receipt of premium. The WCJ, WCAB and CIGA reasoned that Assurance chose not to charge premium. It is unknown whether Assurance could have charged premium under Part Five – Premium of the policy. CIGA suggested deletion of the last sentence of paragraph 2 under subpart Remuneration. We question whether such a deletion would have been approved by the DOI. In any event, 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 with receipt of premium.

special employees such as Miceli was not intended under the Assurance policy and section 3602, subdivision (d).

V. Prospective Application

Petitioners have also alleged that there will be serious adverse consequences on business and the temporary staffing industry in California if the WCAB's decision is affirmed, and separate form endorsements that exclude coverage for special employees like Miceli are required. While we have decided that exclusionary form endorsements pursuant to the statutory scheme are not required under the facts presented, we decline to hold that such endorsements may not be applicable in other cases. The parties and industry now have notice of the issues, and also have the opportunity to remedy the situation with the WCIRB, DOI or the Legislature.

DISPOSITION

The Assurance policy does not provide workers' compensation insurance coverage for special employees such as Miceli, and is not other available insurance within the meaning of Ins. Code section 1063.1, subdivision (c)(9).[126] The dismissal of CIGA by the WCAB is reversed, and the matter is remanded for further proceedings consistent with this opinion.

CERTIFIED FOR PUBLICATION

WOODS, J.

We concur:

PERLUSS, P. J. JOHNSON, J.

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[126] We are also aware of *California Ins. Guarantee Assn. v. Workers' Comp. Appeals Board* (2005) 128 Cal.App.4th 307 and *California Ins. Guarantee Assn. v. Workers' Comp. Appeals Bd.* (2005) 128 Cal.App.4th 569, in which the court of appeal held that insurer claims for contribution or reimbursement from CIGA are precluded by Ins. Code section 1063.1, subdivision (c)(9). In this case, the Assurance policy does not provide insurance coverage for compensation owed special employees like Miceli, and thus there is no claim by Assurance for contribution or reimbursement.