WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

LEAMON PERKINS, *Applicant*

vs.

DON L. KNOX; DLK CAPITAL, INC.; AMERICAN MODERN INSURANCE COMPANY, *Defendants*

Adjudication Number: ADJ10183569
Los Angeles District Office

OPINION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the Findings and Orders (F&O) issued on February 7, 2020, wherein the workers' compensation administrative law judge (WCJ) found that applicant did not sustain injury arising out of and in the course of employment (AOE/COE) on September 11, 2015 and was not an employee of defendants Don L. Knox, an individual, and DLK Capital, Inc., a corporation. The WCJ ordered that applicant take nothing.

Applicant contends that the WCJ erroneously failed to evaluate whether defendants met their burden of proving that applicant was not their employee under all the requisite criteria of *S. G. Borello & Sons, Inc. v. Dept. of Ind. Relations* (1989) 48 Cal.3d 341 [54 Cal.Comp.Cases 80] (*Borello*) and that the evidence establishes that applicant was their employee.

We received an Answer from defendants.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied; or, in the alternative, that the matter be returned to the trial level for further development of the record.

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 rescind the F&O and return the matter to the trial level for further proceedings consistent with this decision.

FACTUAL BACKGROUND

Applicant claims to have sustained injury to his head, neck, both upper extremities and both arms on September 11, 2015 while employed as a laborer/handyman by defendants. (Minutes

of Hearing and Summary of Evidence, March 21, 2018, p. 2.)

The matter proceeded to the initial trial on the issue of employment on March 21, 2018 and June 13, 2018. (*Id*; Minutes of Hearing and Summary of Evidence, June 13, 2018.)

Applicant testified that he had worked as a laborer for defendant Knox for approximately one year before his injury. (Minutes of Hearing and Summary of Evidence, March 21, 2018, p. 3:16-17.) On the date of injury, applicant was engaged in demolition activity at defendants' Long Beach property when he was struck in the head by cedar wood and became unconscious. (*Id.*, p. 3:12-16.) Defendant Knox was in the business of purchasing and remodeling homes. (*Id*., p. 4: 5-6.) Applicant did not participate in the purchasing of homes for remodeling and lacked any professional licenses. (*Id*., p. 4:6-9.) Defendant Knox supplied applicant's tools, except for a hammer, screw driver, ladder and skill saw. (*Id*., p. 6:17-18.) Applicant was paid $120 to $125 per day, sometimes in cash or by wire transfer from defendant Knox. (*Id*., p. 5:15-22.)

Defendant Knox testified that he owns defendant DLK Capital and is engaged in the business of buying, rehabilitating and selling properties. (Minutes of Hearing and Summary of Evidence, June 13, 2018, p. 2:6-7.) Defendant DLK Capital owned the property on which applicant was injured. (*Id*., pp. 2:8-10, 5:12.) Defendant Knox signed the checks admitted into evidence as payment for applicant's work, but the September 2, 2015 check was issued on behalf of a third party for work unrelated to defendants' properties. (*Id*., pp. 3:3-9, 5:12-19.)

After the initial trial, the WCJ found as follows: (1) applicant, while employed at Long Beach, California, sustained injury AOE/COE on September 11, 2015; (2) applicant was an employee of defendants at the time of injury; (3) applicant was not a household employee for purposes of Labor Code sections 3352(h) and 3354;[1] (4) applicant filed his claim fifty-six days after the date of injury; (5) there is no evidence that defendants served applicant with a claim form as required by section 5401(a), thus tolling the statute of limitations; (6) there is no evidence of prejudice to the defendant shown per section 5403; (7) applicant timely filed his claim pursuant to sections 5400 through 5403; and (8) this is an interim award, and jurisdiction over the liens is reserved and the issue deferred. (Findings and Orders, July 20, 2018, pp. 1-2.) The WCJ ordered the parties to adjust or pay benefits to applicant. (*Id*., p. 2.)

