WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

LEOPOLDO RAMIREZ, *Applicant*

vs.

TUNG TAI GROUP and CALIFORNIA INSURANCE COMPANY, adjusted by APPLIED RISK SERVICES, INC., *Defendants*

Adjudication Number: ADJ12205621
San Jose District Office

OPINION AND ORDER DENYING RECONSIDERATION

Defendant seeks reconsideration of the Findings and Order and Opinion on Decision (F&O) issued on April 6, 2023, wherein the workers' compensation administrative law judge (WCJ) found as relevant that on April 4, 2019, while employed as a recycling laborer by defendant, applicant sustained injury arising out of and in the course of employment to the left knee, and claims to have sustained injury to the left ankle, left foot, and psyche.

Defendant contends that applicant failed to meet his burden of proving that he was employed by defendant because his testimony was not credible.

We received an Answer from applicant.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have considered the allegations of the Petition, the Answer, and the contents of the Report. Based on our review of the record, and for the reasons stated below, we will deny the Petition.

FACTUAL BACKGROUND

On March 24, 2022, the matter proceeded to trial as to the following issue: "Employment as to Tung Tai Group, with any other employment issues, including general/special, concurrent, or other employment relationships, specifically deferred." (Minutes of Hearing and Summary of Evidence, March 24, 2022, p. 2:40-43.)

In the Opinion on Decision, the WCJ states:

There is no dispute that Applicant sustained an injury on 04/04/2019 while performing work at Miller Recycling.

The question is whether Applicant was working for Joe Chen of Tung Tai Group [hereinafter referred to as TTG] on 04/04/2019.

The following facts do not appear to be in dispute:

Applicant was hired by Joe Chen of TTG in approximately 2014. Applicant's brother Noe (aka "Chino") was already employed with TTG and continues in such employment. Noe generally interprets between workers and Mr. Chen, as the majority of Mr. Chen's employees are Spanish-speaking. Mr. Chen has testified that he has another employee named Omar Martinez who works for TTG. Applicant has had various periods of employment with TTG and has been terminated then re-hired on more than one occasion. At some point, Applicant was terminated for allegedly being under-the-influence at work. Mr. Chen either owns or manages or has/had some controlling capacity in a variety of business ventures over many years, including at various times TTG and Mega Metals. Mr. Chen and TTG are in the recycling business. TTG places large storage bins (either 4' x 4' or 4' x 6') at various recycling centers in the region, and those bins are filled with recyclable materials. Mr. Chen testified there are approximately 1,000 of these TTG storage bins all around the region. Employees of TTG then go to these centers and retrieve the bins and replace the bins with empty bins. Mr. Chen testified that his employees are not allowed to drive forklifts at these centers while retrieving these large storage bins. It is unclear how a person is to lift these large bins filled with metal in order to pick them up, move them, retrieve them and replace them. Mr. Chen sends workers out to these various locations to check-out what materials are available as he is unable to visit the numerous locations throughout the region and Mr. Chen testified that time is of the essence. It is without dispute that Mr. Chen visited Applicant in the hospital following the industrial injury.

Thereafter, the facts are in dispute.

Applicant testified either at trial, deposition or both:

- he approached Mr. Chen after the under-the-influence-termination and asked for his job back. [MOH/SOE 11/29/22; page 6; Joint 1, page 35]
- that Mr. Chen told him "Ok Leo. Monday at Mega Metals." [MOH/SOE 11/29/22; page 7]
- that as an employee of TTG he (and others) would be sent to various locations including Mega Metals, TTG or Miller Recycling [Joint 1, page 39] and that often he was transported between the locations by the [TTG] truckers [Joint 1, page 43]
- that while employed directly for TTG he would be paid by check. At one time in 2017 Applicant received a paycheck from Mega Metals rather than from TTG and he never understood why such paycheck issued from Mega Metals rather than from TTG, but Applicant accepted. [Joint 1, page 30; Joint 4, page 38]
- that after being re-hired (after the under-the-influence-termination) he was then paid in cash. [Joint 1, page 37; Joint 4, page 35; Joint 4, page 48 - 52]
- that employees of TTG would come to the various worksites on payday and deliver envelopes of cash to the employees. [Joint 1, page 55; Joint 4, page 36]
- that he would routinely be sent to the various worksites for TTG including the TTG site, Mega Metals, Masters, and Miller Recycling. [Joint 4, page 30]

