WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

AGUSTIN CIPRIAN, *Applicant*

vs.

LARRY D. SMITH CORRECTIONAL FACILITY; permissibly self-insured, administered by COUNTY OF RIVERSIDE, *Defendants*

Adjudication Number: ADJ13096766
Anaheim District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration filed by applicant Agustin Ciprian. This is our Opinion and Decision After Reconsideration.[1]

Applicant seeks reconsideration of the January 21, 2021 Finding of Fact, wherein the workers' compensation administrative law judge (WCJ) found that applicant was not an employee of defendant.

Applicant contends that he is presumed to be an employee and that neither the Riverside County Ordinance nor the fact that applicant is an inmate worker overcomes this presumption. Applicant further contends that the WCJ erroneously relied on *Rentie v. Workers' Comp. Appeals Bd.* (1986) 51 Cal.Comp.Cases 503 because unlike the applicant in *Rentie*, applicant's work here was not compulsory as applicant would not "automatically" lose all of his time credit by refusing to work.

We received an answer from defendant County of Riverside. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the Answer and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we amend

[1] Commissioner Lowe, who was previously a panelist in this matter, no longer serves on the Appeals Board. Another panel member has been assigned in her place.

the January 21, 2021 Finding of Fact to find that applicant is an employee of the County of Riverside.

FACTS

The facts here do not appear to be in dispute. On October 6, 2019, applicant, while an inmate at the county jail, sustained injury while working as a cook's assistant. The WCJ stated:

> The parties sought the Court's decision on whether the applicant, Mr. Ciprian, was an employee of Riverside County. Employment was the sole issue for the Court at this Trial setting.
>
> Mr. Ciprian was charged with three violations of the California Vehicle Code on September 3, 2018. He was convicted and sentenced for Count 2, VC23152(a), driving under the influence with a blood alcohol level of .08 or higher. He was incarcerated by the Riverside County Sheriff at the Larry D. Smith Correctional Facility, from August 6, 2019 to January 26, 2020, a period of 177 days. Mr. Ciprian's actual sentence is unknown, as sentencing paperwork was not provided to the Court. The Court referenced the testimony of the witness Captain Jim Krachmer, former Administrative Lieutenant, at the Larry D. Smith Correctional Facility. He was in that role during the time of Mr. Ciprian's incarceration.
>
> Capt. Krachmer testified summarily as follows: "All inmates who are sentenced to county time receive credit up front from the judge. The credits assume the inmate will work. Not all inmates are chosen to work on a crew. If an inmate is chosen for a crew but the inmate refuses to work on the available crew, a report is generated and it is reviewed. If there is no valid reason for the refusal, the inmate could lose some of their work time credit." It is from this unrebutted testimony the Court believes the applicant was the recipient of work time credits at time of sentencing. (Report, p. 2.)

Riverside County Ordinance No. 766 provides:

> Section 3. Prisoners Compelled to Labor.
> In accordance with Section 4017 of the Penal Code of the State of California, any and all prisoners as defined herein are required by the County of Riverside to perform labor on the public works or ways. (Joint Exhibit X, County Ordinance No. 766, p. 1.)

The Ordinance defines "public works or ways" as follows:

> (c) Public Works or Ways – For the purpose of this Ordinance, "public works or ways" means any project or improvement constructed or maintained by the County of Riverside and districts governed by the Board of Supervisors, including, but not limited to, parks, buildings, paths, roads, streets, highways, public roads and flood control rights-of-way or easements, facilities, reservoirs, channels and sewers. (Joint Exhibit X, County Ordinance No. 766, p. 1.)

