

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

CARMEN HERNANDEZ; EUGENIO HERNANDEZ AGUILAR (Deceased), *Applicants*

vs.

**PENINSULA LUGGAGE, INC.; THE HARTFORD; CALSTAR INSURANCE AGENCY, INC.; CITIZENS INSURANCE COMPANY OF AMERICA, administered by HANOVER INSURANCE GROUP; TRUMBELL INSURANCE COMPANY, administered by THE HARTFORD and EMPLOYERS PREFERRED INSURANCE COMPANY; FORTUNE SECURITIES, INC.; AMGUARD INSURANCE COMPANY, administered by GUARD INSURANCE COMPANIES; TODD and DEANNE THORNE; STATE FARM GENERAL INSURANCE COMPANY, administered by SEDGWICK CLAIMS MANAGEMENT SERVICES; SHIVANG JOSHI, STATE FARM GENERAL INSURANCE COMPANY, administered by SEDGWICK CLAIMS MANAGEMENT SERVICES; and KIRAN and MAYURI PATHAK; ALLSTATE INSURANCE COMPANY, administered by SEDGWICK CLAIMS MANAGEMENT SERVICES,
*Defendants***

**Adjudication Numbers: ADJ11497481; ADJ11523341
Los Angeles District Office**

**OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND
DECISION AFTER RECONSIDERATION**

Applicants seek reconsideration of the Joint Findings of Fact and Order/Joint Opinion on Decision (F&O) issued on January 29, 2024, wherein the workers' compensation administrative law judge (WCJ) found that (1) applicant Carmen Hernandez was not employed as a cleaning person during the period September 4, 1992 to September 4, 2018, by Peninsula Luggage, Inc., whose workers compensation carrier was The Hartford for the period April 1, 2017 to September 4, 2018; by Calstar Insurance Agency, Inc., whose workers compensation carriers were Citizens Insurance Company of America, administered by Hanover Insurance Group for the period January 16, 2018 to September 4, 2018, Trumbull Insurance Company, administered by The Hartford for the period January 16, 2017 to January 16, 2018, and Employers Preferred Insurance Company for the period January 16, 2016 to January 15, 2017; by Fortune Securities, Inc., whose workers compensation carrier was Amguard Insurance Company, administered by Guard Insurance for the period September 4, 2017 to September 4, 2018; by Todd and Deanne Thome, whose insurance carrier was State Farm General Insurance Company, administered by Sedgwick Claims

Management for the period September 4, 2017 to September 4, 2018; by Shivang Joshi, whose insurance carrier was State Farm Insurance Company, administered by Sedgwick Claims Management for the period 2010 to 2012; and by Kiran and Mayuri Pathak, whose insurance carrier was Allstate Insurance Company, administered by Sedgwick Claims Management for the period March 18, 2005 to September 4, 2018 (case number ADJ11487481); and (2) applicant Eugenio Hernandez Aguilar (deceased) was not employed as a cleaning person during the period January 1, 2000 to September 4, 2018, by Peninsula Luggage, Inc., whose workers compensation carrier was The Hartford for the period April 1, 2017 to September 4, 2018; by Calstar Insurance Agency, Inc., whose workers compensation carriers were Citizens Insurance Company of America, administered by Hanover Insurance Group for the period January 16, 2018 to September 4, 2018, Trumbull Insurance Company, administered by The Hartford for the period January 16, 2017 to January 16, 2018, and Employers Preferred Insurance Company for the period January 16, 2016 to January 15, 2017; by Fortune Securities, Inc., whose workers compensation carrier was Amguard Insurance Company, administered by Guard Insurance for the period September 4, 2017 to September 4, 2018; by Todd and Deanne Thome, whose insurance carrier was State Farm General Insurance Company, administered by Sedgwick Claims Management for the period September 4, 2017 to September 4, 2018; by Shivang Joshi, whose insurance carrier was State Farm Insurance Company, administered by Sedgwick Claims Management for the period 2010 to 2012; and by Kiran and Mayuri Pathak, whose insurance carrier was Allstate Insurance Company, administered by Sedgwick Claims Management for the period March 18, 2005 to September 4, 2018 (ADJ11523341).

Applicants contend that (1) they met the burden of proof to establish the legal presumption that they were employed by defendants Kiran and Mayuri Pathak; and (2) the Pathaks failed to meet their burden of proof to establish that they were independent contractors.

We received an Answer from defendants.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be dismissed as untimely or denied on the merits.

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 grant reconsideration, and, 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.

