

**WORKERS' COMPENSATION APPEALS BOARD  
STATE OF CALIFORNIA**

**MARY VOGT for CARL VOGT (deceased), *Applicant***

**vs.**

**BADYAL BROS. ENTERPRISE, a California Corporation and AMOLAK SINGH  
BADYAL, an individual and as the substantial shareholder of BADYAL BROS.  
ENTERPRISE, a California Corporation, UPPAL ENTERPRISES, a Nevada Corporation,  
and AMOLAK SINGH BADYAL, as an individual and as a substantial shareholder of  
UPPAL ENTERPRISES, a Nevada Corporation, *Defendants***

**Adjudication Number: ADJ10865935  
Stockton District Office**

**OPINION AND ORDER DENYING RECONSIDERATION**

Defendant seeks reconsideration of the Findings of Fact, Orders, Award and Opinion on Decision (F&O) issued on January 3, 2023, wherein the workers' compensation administrative law judge (WCJ) found that on February 8, 2017, applicant was involved in an accident while employed by Badyal Brothers Enterprise, a California Corporation and Amolak Singh Badyal, an individual and substantial shareholder of Badyal Brothers Enterprise.

Defendant contends that applicant cannot be deemed to be an employee under Labor Code sections 3351 and was an independent contractor under 3353.<sup>1</sup>

We received an Answer from applicant.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.<sup>2</sup>

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.

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<sup>1</sup> Unless otherwise stated, all further statutory references are to the Labor Code.

<sup>2</sup> We note that the Report states that the Petition was unverified. However, the record in EAMS includes a letter from defendant's attorney to the WCJ which encloses a copy of the verification, asserts that it was served with the Petition on the parties, and states that it was inadvertently omitted from the Petition when it was uploaded into EAMS. (Letter to WCAB Curing Defect, February 8, 2023.) Based upon this letter and the absence of any allegation in the Answer that the Petition was unverified, we deem the Petition to be verified.

## FACTUAL BACKGROUND

On September 23, 2021, the matter proceeded to trial as to the following issue: “whether or not the Decedent Carl Vogt was an employee of the above-mentioned employer, individual named, or an independent contractor.” (Minutes of Hearing and Summary of Evidence, September 23, 2021, p. 3:15-16.)

The WCJ admitted exhibits entitled Check from Badyal Bros. to Karl Vogt dated 3-29-17, W-2 Form issued by Badyal Bros. to Karl Vogt dated 2016, Badyal Bros., Inc. Statement from 2017, one page, Document called a Driver Pay Settlement, two checks, dated 12-30-16, and 1-13-17. (*Id.*, p. 4:5-13.)

At trial, Mr. Badyal testified as follows:

Q. So, Mr. Badyal, in 2016, is it correct that Mr. Vogt worked for Badyal Brothers Enterprise as an employee? Is that correct?

A. Yes, Yes.

(Transcript of Proceedings, September 23, 2021, p. 4:18-21.)

Q. And the job he performed for Badyal Brothers in 2016, that was as a truck driver; is that correct?

A. Yes.

Q. And Badyal Brothers Enterprise issued a W-2 to Mr. Vogt for any work in 2016; is that correct?

A. Yes.

Q. Okay. You -- in 2017, it's my understanding that Badyal Brothers stopped withholding payroll taxes out of Mr. Vogt's checks up until the time that he passed away, and it's my understanding that Badyal Brothers did that at the instruction of Mr. Vogt; is that correct?

A. Yes.

Q. As far as services that Mr. Vogt performed in 2017, he continued to perform services as a truck driver; is that correct?

A. Yes.

Q. And as far as the way he performed those services, is it correct that he performed the services the same way he did in 2016 as he did in 2017?

A. Yes.

Q. Okay. And while performing those services in both 2016 and 2017, he utilized trucks which were owned by Uppal Enterprise and leased by Badyal Brothers Enterprise, correct?

A. Yes.

(*Id.*, pp. 4:24-6:1.)

Q. Okay. Now, you became aware that Mr. Vogt passed away on February 8, 2017, correct? A. Yes.

Q. And at the time he passed away, on February 8, 2017, isn't it correct that he was

driving a vehicle leased by Badyal Brothers Enterprise?

A. Yes.

Q. And at the time he passed away, on February 8, 2017, he was performing services for Badyal Brothers Enterprise, correct?

A. Yes.

(*Id.*, p. 6:2-12.)