Defendants sought reconsideration of the WCJ's findings, arguing that the WCJ erroneously applied *Dynamex Operations West, Inc., v. Superior Court* (2018) 4 Cal.5th 903 [83

[1] Unless otherwise stated, all further statutory references are to the Labor Code.

Cal.Comp.Cases 817] (*Dynamex*) to determine that applicant was an employee and that the evidence establishes that applicant was an independent contractor under *Borello*.

In his report and recommendation on defendants' petition for reconsideration, the WCJ stated:

> While the undersigned used the Dynamex test, one could argue the Borello factors for either side. With respect to factor (a) . . . it is difficult to say whether applicant had an independent handy man business or simply worked for KNOX/DLK.
>
> With respect to factor (b) the Applicant was definitely a general laborer and not a specialist but no one explained with evidence whether such work is usually supervised or not. . .
>
> The skill level in factor (c) is an argument for a finding of employment as applicant's services required no special skill.
>
> Factor (d) also militates in favor of Applicant as defendant provided most of the tools . . . and all of the work sites.
>
> Factor (e) also militates in favor of applicant as the Applicant's testimony that he worked for defendants from June or July 2014 to 11 September 2015 was more credible than the defendant's interpretation of the 02 September 2015 check. . . .
>
> With respect to factor (f) the defendant paid by the day, not by the job, which, again, favors the Applicant's argument . . .
>
> Factor (g) asks whether the work is part of the regular business of the principal. Here the defendant is in the regular business of flipping houses which necessarily includes demolition work.
>
> Factor (h) focuses on the intent of the parties. Here, the principal claims that he intended to create an independent contractor relationship. When asked what he believed the difference was he said if there is a W-2 that is employment, otherwise it is an independent contractor relationship. This is not persuasive evidence under factor (h.) . . .
>
> If Borello applies, the undersigned could either weigh the existing evidence using the above factors or develop the record on factors (a)(b) and (e.) . . . If Dynamex applies, the undersigned would find for the Applicant. (Report and Recommendation on Petition for Reconsideration, September 14, pp. 4-6.)

On October 23, 2018, we granted defendants' petition for reconsideration, rescinded the Findings and Orders issued on July 30, 2018, substituted new findings that deferred the issue of employment and restated findings 4 through 8, and returned the matter to the trial level for further proceedings consistent with our decision. (Opinion and Order Granting Petition for

Reconsideration and Decision After Reconsideration, October 23, 2018, pp. 2:26-3:3.) In our decision, we stated:

> [T]he WCJ erred in applying the *Dynamex* standard to determine that applicant was employed by defendants.
>
> Turning to defendants' contention that the evidence in the record establishes that applicant was an independent contractor, we agree with the WCJ that the record requires further development regarding the evidence necessary for analysis of the *Borello* factors. In particular, as noted by the WCJ in his Report, we agree with the WCJ that the record requires further development regarding the evidence necessary for analysis of the *Borello* factors. In particular, as noted by the WCJ in his Report, the record appears to be incomplete as to whether and to what extent applicant was independently engaged in a handyman/laborer business, applicant was subject to supervision in the tasks he performed, and applicant or defendants can present corroborative evidence in support of their respective contentions regarding the length of time applicant performed services for defendants. We will therefore order further development of the record as to the issue of whether applicant was an employee or an independent contractor.
> (*Id.*, p. 6:15-25.)

On January 14, 2020, the matter proceeded to trial pursuant to our order to develop the record. (Minutes of Hearing and Summary of Evidence, January 14, 2020, p. 2:7-10.)