- that he performed the same work at each of these locations, under the direction and supervision of the same persons and that Joe Chen also gave him work instructions at the various locations. [Joint 4, page 25; Joint 4, page 82, 85]
- that he understood he was working for Joe Chen and TTG whether he was at the TTG location, the Mega Metals location, or at the Miller Recycling location. [Joint 4, page 22]
- he never applied for a job at Miller Recycling, never met Mr. Miller, never received a paycheck from Miller Recycling and never received any supervision or direction from anyone from Miller Recycling. [Joint 1, page 44]
- that at Mega Metals and at Miller Recycling, Omar Martinez was the supervisor.[Joint 1, page 40; Joint 4, page 87]
- that Mr. Joe Chen would appear at Miller Recycling several times a week and often was the one who arrived in the morning to unlock the door so the employees could enter and begin their workday. [Joint 1, page 49]

Mr. Joe Chen testified either at trial, deposition or both:

- that TTG and Miller Recycling had a business relationship on 04/04/2019 and were doing business together. [MOH/SOE 05/11/22, page 5]
- that in 2019 he would visit Miller Recycling a lot. [Applicant's Exhibit 2, page 27]
- that Applicant NEVER worked for TTG and never performed any kind of service for TTG [Applicant's Exhibit 2, page 16]
- that Applicant did work for TTG at one time about 3 years prior to date of injury.[MOH/SOE 05/11/22, page 4; MOH/SOE 06/23/22, pages 4-5]
- that Omar Martinez worked for TTG. [Applicant's Exhibit 2, page 68; MOH/SOE 05/11/22, page 5]
- that Omar Martinez was an employee at Miller Recycling. [Applicant's Exhibit 2, pages 45, 69]
- that Omar Martinez did not work for Miller Recycling. [MOH/SOE 05/11/22, page 5; MOH/SOE 06/23/22, page 3]
- That he does not recall any TTG employees being sent to Miller Recycling in April 2019 for any purpose. [MOH/SOE 05/11/22, page 5]
- That on 04/04/19 he sent Omar Martinez to Miller Recycling to take a look.[Applicant's Exhibit 2, page 75]
- that it is possible that on occasion he would see Applicant at Miller Recycling and might make suggestions on how Applicant should do his work. [MOH/SOE 05/11/22, page 7]
- that Applicant had not worked for TTG in any capacity since his last termination and that Applicant was not an employee of TTG on 04/04/2019. [MOH/SOE 06/23/22, page 8]
- that all TTG employees are paid by check but he does not know if any of his employees are paid in cash. [Applicant's Exhibit 2, page 33]
- that he does not recall if TTG has ever issued paychecks to the employees.[Applicant's Exhibit 2, page 18]
- that Applicant never worked for Mega Metals. [MOH/SOE 02/14/23, page *]
- that he has never owned Mega Metals but at one time did manage it. [Applicant's Exhibit 2, pages 35 – 36]
- that he does not know if his son or anyone else from TTG ever sent anyone to work at Miller Recycling. [Applicant's Exhibit 2, page 53]

There was evidence provided by Defendant of records from CalOSHA [Defendant's Exhibit F]. CalOSHA conducted an inspection of the Miller Recycling location on

or about 02/17/2019 [about two months before the injury] and noted that the owner of Miller Recycling was Keith Miller, and that the on-site supervisor was Omar Martinez. Applicant is listed as being an employee of Miller Recycling. CalOSHA in turn reviewed records from the Secretary of State which shows Miller Recycling as a foreign corporation registered in Nevada with Keith Miller as a manager – and the ownership left blank. Defendant also provided a writing from Keith Miller in which he states [under penalty of perjury that Miller Recycing does not have employment records related to applicant because such documents never existed] [Defendant's Exhibit G].