Q. You testified earlier that Mr. Vogt requested that taxes not be withheld from his check when he engaged in a business relationship with you in 2017, correct?

A. Yes.

Q. Do you know why he did not want you to withhold taxes?

A. He said that he wanted all his money at the time.

(*Id.*, p. 14:2-9.)

Q. So did you or did you not have workers' compensation for any employee in 2016?

A. No, I did not.

Q. Okay. And since Mr. Vogt was working as an employee in 2016, is there any reason you did not have workers' compensation coverage during that year?

A. The reason -- he did one load for me at that time, and the reason he did one load for me at that time -- and I'm just -- you know, I work with the Postal Service and didn't know much about it, and when I got advice from somebody that said if you have employee you have to have workers' comp. So I stopped that immediately after he did one load. We were done. I didn't have workers' comp, so only one load he did in 2016.

Q. Okay. So is it also fair to say, then, that one of the reasons Mr. Vogt was not classified as an employee in 2017 is because you didn't have workers' compensation coverage?

A. Yes.

(*Id.*, p. 15:5-21.)

Q. Okay. And you are also the owner of Uppal Enterprises, a Nevada Corporation; is that correct?

A. Yes.

Q. And you are the sole owner of Uppal Enterprises, a Nevada Corporation?

A. Yes.

Q. Okay. So when you leased one vehicle to the other, you were leasing the vehicle from one corporation that you owned to another corporation that you owned; is that correct?

A. Yes.

(*Id.*, p. 17:1-12.)

Q. Did you tell Mr. Vogt where he was supposed to go and deliver goods on behalf of being owner of the two companies that you owned?

A. I tell him. I give him an address, yes.

Q. Okay. So, and that address was where he was supposed to drop off the goods?

A. Yes.

Q. Okay. Did you tell him where to fill the truck before he drove it to the location?

A. Fill with fuel?

Q. No. I mean, as far as fill the trailer with goods to be transported to another person?

A. No, because the trailer was ready for him to take. He was just -- he was going to just drive it, it was already --

Q. So he didn't -- so would it be fair to say that he did not load and unload the truck himself, he just drove it to the place it was supposed to be?

A. Yes.

Q. Did you -- either one of your companies have insurance for the truck that Mr. Vogt was driving at the time of his accident?

A. Yes.

Q. And was that insurance -- was that paid by Badyal Brothers Enterprise or by Uppal Enterprises?

A. I don't know how that was. I don't remember how that was set up, but I know there was insurance.

Q. Okay. And it was insured by one of your companies, you just don't remember which one?

A. Yes.

(*Id.*, pp. 17:23-18:25.)

Q. Okay. Did you give Mr. Vogt any information regarding what he was supposed to do if he had any problems with the truck when he was out delivering goods?

A. Can you repeat the question, please?

Q. Did you give Mr. Vogt any information regarding what he was supposed to do if he had any problems with the truck when he was out delivering goods?

A. He didn't have problem; but he knew to call me, yes.

Q. So if he had any problems he would call you, and you would resolve that issue; is that correct?

A. Yes.

(*Id.*, p. 19:17-25.)

THE COURT: Do you know who loaded that load?

THE WITNESS: No. When it was -- I mean, we pick up, you know, water from Crystal Geyser water. That was the most of our deliveries, so I would say water.

THE COURT: Well, you probably remember after the accident, was the truck damaged at all?

THE WITNESS: Yes, the truck was damaged.

THE COURT: Okay. So then there was, like, product somewhere, or you had to check the product in the back of the truck; is that correct? It's kind of a big deal.

THE WITNESS: I want to say water. I think it was water.

(*Id.*, p. 20:5-20.)

Q. Do you know if in 2017, Mr. Vogt worked for other companies as an independent contractor?

A. I don't know independent, but he said -- he said he was working for someone else. I didn't ask him why, because it didn't matter to me, but he did -- he mentioned something about that he was working elsewhere.

(*Id.*, p. 22:20-25.)

Q. What was the pay rate based on?

A. Per mile. It was per mile.

(*Id.*, p. 23:24-25.)

Sir, sir, he had to pick up a load in a certain place, correct?

THE WITNESS: Yes, at a certain date.

THE COURT: Is that correct?

THE WITNESS: Yes.

THE COURT: Okay. And he had to drop it somewhere on a certain date; is that correct?

THE WITNESS: Yes.  
(*Id.*, p. 25:4-11.)

Q. How did -- oh, sorry. You, yourself, do you have a license --

THE COURT: To drive what? I missed -- what had you said?