DISCUSSION

We first address defendant's contention that the petition should be summarily denied because applicant failed to set forth one or more of the five grounds for reconsideration. Defendant cites to *Alaniz v. Workers' Compensation Appeals Bd.* (2011) 76 Cal.Comp.Cases 784 [2011 Cal. Wrk. Comp. LEXIS 117] to support its contention that the petition should be summarily denied. Although the WCJ in *Alaniz* raised the issue that the applicant there failed to state the grounds for reconsideration, the WCJ, nevertheless, reached the merits of the matter. (*Ibid.*) We, too, reach the merits here in favor of the strong public policy to hear appeals on the merits in light that defendant was not prejudiced by this failure and was able to address applicant's petition. (*Palacios v. Ortiz* (2005) 70 Cal.Comp.Cases 567, 588-589 [2005 Cal. Wrk. Comp. LEXIS 108].)

Labor Code[2] section 3351 defines "employee" 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, and includes: . . . (e) a person incarcerated in a state penal or correctional institution while engaged in assigned work . . . ." (§ 3351, subdiv. (e).) Section 3351 does not include county inmates in its definition of employee. (§ 3351.) Section 3352 excludes certain persons from the definition of employee but does not exclude county inmates. (§ 3352.)

Section 3357 provides that "Any person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee." (§ 3357.) This presumption is a rebuttable presumption. (*Gale v. Industrial Acci. Com.* (1930) 211 Cal. 137; *Duenas v. Workers' Comp. Appeals Bd.* (2010) 75 Cal.Comp.Cases 829, 835-836 [2010 Cal. Wrk. Comp. LEXIS 154].) The issue here is whether defendant rebutted this presumption with Ordinance no. 766, which provides:

> Section 3. Prisoners Compelled to Labor.

[2] All subsequent references are to the Labor Code unless otherwise indicated.

> In accordance with Section 4017 of the Penal Code of the State of California, any and all prisoners as defined herein are required by the County of Riverside to perform labor on the public works or ways. (Joint Exhibit X, Ordinance No. 766, Section 3.)

Penal Code section 4017 provides that county inmates working in the suppression of fire are considered employees of the county. (Pen. Code, § 4017.) It does not speak as to the employee status of county inmates who do not work in fire suppression. The employee status of county inmates are thus left to the courts to decide. In making this determination, courts have looked at whether the work that the inmate performed was "voluntary" or "compulsory" as an incident to incarceration and whether there was consideration for the work performed. (*Rowland v. County of Sonoma* (1990) 220 Cal.App.3d 331, 333-334; *Pruitt v. Workers' Comp. Appeals Bd.* (1968) 261 Cal.App.2d 546 [33 Cal.Comp.Cases 225]; *State Comp. Ins. Fund v. Workmen's Comp. Appeals Bd.* (*Childs*) (1970) 8 Cal.App.3d 978 [35 Cal.Comp.Cases 295]; *Parsons v. Workers' Comp. Appeals Bd.* (1981) 126 Cal.App.3d 629 [46 Cal.Comp.Cases 1304]; *Morales v. Workers' Comp. Appeals Bd.* (1986) 186 Cal.App.3d 283 [51 Cal.Comp.Cases 473]; *County of Kings v. Workers' Comp. Appeals Bd.* (*Garza*) (1986) 51 Cal.Comp.Cases 424 [1986 Cal.Wrk. Comp. LEXIS 3361] (writ denied); *Salazar v. Workers' Comp. Appeals Bd.* (1980) 45 Cal.Comp.Cases 16 [1980 Cal. Wrk. Comp. LEXIS 3119] (writ denied).) If an inmate was performing compulsory work as an incident to penal servitude, he is not an employee and has no rights to workers' compensation benefits. (*Parsons* at p. 638.) In deciding whether an inmate was performing compulsory or voluntary work, trial courts may ask the following questions (the *Rowland* factors):

(1) Did the county require the worker to work as a condition of incarceration?

(2) Did the inmate worker volunteer for the assignment? and

(3) What consideration were received, if any; for example, monetary compensation, work-time credits, freedom from incarceration, etc. (*Rowland,* 220 Cal.App.3d at pp. 333-334.)