. . .

I had some concerns over Applicant's credibility . . . However, his inconsistent statements generally had to do with his ability to speak some English, Mr. Chen's ability to speak some Spanish, and the nature and type of interaction/communication between himself and Mr. Chen.

. . .

I do find Applicant's testimony to be credible and persuasive.

I had greater concern over Mr. Chen's testimony. Mr. Chen gave conflicting testimony on a number of critical points: Applicant never worked for TTG vs. Applicant did work for TTG but prior to the injury only. His employees were always paid by check and never in cash, but he doesn't know if his employees were ever paid in cash and he does not recall if TTG ever issued paychecks to the employees. That Omar Martinez worked for TTG and did not work for Miller Recycling vs. Omar Martinez did work for Miller Recycling. That he does not recall any TTG employees being sent to Miller Recycling for any purpose in April 2019 vs. he did send Omar Martinez to Miller Recycling on 04/04/2019 to take a look. That Applicant never worked for Mega Metals, but Mr. Chen did manage Mega Metals and Applicant does in fact have a paycheck from Mega Metals. That he does not know if his son or anyone else ever sent TTG employees to work at the Miller Recycling location. I did not find Mr. Chen's overall testimony to be credible or persuasive.

Coupled with the testimony is the other evidence of 1,000 storage bins being placed all over the region to be filled by on-site workers for the benefit of TTG. TTG would send employees to retrieve these filled bins and replace them with empty bins. Applicant filled these bins for TTG at the direction of and under supervision of Omar Martinez, who worked for TTG. . . . CalOSHA verified that Applicant was working at the Miller Recycling location under the supervision of Omar Martinez. It is clear that Omar Martinez directed Applicant's work as an agent (supervisor) and employee of Joe Chen/TTG.

It is my determination that Applicant worked for Mr. Chen at TTG and was fired. He then asked for and got his job back. He was assigned to work at various locations for Joe Chen including TTG, Mega Metals, and Miller Recycling. Applicant was initially paid by check for his work and after being re-hired was thereafter paid in cash. On 04/04/2019 Applicant was working under the direction and supervision of Omar Martinez, an employee of TTG, for the benefit of Joe Chen and TTG at the Miller Recycling location.

I do not address whether Applicant was also working FOR Miller Recycling. I will not address whether there is a general/special relationship between Joe Chen/TTG and Miller Recycling. I will not address whether there was an employee-sharing scheme in place on 04/04/2019. All those questions/issues remain deferred.
(Opinion on Decision, pp. 3-8.)

In the Report, the WCJ states:

Applicant was hired by Joe Chen, President of TTG, in approximately 2014. Applicant's brother Noe (aka "Chino") was already employed with TTG and continues in such employment. Noe generally interprets between the workers and Mr. Chen as the majority of the employees are Spanish-speaking. Mr. Chen has testified that he has another employee named Omar Martinez who works for TTG.

Applicant has had various periods of employment with TTG and has been terminated and then re-hired on multiple occasions. At some point, Applicant was terminated for being intoxicated at work. Thereafter there is a dispute as to whether or not Applicant was re-hired.

Mr. Chen either owns, manages or has had control of a variety of business ventures over many years, including TTG and Mega Metals. Mr. Chen and TTG are in the recycling business. TTG places large storage bins at various recycling centers and those bins are filled with materials. Employees of TTG then go to the centers and retrieve the bins once full and place new bins. Mr. Chen sends workers to the various locations to see what materials are available. Applicant's work was to sort through the recyclable materials.