BY MS. TONG:

Q. -- to drive a semitruck?

A. No, I don't.

(*Id.*, pp. 26:24-27:4.)

In the Opinion on Decision, the WCJ states:

Decedent, Mr. Vogt, died on 2/8/2017. He was involved in a Trucking accident during the delivery of goods for Mr. Badyal and while driving a truck leased by Mr. Badyal and owned by Uppal Enterprises. At the time of his death, he was performing services as a truck driver for Badyal Brothers Enterprises.

...  
Mr. Vogt's death occurred early in 2017 and Mrs. Vogt was paid some money after the trucking accident by Mr. Badyal. The work performed by Mr. Vogt did not change in character from 2016 to 2017. Mr. Vogt did several jobs for Mr. Badyal in 2017.

While Mr. Badyal did not carry any worker's compensation insurance, there was no written agreement or any other witness testimony indicating the status of decedent, Mr. Vogt, as an independent contractor. Mr. Badyal did not ask Mr. Vogt for any documentation as to Mr. Vogt's insurance status and he stated that all communications were done verbally. Mr. Vogt did a significant amount of work for Mr. Badyal in both 2016 and 2017.

On the day in question, Mr. Badyal gave Mr. Vogt an address to pick up the already loaded truck and an address as to where the merchandise was to be delivered. Mr. Badyal rented the truck and carried insurance on the truck that was driven by Mr. Vogt. This was done between two companies that Mr. Badyal owned. Testimony indicated that if there was a problem with the truck, Mr. Badyal was to be notified. (Opinion on Decision, pp. 2-3.)

In the Report, the WCJ states:

Mr. Vogt did not bring his own equipment or vehicle to perform his job. He did not insure himself for this alleged independent contractor job. There is no written agreement to rely on for independent contractor status. Mr. Vogt is now deceased while performing his work for Mr. Badyal. (Report, p. 3.)

## 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, Mr. Badyal testified that his business utilized semi-trucks to haul freight for such businesses as Crystal Geyser using a truck owned and insured by a company he owned which was leased to a company he owned. (Transcript of Proceedings, September 23, 2021, pp. 4:24-6:12, 17:1-8, 17:23-18:25, 20:5-20.) He hired applicant believing he was an employee, terminated him upon learning that worker's compensation was required, and rehired him after applicant offered to work without being paid as an employee. (*Id.*, p. 25:5-21.) He would tell applicant the date on which applicant was to pick up a load, the location of delivery, and the date for completion of delivery. (*Id.*, pp. 17:23,-18:25, 25:4-11.) Applicant was to contact him for assistance if he encountered problems making deliveries. (*Id.*, p. 19:17-26.) Hence defendant retained control over applicant's work.

In addition, the application of *Borello's* secondary factors suggest that applicant's work was that of an employee. In particular, the evidence shows that it was defendant's business to haul freight by truck, and that defendant supplied the truck used by applicant and determined the pickup and delivery locations. (*Id.*, pp. 4:24-6:12, 17:1-25, 20:5-20.)

Defendant paid applicant by mile of freight delivered, which corresponds more closely to paying by time than by job. (*Id.*, pp. 23:24-25.)

There is no evidence applicant's work was to cease at any certain time after it recommenced in 2017. (See *Id.*, pp. 4:24-6:1.)

The record does not reveal evidence that applicant was engaged in a distinct occupation or business, and there is no evidence that truck driving is usually done under the direction of a principal or by a specialist without supervision. (See *Id.*, 22:20-15.)

However, the record also suggests that the parties believed in 2017 that they were no longer involved in an employer-employee relationship, and that applicant possessed a skill that, at a



minimum, required a specialized driving license. (*Id.*, pp. 25:5-21, 26:24-27:4.)

Hence the weight of the evidence applicable to the secondary *Borello* factors shows that applicant was defendant's employee for purposes of Workers' Compensation law. Accordingly, we conclude that applicant performed work for defendant as an employee and not an independent contractor.

Accordingly, we will deny the Petition.

For the foregoing reasons,

**IT IS ORDERED** that the Petition for Reconsideration of the Findings of Fact, Orders, Award and Opinion on Decision issued on January 3, 2023 is **DENIED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**I CONCUR,**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**MARCH 28, 2023**

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

**MARY VOGT  
LAW OFFICES OF GLEASON & CAMACHO  
LAW OFFICES OF GARY NELSON  
OFFICE OF THE DIRECTOR – LEGAL UNIT**

**SRO/cs**

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