In *Pruitt, supra,* 261 Cal.App.2d at p. 551, there was a county ordinance that allowed the county to require its prisoners to work as a consequence of incarceration. The applicant in *Pruitt* was a county inmate who was injured while working for the city at a sewage plant. (*Id.* at p. 548.) There was an agreement between the county and the city where county prisoners could be picked up by the city for work in the City Park or at the sewage plant. (*Ibid.*) Notwithstanding the county ordinance, the *Pruitt* court held that the county inmate was an employee. (*Id.* at pp. 552-553.) In

reaching its holding, the *Pruitt* court analyzed the inmate's relationship with the city and not the county. (*Id.* at pp. 552-553.)

In *Parsons, supra,* 126 Cal.App.3d at p. 639, the court found that the county inmate there was not an employee. The inmate in *Parsons* was sentenced to probation with the condition that he serve 45 days at an industrial camp. (*Ibid.*) The *Parsons* court held that it cannot be said that the *Parsons* inmate bargained for or consented to work. (*Ibid*.) "His choice was between regular sentencing or probation with the included condition that he serve 45 days at the road camp. In short, petitioner accepted an act of judicial leniency." (*Ibid.*) The *Parsons* court noted that the county ordinance in that case compelling county inmates to work further negates any consensual employment relationship that would make the work performed voluntary. (*Ibid.*)

In *Morales, supra,* 186 Cal.App.3d at p. 289, the court held that a county inmate was an employee when the county offered him a work release program sometime after the inmate began serving his sentence but before he completed his sentence. The *Morales* court distinguished the facts in that case from the facts in *Parsons* by emphasizing that in *Morales*, the inmate was offered a work release program after he began serving his sentence. (*Ibid.*) "Unlike the situation in *Parsons*, applicant in the present case was serving a regular jail sentence when he was offered the opportunity to perform voluntary community work. In exchange for his agreeing to work, he was recompensed by being allowed to reside anywhere within the county and was no longer confined to jail." (*Ibid.*)

In *Childs, supra,* 8 Cal.App.3d at pp. 981-983, the court held that a county inmate's work was voluntary based on the absence of a county ordinance requiring him to work as an incident of incarceration and based on the relationship between the inmate and the county. An "inmate was at liberty to either accept the work or refuse it and was thus a volunteer; that having accepted the work in return for compensation he was entitled to the benefits enjoyed by employees under the Workmen's Compensation Act, which act should be liberally construed to carry out its beneficent purposes. [citation omitted]." (*Id.* at p. 980.) The inmate in *Childs* provided unrefuted testimony that his work was voluntary. (*Id.* at p. 981.)

The courts in *Garza, supra,* 51 Cal.Comp.Cases 424 and *Salazar, supra,* 45 Cal.Comp.Cases 16 scrutinized the language of the relevant county ordinance and noted the permissive language of the ordinance. In *Garza,* the court held that the county ordinance that provided that county inmates "may" be required to work did not require a finding that a county inmate's work was compulsory. (*Garza* at p. 425.) In other words, the court in *Garza* held that a

county inmate could be working voluntarily even though there was an ordinance in place allowing the county to require work as an incidental consequence of incarceration.

In contrast, in *Salazar*, the court held that even though the county ordinance provided that county inmates "may" be required to work, a county inmate's work is compulsory "because the ordinance gave the sheriff the decision-making power regarding work by county prisoners." (*Salazar* at p. 17.)

Here, we are cognizant of the disparate impact in determining the employee status between persons incarcerated in state prison and person incarcerated in county jail. State inmates are statutorily included in the definition of "employee" while county inmates are subjected to a compulsory test to determine their employee status. We are also cognizant of the difference between county inmates who work in fire suppression and county inmates who do not, the former being statutorily included in the definition of employee, while the latter being subjected to the aforementioned compulsory test. Lastly, we are aware that in more recent laws, employer control is a major factor in determining employment status (the more employer control, the more likely employment status is found[3]), whereas here, the opposite effect results when applying the compulsory test, in that the more control the county exercises, the more likely the inmate's work is found to be compulsory without the protections of an employment relationship. Given these considerations, we find that the case law with respect to county inmates is antiquated and deserving of a fresh look by the Legislature or courts. That said, we understand that we are bound by existing case law and are constrained in applying the compulsory test explained above.