Applicant was working AT a location named Miller Recycling on 04/04/2019. There is no dispute that Applicant suffered a serious injury on 04/04/2019 while performing his regular duties. Omar Martinez, employee of TTG, was the supervisor at Miller Recycling on the date of injury, and Applicant has vehemently maintained that he had been rehired by Joe Chen and directed to work at the Miller Recycling location under the supervision of Omar Martinez. Mr. Chen on behalf of TTG has denied employment.

It has not been conclusively established if Applicant has ever worked FOR Miller recycling, despite being AT the Miller Recycling LOCATION. The ownership of Miller Recycling has not been established. The management and/or control of Miller Recycling has not been established. Miller Recycling was not a participant in the workers' compensation litigation herein other than to provide a writing that Applicant was never employed at Miller Recycling.

Applicant and Mr. Chen testified. There were problems with both their testimony, but in the overall, this Judge found Applicant to be credible and found Mr. Chen to be not credible.

. . .

There is evidence from CalOSHA that it conducted an inspection of the Miller Recycling location before Applicant's injury and noted the owner was Keith Miller. It is unknown how the investigator came to this determination. The same records show Omar Martinez [TTG employee] was the on-site supervisor. Applicant is listed as an employee of Miller Recycling, but again, I have no information as to how this was determined. The CalOSHA records indicate a review of records from the

California Secretary of State showing that Miller Recycling is a foreign (Nevada-based) corporation, with Keith Miller as a manager (not owner), and with the ownership information blank. There is a writing from Keith Miller that he is the manager (not owner) of Miller Recycling and that Applicant has never been employed at Miller Recycling.

. . .

Defendant begins the attempt to establish a lack of candor by pointing out that Applicant failed to appear at trial twice. This is correct. Applicant did in fact fail to appear. However, good cause was established; had it not been there would have been a notice of intention to dismiss this case and/or an actual dismissal. It is noted and without dispute that Applicant has suffered a very serious injury and has had no real treatment since discharge from the extended hospitalization as this case remains denied and no treatment is being authorized. Applicant's counsel represented to the Court that Applicant is in great pain and self-medicates with alcohol.

. . .

There is no dispute that Applicant is interested in pursuing this case and did in fact appear and participate. I will not punish Applicant by dismissing his testimony because he suffers from the disease of alcoholism. Defendant has not established that alcoholics cannot be credible.

. . .

Defendant indicates that Applicant's testimony cannot be found credible on the issue of employment because Applicant and Mr. Chen were unable to communicate with each other. Testimony all over the place on this point as pointed out in the Opinion on Decision:

- Applicant testified he approached Joe Chen and asked for his job back after the intoxicated-at-work termination
- Applicant testified Joe Chen responded "Ok Leo. Monday at Mega Metals"
- Applicant did testify that he never spoke directly with Joe Chen
- Applicant testified that he only spoke Spanish and Joe Chen did not speak Spanish
- There was testimony that Noe or Omar were translators for Joe Chen "sometimes" but that sometimes Joe Chen gave the workers instructions himself and would occasionally try to speak some Spanish

It is clear that while there was little direct and substantive communication between Applicant and Joe Chen, the fact remains they did in fact communicate. Applicant attempted to speak some English to Mr. Chen. Mr. Chen attempted to speak directly to Applicant. Communication was primarily through Noe or Omar. But again, I am convinced there was communication and I have no evidence of any misunderstanding in those communications.

Applicant understood sufficiently to subjectively believe that he had been re-hired by Joe Chen/TTG, that he was eventually directed to work at the Miller Recycling location, that he was under the supervision of Omar Martinez (who Mr. Chen repeatedly acknowledged as his employee), that Mr. Chen would appear most often in the mornings to open the Miller Recycling location to allow employees entrance,

and that he was paid in cash by either Joe Chen or employees of Joe Chen every week for the work he performed.