In the Report, the WCJ states:

> On [the date of injury] applicant was doing demolition work for the defendants who were in the business of "flipping" houses, that is to say, buying houses, demolishing old fixtures, walls and appliances and replacing them with new construction and then selling the houses for a profit. The injury occurred when a piece of cedar fell and struck him in the head and he became unconscious.
> . . .
> Applicant testified that he had worked for defendants for a little more than a year prior to the injury, since June or July of 2014. He testified that he was paid weekly at a daily rate that began at $80.00 and eventually reached $120.00 to $125.00 per day. Defendants sometimes paid him by check but applicant only presented two checks at the first trial: one dated 02 September 2015 and the other dated 18 September 2015. . . . He testified that he worked consistently from June or July 2014 through the date of injury in September 2015. Thus, applicant testified about working consistently with the defendants but the documentary evidence was scant.
> . . .
> In the original trial, applicant testified that the only tools he had were a hammer, a screwdriver and a skill saw. The defendants provided all the other tools including a truck. Defendant testified that he did not supervise applicant and that he did not keep track of applicant's arrival and departure times at work.

> After remand at trial, the applicant presented one bank statement, a deposit slip, and a withdrawal slip from Mr. Knox and a copy of a check from DLK Capital. Defendant submitted a series of checks (Exhibit "C") which included four checks from someone named Lamar Shipp. On cross-examination, applicant could offer no explanation for these checks.
> . . .
> In the Opinion on Decision after the second trial, the undersigned found that factors (a) and (e) militate in favor of the defense. Applicant was indeed engaged in a distinct business of providing handyman work for other contractors. Furthermore, factor (e) now favors the defendant as applicant has been shown to have been inconsistent in his testimony about his work for others.
>
> With respect to factor (b) the analysis did not change. The applicant was definitely a general laborer and not a specialist but no one explained with evidence whether such work is usually supervised or not. The skill level in factor (c) is an argument for a finding of employment as applicant's services required no special skill. Since the undersigned was tasked with developing the record only with respect to (a), (b) and (e) the undersigned only discusses these three here but all the Borello factors were re-weighed together with consideration of the credibility of the applicant, particularly on cross-examination.
> (Report, pp. 2-5.)

DISCUSSION

We observe that California has a no-fault workers' compensation system. With few exceptions, all California employers are liable for the compensation provided by the system to employees injured or disabled in the course of and arising out of their employment, "irrespective of the fault of either party." (Cal. Const., art. XIV, § 4.) The protective goal of California's no-fault workers' compensation legislation is manifested "by defining 'employment' broadly in terms of 'service to an employer' and by including a general presumption that any person 'in service to another' is a covered 'employee.'" (§§ 3351, 5705(a); *Borello, supra,* at 354.)

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.) 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*).)

Consequently, all workers are presumed to be employees unless the hirer can demonstrate that the worker meets specific criteria to be considered an independent contractor.

Under these authorities, applicant bears the burden of proving that he rendered service for defendants, whereupon the burden shifts to defendants to rebut the employment presumption with proof that applicant did not work "under any appointment or contract of hire or apprenticeship." (See § 3351; *Parsons v. Workers' Comp. Appeals Bd*. (1981) 126 Cal.App.3d 629, 638 [46 Cal.Comp.Cases 1304]) In other words, after applicant demonstrates that he rendered service for defendants, defendants must show by a preponderance of the evidence that he rendered service in an excluded status such as that of an independent contractor. (C*alifornia Compensation Ins. Co. v. Workers' Comp. Appeals Bd.* (*Hernandez*) (1998) 63 Cal.Comp.Cases 844 (writ den.); *Lara v. Workers' Comp. Appeals Bd*. (2010) 182 Cal.4th 393, 402 [75 Cal.Comp.Cases 91].)

In this regard, the record demonstrates that applicant proved that he sustained injury while performing demolition work for defendants and thereby established his prima facie case that he is entitled to employment status. (Report, p. 2.) As a consequence, defendants carry the burden of proving that applicant was an independent contractor at the time of injury.

Here, as we previously opined, *Borello* provides the applicable standard for determining whether applicant was an employee or independent contractor. (Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration, October 23, 2018, pp. 4:17-5:4.) In *Borello,* the question 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 the principal 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, p. 875; see also *Borello, supra,* at p. 350.) 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 "w*hether 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.)