In applying the compulsory test above using the *Rowland* factors, we conclude that applicant's work here was voluntary. Defendant bears the burden to rebut the employment presumption found in section 3357. The only relevant evidence in the record to rebut this presumption is the county ordinance requiring county prisoners to perform labor on the "public works or ways" and the testimony of Captain Jim Krachmer that every county inmate receives work time credit up front from the judge and that these work time credits "could" be lost if the inmate refuses to work. (Joint Exhibit X, Ordinance No. 766, Section 3; Minutes of Hearing/Summary of Evidence (MOHSOE) dated November 9, 2020, pp. 3:23-4:1.)

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[3] See *Dynamex Operations W. v. Superior Court* (2018) 4 Cal.5th 903 and *S. G. Borello & Sons, Inc. v. Dept. of Ind. Relations* (1989) 48 Cal.3d 341 [54 Cal.Comp.Cases 80], codified in section 2775. We do not consider whether the factors in section 2775 are applicable here since the 2019 injury here preceded the September 2, 2020 effective date of section 2775.

First, the county ordinance defines "public works or ways" as "any project or improvement constructed or maintained by the County of Riverside and districts governed by the Board of Supervisors, including, but not limited to, parks, buildings, paths, roads, streets, highways, public roads and flood control rights-of-way or easements, facilities, reservoirs, channels and sewers." (Joint Exhibit X, Ordinance No. 766, Section 2(c).) Here, applicant was working as part of a kitchen crew, which does not seem to fit into the definition of "public works or ways." Thus, the ordinance requiring county prisoners to work on the "public works or ways" does not rebut the employment presumption of section 3357.

Second, irrespective of the existence of a county ordinance compelling inmates to work, both the *Pruitt, supra,* 261 Cal.App.2d 546 and *Parsons, supra,* 126 Cal.App.3d 629 courts focused their analysis on the relationship between the inmates and the county. Here, Captain Krachmer testified that all sentenced county inmates receive work time credit up front and are therefore expected to work, although not all end up being assigned to work, but if an inmate is assigned to work and refuses, he "could" lose the work time credit already given to him, thereby adding his time in jail. (MOHSOE dated November 9, 2020, pp. 3:23-4:9.) We are familiar that a different panel in *Rentie, supra,* 51 Cal.Comp.Cases 503, noted that "it would be illogical for an inmate to refuse to work if, as a consequence of this refusal, his work time credit would be taken away and his incarceration would be longer." We agree that an illusory choice is not a choice at all but the facts in this case are lacking. For instance, there is no certainty from Captain Krachmer's testimony that applicant here will lose work time credit if he refused to work. Furthermore, Captain Krachmer testified not all inmates are chosen to work yet those inmate are still awarded work time credit up front. In short, the up front award of work time credit is not necessarily correlated to an inmate's work. Captain Krachmer's testimony, therefore, is not sufficient to rebut the presumption of employment.

Accordingly, we amend the January 21, 2021 Finding of Fact to find that applicant is an employee of the County of Riverside.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that applicant Agustin Ciprian's Petition for Reconsideration of the January 21, 2021 Finding of Fact is **AMENDED** as follows:

Finding of Fact

The applicant, Agustin Ciprian, is an employee of the County of Riverside.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

DECEMBER 21, 2022

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

AGUSTIN CIPRIAN
ULLASINI JOY DHOLAKIA, APC
LAW OFFICES OF JEFFREY B. SELLBERG

LSM/*pc*

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