Be it remembered that while Defendant hammers away at Applicant's credibility, this Judge actually determined that it was Mr. Joe Chen who was not credible in this litigation. **Mr. Chen initially denied that Applicant ever worked for him and then admitted that yes, Applicant had in fact been an employee**. Mr. Chen denied that Applicant ever worked at Mega Metals, even though there was at least one paystub to establish otherwise. Mr. Chen admitted that Omar Martinez was his employee and there is no dispute that Omar Martinez was Applicant's supervisor on the date of injury and before, as established by the CalOSHA records. Mr. Chen admitted he had a business relationship with Miller Recycling, would visit the Miller Recycling location a lot around the time of the injury, that he did not send any employees to Miller Recycling in April 2019 for any purpose but then admitted he did send Omar Martinez to Miller Recycling on 04/04/2019. Mr. Chen also admitted that on occasion he would "suggest" to Applicant how best to do his work at Miller Recycling. Mr. Chen denied paying employees in cash, but admitted he does not know if any were actually paid in cash, and he does not recall if his company has ever issued paychecks to the employees. In the overall, not credible to this Judge.

As between the two witnesses, this Judge determined Applicant's testimony was more credible than Mr. Chen's testimony. This determination, given the opportunity to observe the witnesses and their demeanor, etc., is to be given great weight by the Board.

. . .

Defendant alleges that Applicant had a certified Spanish interpreter at trial. This is correct and not in dispute. Whether or not there was an interpreter at trial had no bearing on the weight of the testimony at trial in terms of the recollections of the witnesses and their prior conversations or conduct.

. . .

Defendant alleges that the testimony is contradicted by unbiased documentary evidence. Specifically, Defendant refers to the pending Civil claim in which Applicant is also suing Miller Recycling.

The parties made a conscious decision to not include Miller Recycling in the present litigation. Miller Recycling did not appear and did not participate. I made no ruling as to whether or not Applicant was ALSO an employee of Miller Recycling, or if there existed a general/special relationship or if there was any employee sharing or any other related findings. It is within the realm of possibility that Applicant could be an employee of BOTH and a finding of employment as to one does not necessarily preclude the other. That Applicant has filed a Civil claim which also names Miller Recycling is not evidence of employment nor does it preclude a finding of employment with Joe Chen/TTG.

Defendant also refers to the CalOSHA records. I have no testimony from the investigator who prepared the documents and have no information to conclude if said records are accurate. I note that said records show Liberty Mutual as the carrier for Miller Recycling but it appears that Miller Recycling is apparently uninsured. As such, the records are suspect in that I can infer someone did not tell the investigator the truth; at the very least there are various State agencies with differing "facts." What CAN be gleaned from the CalOSHA records is that Applicant was performing

work AT Miller Recycling and that Omar Martinez was the supervisor. We already know that Omar Martinez was an employee of Joe Chen/TTG which supports Applicant's contention that he was performing services for the benefit of Joe Chen/TTG.

Defendant fails to refer to the evidence it offered into evidence – namely the declaration from Keith Miller that [Miller Recyling had no employment records relating to applicant because no such documents had ever existed].

Defendant alleges that the documentary evidence was not controverted and this is not accurate. The documentary evidence was rebutted by Applicant's testimony and the signed declaration from Keith Miller which was Defendant's own evidence.
. . .
Defendant concludes that Applicant has failed to meet his burden of proof. I disagree. Applicant has established:

- He was an employee of TTG and was terminated

- He asked for his job back and got it

- He was assigned to work at the Miller Recycling location under the supervision of established TTG employee Omar Martinez

- He was paid in cash by Joe Chen or employees of TTG for the work performed at the Miller Recycling location

- He never met Keith Miller, never applied for a job at Miller Recycling and never interacted with any Miller Recycling employees

- There is a writing from Miller Recycling denying ever any employment of Applicant with Miller Recycling

- There is evidence from CalOSHA that Applicant was on the Miller Recycling premises doing work under the supervision of Omar Martinez

- Joe Chen now admits that Applicant did work for him at one time although denies employment on the date of injury

- Joe Chen admits that Omar Martinez was his employee

- Joe Chen admits he had a business relationship with Miller Recycling

- Joe Chen admits he went to the Miller Recycling location a lot

- Joe Chen confirms he had not seen Keith Miller for at least ten years and had NEVER seen any Miller staff at the Miller Recycling location

I do not believe Applicant randomly picked a company and presented himself at that company and worked there for a few years without having authorization to do so or having been hired by someone. No one walks in off the street and starts working at a random company. It does not happen.