However, as *Borello* states, the control test cannot be applied in isolation and "secondary" indicia of an employment relationship should also 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.
> (*Borello, supra,* at p. 351.)

In short, *Borello* requires evaluation of whether or not the alleged employer retained control over the alleged employee's work and application of "secondary" factors (a) through (h). (See, e.g., *Garcia v. C&C Food Enters*., 2020 Cal. Wrk. Comp. P.D. LEXIS 129 (finding joint employment upon application of *Borello's* right-to-control test and secondary factors); *Villa v. In-Home Compassionate Care*, 2020 Cal. Wrk. Comp. P.D. LEXIS 120 (finding that defendant did not prove that applicant was an independent contractor upon application of *Borello's* right-to-control test and secondary factors.)[2]

In this case, the record fails to show how, if at all, the WCJ evaluated whether or not defendants retained control over applicant's work and how he "re-weighed" all the secondary factors to conclude that defendants presented evidence sufficient to rebut the employment presumption. (Report, p. 5.)

Furthermore, while the Report does set forth a record of the WCJ's evaluation of secondary factors (a), (b), and (e), it remains unclear as to how evidence that applicant performed work for others, including documentary evidence showing payments from Mr. Shipp and applicant's testimony on cross-examination regarding his work for others, may tend to show that applicant was (1) engaged in a distinct occupation or business under factor (a); and (2) not engaged to perform services for defendants for a substantial length of time under factor (e). (Report, p. 5.) More specifically, given the WCJ's previous conclusions that it was unclear whether "applicant had an independent handy man business or simply worked for [defendants]" and that applicant testified credibly that he worked for defendants from June or July 2014 until September 11, 2015, we are unable to discern how evidence that applicant also performed work for others, evidence that on its face is not inconsistent with defendants' hiring of a laborer to perform work as needed

[2] Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd*. (2002) 96 Cal.App.4th 1418, 1425 fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we consider these decisions to the extent that we find their reasoning persuasive, particularly on issues regarding construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, fn. 7 (Appeals Board en banc); *Griffith v. Workers' Comp. Appeals Bd*. (1989) 209 Cal.App.3d 1260, 1264, fn. 2, [54 Cal.Comp.Cases 145].)

in its business of "flipping" houses, may demonstrate that applicant operated a distinct business or was not engaged to perform services for defendants for a substantial period. (Report and Recommendation on Petition for Reconsideration, September 14, pp. 1-4.)

Section 5313 requires the WCJ to produce "a summary of the evidence received and relied upon and the reasons or grounds upon which the [court's] determination was made." (See also *Blackledge v. Bank of America* (2010) 75 Cal.Comp.Cases 613, 621-22.) The WCJ's opinion on decision "enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful." (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc), citing *Evans* v. *Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].) A decision "must be based on admitted evidence in the record" (*Hamilton, supra,* at p. 478), and must be supported by substantial evidence. (§§ 5903, 5952, subd. (d); *Lamb* v. *Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza* v. *Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque* v. *Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) As required by section 5313 and explained in *Hamilton,* "the WCJ is charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision." (*Hamilton, supra,* at p. 475.)

In this case, pursuant to the discussion above, we are unable to ascertain the reasons or grounds upon which the WCJ determined that defendants presented evidence sufficient to prove that applicant was an independent contractor under *Borello's* control test and secondary factors. We therefore conclude that the WCJ should develop the record on the issue of whether applicant was employed by defendants at the time of injury. Accordingly, we will rescind the F&O and return the matter for further proceedings consistent with this decision.

Accordingly, as our Decision After Reconsideration, we will rescind the F&O and return the matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Orders issued on February 7, 2020 is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JANUARY 28, 2022

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

FENSTEN AND GELBER
LEAMON PERKINS
LAW OFFICES OF MARVIN L. MATHIS

SRO/*pc*

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