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Supreme Court, Appellate Division, Third Department, New York

In the Matter of the Claim of Alex Adonias PINTO CARDONA, Claimant

v

DRG CONSTRUCTION, Respondents

and

AVITUS INC., Appellants

and

PCCI Corp., Respondents

and

WORKERS' COMPENSATION BOARD, Respondent

Decided July 22, 2021

Facts: The claimant was part of a construction crew lifting a home off its foundation and was injured when it collapsed. While the claimant was found to be an employee of DRG, the company handling the house lifting work, the issue presented for review was with regard to the responsibility of Avitus, a professional employer organization (PEO). The judge determined the claimant was also an employee of the PEO and found that it, and its workers' compensation carrier (American Zurich) were also responsible. The Board affirmed that decision and both Avitus and American Zurich appealed.

Holding: Affirmed

Discussion: The Court referenced the Board's analysis of this claim. The pertinent factors of employer/employee relationship (nature of work, right to set schedule, manner in which wages are paid, right to fire) supported a finding of employer/employee relationship with DRG. However similar factors did not support such a finding with the PEO. However, a review of Labor Law Art. 31 in regard to the New York Professional Employer Act was conducted. When a PEO enters into an agreement with a client, it assumes responsibility to secure workers' compensation coverage and in turn the PEO is considered, with its client an

employer for purpose of coverage under the Workers Compensation Law. Although an agreement between Avitus and DRG reference there was to a list of the covered employees (that did not include the claimant's name) there was no indication that list was to be comprehensive. In addition, the policy issued by American Zurich named DRG and in the schedule of insureds listed "BUILDING RAISING OR MOVING-ALL EMPLOYEES-ALL OPERATIONS TO COMPLETION & DRIVERS."

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