Applicant's connection to Miller Recycling is through Joe Chen and TTG. I am convinced Joe Chen sent Applicant to work at the location under the supervision of

Omar Martinez and that Applicant was paid in cash for his work performed for the benefit of Joe Chen and TTG. No other findings were made. Again, it is POSSIBLE there is more than one employer in this case, but that issue was not submitted for determination.
(Report, pp. 2-9.)

DISCUSSION

An "employee" is defined as "every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed." (§ 3351.) Further, any person rendering service for another, other than as an independent contractor or other excluded classification, is presumed to be an employee. (See § 3357.) Once the person rendering service establishes a prima facie case of "employee" status, the burden shifts to the hirer to affirmatively prove that the worker is an independent contractor. (*Cristler v. Express Messenger Sys., Inc.* (2009) 171 Cal.App.4th 72, 84 [74 Cal.Comp.Cases 167] (*Cristler*); *Narayan v. EGL, Inc.* (2010) 616 F.3d 895, 900 [75 Cal.Comp.Cases 724] *(Narayan)*.) Thus, unless the hirer can demonstrate that the worker meets specific criteria to be considered an independent contractor, all workers are presumed to be employees.

In this case, *S. G. Borello & Sons, Inc. v. Dept. of Ind. Relations* (1989) 48 Cal.3d 341 [54 Cal.Comp.Cases 80] (*Borello*), provides the applicable standard for determining applicant's employment or independent contractor status with respect to the requirement of an employer to provide workers' compensation insurance. In *Borello,* the question presented was whether a cucumber grower, who had hired migratory workers to harvest its crop on the basis that the workers managed their own labor and shared in the profits of the harvested crop, was required to obtain workers' compensation coverage. The Court found that, although the grower purported to relinquish supervision of the harvest work, it retained overall control of the production and sale of the crop and, therefore, the migratory workers were employees entitled to workers' compensation coverage as a matter of law.

In deciding the case, the Court made clear that the hirer's degree of control over the details of the work is not the only factor to be considered in deciding whether a hiree is an employee or an independent contractor. (*Borello*, *supra*, at p. 350 (stating that the "principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired ..."); see also *Burlingham v. Gray* (1943)

22 Cal.2d 87, 99-100 [8 Cal.Comp.Cases 105] (stating that "the determination of whether the status of an employee or of an independent contractor exists is governed primarily by the right of control which rests in the employer, rather than by his actual exercise of control [Citations.] ... The real test has been said to be 'whether the employee was subject to the employer's orders and control and was liable to be discharged for disobedience or misconduct; and the fact that a certain amount of freedom of action is inherent in the nature of the work does not change the character of the employment where the employer has general supervision and control over it.'[Citations.] 'Perhaps no single circumstance is more conclusive to show the relationship of an employee than the right of the employer to end the service whenever he sees fit to do so.' [Citations.] The fact that the employee chooses his own time to go out and return and is not directed where to go or to whom to sell is not conclusive of the relationship and is not inconsistent with the relation of employer and employee, nor is the manner of payment a decisive test of the question. [Citations.]").)

Thus, the right to control may be shown by evidence that the worker must obey instructions and is subject to consequences, including discipline or termination, for failure to do so. (*Toyota Motor Sales v. Superior Court* (1990) 220 Cal.App.3d 864, 269 Cal. Rptr. 647, p. 875.) Moreover, "the unlimited right to discharge at will and without cause has been stressed by a number of cases as a strong factor demonstrating employment. [citations]" (*Id*.) So long as the employer has the authority to exercise complete control "*whether or not that right is exercised with respect to all details*, an employer-employee relationship exists." (*Id*., p. 874 [Emphasis added.].)

Hence, when considering *the right to control*, the focus is on the *necessary control*, and an employment relationship for purposes of workers' compensation may be found even when the company "is more concerned with the results of the work rather than the means of its accomplishment." (*JKH Enterprises v. Dept. of Ind. Relat*. (2006) 142 Cal.App.4th 1046, 1064-1065 [71 Cal.Comp.Cases 1257]; see also *Borello*, *supra*, at pp. 355-360; *Air Couriers, Intl. v. Emp. Dev. Dept.* (2007) 150 Cal.App.4th 923, 937, 59 Cal. Rptr. 3d 37.)

Unlike the common law principles used to distinguish between employees and independent contractors, the policies behind the Workers' Compensation Act are not concerned with "an employer's liability for injuries caused by his employee." (*Borello*, *supra*, at p. 352.) Instead, they concern "which injuries to the employee should be insured against by the employer." (*Id*.) Accordingly, in addition to the "control" test, the question of employment status must be decided with deference to the "purposes of the protective legislation." (*Id.* at p. 353.) In this context, the

Court observed that the control test cannot be applied rigidly and in isolation, and "secondary" indicia of an employment relationship should be considered:

> "Additional factors have been derived principally from the Restatement Second of Agency. These include (a) whether the one performing services is engaged in a distinct occupation or business (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision (c) the skill required in the particular occupation (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work (e) the length of time for which the services are to be performed (f) the method of payment, whether by the time or by the job (g) whether or not the work is a part of the regular business of the principal and (h) whether or not the parties believe they are creating the relationship of employer-employee." (*Id.,* at p. 351.)

The Court further stated that these factors "may often overlap those pertinent under the common law," that "[e]ach service arrangement must be evaluated on its facts, and the dispositive circumstances may vary from case to case," and "all are logically pertinent to the inherently difficult determination whether a provider of service is an employee or an excluded independent contractor for purposes of workers' compensation law." *(Borello*, *supra*, at pp. 354-355.)

Here, the record shows that defendant is either owned or managed by Mr. Chen, that defendant sends employees to various recycling centers to fill, sort and retrieve recyclable materials in bins it placed at the centers, and that defendant employed Omar Martinez as a supervisor of the employees sent to the centers for such work. (Opinion on Decision, pp. 3, 8; Report, p. 2.) The record also shows that defendant employed applicant, terminated him, and then re-hired him on a number of occasions. (Opinion on Decision, p. 3.)

Applicant testified that, after defendant terminated him for being intoxicated at work, he asked Mr. Chen for his job back and Mr. Chen responded: "Ok Leo. Monday at Mega Metals." (*Id.*, p. 4.)

Applicant also testified that defendant would send (and sometimes transport) him to recycling centers, including defendant's premises, Miller Recycling, Mega Metals, and Masters. (*Id*.) He testified that he would receive work instructions from the same persons at these locations, including Mr. Martinez and Mr. Chen, who was often present at the centers. (*Id.*, pp. 4-5.) Applicant further testified that he understood that he was working for defendant, whether he was working at defendant's premises, Mega Metals or Miller Recycling. (*Id.*, p. 4.)

Mr. Chen testified that he would often visit Miller Recycling in 2019, that he may have suggested to applicant how he should perform his work there, and that Mr. Martinez was employed by defendant and worked at Miller Recycling. (*Id.*, pp. 5-6.) Mr. Chen further testified that he instructed Mr. Martinez to go see what happened at Miller Recycling on the date when applicant was injured there. (*Id.*, p. 5.)

On this record, it is clear that defendant had the right to hire and fire applicant, direct applicant as to where and when he would work, and supervise his work through instructions from Mr. Martinez and Mr. Chen. It follows that defendant maintained all necessary control over applicant's work. Accordingly, we conclude that the record as to the primary *Borello* factor suggests that defendant employed applicant.

Regarding the secondary *Borello* factors, there is no evidence that applicant was engaged in a distinct occupation or business, performed the kind of occupation that is usually done under the direction of the principal or by a specialist without supervision, or exercised a specialized skill.

As we have explained, there is evidence that defendant sent and sometimes transported applicant to his places of work and supervised his work of filling, sorting, and retrieving recyclable materials in bins it had placed at recycling centers.

There is no evidence that applicant's work was to cease at any certain time after applicant testified that it recommenced and it is undisputed that applicant performed work for defendant off-and-on from 2014 until approximately 2017, when applicant received a paycheck from Mega Metals for work he testified he performed for defendant. (Opinion on Decision, p. 4.)

There is evidence that applicant and other workers were paid in cash on payday for work performed. (*Id*.) We view this evidence as persuasive because Mr. Chen testified both that employees were and were not paid by check and that he did not know whether any employees were paid in cash. (*Id*.) Because we conclude that workers were paid in cash at the same time, i.e., on payday, we conclude that they were not paid by the job and surmise that they were paid by the time.

The evidence is that the work performed directly related to defendant's regular business because it concerned retrieval of recyclable materials necessary for the recycling business.

The WCJ concluded that applicant believed the parties were creating an employer-employee relationship while defendant's assertions to the contrary were self-contradictory. (*Id.*, pp. 7-8; Report, p. 5.)

Accordingly, we conclude that the record as to the secondary *Borello* factors suggests that defendant employed applicant.

Additionally, we recognize the WCJ's determinations regarding the credibility of the testimony presented by applicant and defendant's representative, Mr. Chen. We accord these determinations great weight because the WCJ had the opportunity to observe the witnesses' demeanor at trial; and, as we explain below, the record lacks evidence of considerable substantiality that would warrant our rejection of the determinations. (Opinion on Decision, p. 7 ; Report, p. 6; *Garza v. Worker's Comp. Appeals Bd*. (1970) 3 Cal. 3d 312 [35 Cal.Comp.Cases 500].)

Specifically, defendant's arguments that we must reject applicant's testimony do not show that applicant lacks veracity or that his testimony is not to be believed based upon surrounding circumstances. The arguments that applicant (1) twice failed to appear at trial; (2) did not speak the same language as Mr. Chen and therefore could not effectively speak with him; (3) filed a civil lawsuit alleging that Miller Recycling was his employer; and (4) has been named as an employee of Miller Recycling in documents prepared by OSHA do not necessarily tend to discredit applicant's credibility. After all, as the Report states, there is no evidence that applicant's failures to appear at trial have to do with issues of credibility; nor evidence that applicant was altogether unable to communicate with Mr. Chen, whether directly in a limited fashion or through an interpreter; nor any legal basis to conclude that applicant's civil allegation that he was employed by Miller Recycling or that OSHA documents name him as one contradict the allegation of employment herein because they neither purport that applicant was employed solely by Miller Recycling or not employed by defendant. (Report, pp. 4-9; See also, e.g., Cal. Evidence Code § 786 (prohibiting the use of evidence showing traits of a witness's character other than honesty or veracity)*; Kowalski v. Shell Oil Co.* (1979) 23 Cal.3d 168 [44 Cal.Comp.Cases 134] (stating that dual employment in the context of workers' compensation law may be shown where the employee is sent by one employer to perform labor for another employer; the rendition of the work yields a benefit to each employer; and each employer has some direction and control over the details of the work).) Accordingly, we conclude that the record supports the finding that applicant was employed by defendant on the date of injury.

Accordingly, we will deny the Petition.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Findings and Order and Opinion on Decision issued on April 6, 2023 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ NATALIE PALUGYAI, COMMISSIONER

KATHERINE A. ZALEWKSI, CHAIR
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUNE 30, 2023

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

LEOPOLDO RAMIREZ
LAW OFFICE OF MANUEL REYNOSO
MICHAEL SULLIVAN & ASSOCIATES

SRO/*cs*

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