FACTUAL BACKGROUND

In the Report, the WCJ states:

In **ADJ11497481**, CARMEN HERNANDEZ, allegedly employed during the period September 4, 1992 to September 4, 2018 by Peninsula Luggage, Inc., Calstar Insurance Agency, Inc., Fortune Securities, Inc., Todd and Deanne Thome, Shivang Joshi, and Kirin and Mayuri Pathak, claimed to have sustained injury arising out of and in the course of employment to her eye, neck, shoulders, back, right and fingers. In **ADJ11523341** EUGENIO HERNANDEZ AGUILAR, deceased, allegedly employed on during the period January 1, 2000 to July 19, 2018 by Peninsula Luggage, Inc., Calstar Insurance Agency, Inc., Fortune Securities, Inc., Todd and Deanne Thome, Shivang Joshi, and Kirin and Mayuri Pathak, claimed to have sustained injury arising out of and in the course of employment to his eye, neck, fingers, shoulders, internal system, diabetes, cardiovascular system, central nervous system and psyche . . . This Judge issued her Findings of Fact, Award, and Orders and Opinion on Decision dated January 26, 2024, served on January 29, 2024. The Applicant as Petitioner has filed a verified Petition for Reconsideration in EAMS FILE NET dated February 23, 2023, although based on the proof of service, the Petition for Reconsideration was served by applicant on February 28, 2024. Thus the Petition could be viewed as untimely.

...

Although there were numerous alleged employers in this matter, including the Pathak's company, Peninsula Luggage, Inc., Petitioners seem to be only challenging the finding that the applicants were not employees of Kiran and Mayuri Pathak.

...

[T]he petitioners certainly worked for the Pathak's for a long period of time, and no doubt could have been considered presumed employees of the Pathak's, however, this presumption is a rebuttable presumption and one must consider all of the testimonial and documentary evidence presented by the parties. In particular, one must also consider the criteria noted in the case of *S.G. Borello & Sons, Inc., v. Department of Industrial Relations*, (1989) 48 Cal. 3d 341.

The factors noted in *Borello*, at page 351, "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. Generally, ... The individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations." (citations omitted.)

...

This case involved numerous alleged employers over a time span of more than 20 years regarding applicant Carmen Hernandez and 18 years regarding applicant Eugenio Hernandez Aguilar, the late spouse of Carmen Hernandez. Thus the *Borello*, supra, as well as all of the testimonial & documentary evidence must be evaluated.

The first factor noted in *Borello*, supra, was whether the one performing services is engaged in a distinct occupation or business. Here, the testimony of Carmen Hernandez and all of the defense witnesses confirmed that she and her husband Eugenio Hernandez Aguilar would clean and do housekeeping services to either each defendant's home and/or business. Ms. Hernandez also testified that she and her husband had their own janitorial service before, E&C Cleaning Services, about 25 years ago (**Summary of Evidence dated 5/2/2022, page 6, lines 22-23**). They cleaned both offices and homes and had their own supplies and **equipment (Summary of Evidence dated 5/2/2022, page 6, lines 23-24)**. However, Joint Defense Exhibit 1 is a business card for C & E House/Office Cleaning Services (**EAMS DOC ID#36276547**). Joint Defense Exhibit 4 is the 1099 tax form for 2017 from Fortune Securities, Inc. to Carmen Hernandez C&E Cleaning (EAMS DOC ID#36276538). Joint Defense Exhibit 3, is a copy of Applicants' 2017 Federal Tax return with notes that it is an individual return however, on page 1 all of the income is noted as "Business Income" at line 12 (**EAMS DOC ID#36266539**). Additionally, page 3 of the return, "Net Profit from Business", part 1, A-C notes the principal business as "Housekeeper", the business name "Eugenio Carmen Hernandez" and a business code as 561720. Defense Exhibit J are copies of checks to C&E Cleaning from Fortune Securities from October 30, 2017 through September 24, 2018 (**EAMS DOC ID#38692058**). The vendor report of Calstar Insurance Agency for the period November 10, 2003 to November 5, 2018 (Defense Exhibit A) note that the services of C&E House Cleaning Services House Clean Nov & Dec 2003, Jan 2004, Feb 2004 and then Office clean monthly March 2004 to November 2018 and denotes all of the entries as janitorial expense (**EAMS DOC IO#36302741**). Here it is quite clear based on the testimonial and documentary evidence that the applicants were engaged in a distinct occupation or business, namely that of a housekeeping/cleaning service and office cleaning/janitorial service and they claimed their income as Business Income.

The next factor noted in *Borello*, supra, was 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. In other words, was there control exercised by the alleged employer. Here, based on the testimony of Carmen Hernandez she would clean the Pathak home and business and also alleged that Mrs. Pathak hired her to work as her assistant (**Summary of Evidence dated 5/2/2022, page 4, lines 17-18**), Mr. & Mrs. Pathak both dispute this allegation. Mrs. Hernandez also didn't remember most details. Mrs. Hernandez testified that she first started doing janitorial services for the Pathaks maybe 20-25 years ago, but she did not remember (**Summary of Evidence dated 5/2/2022, page 4, lines 9-10**). She testified she got that job when she was knocking on doors handing out flyers looking

for people to hire her (**Summary of Evidence dated 5/2/2022, page 4, lines 10-11**). Both Mr. and Mrs Pathak did testify to receiving a flyer at their home from C&E Cleaning Services (**Summary of Evidence dated 6/30/2022, page 5, line 3, and Summary of Evidence dated 12/1/2022, page 6, lines 19-20**). Ms. Hernandez testified she was told by the Pathak's what to do regularly and she was told her schedule by Mrs. Pathak (**Summary of Evidence dated 5/2/2022, page 4, lines 12-13**). Mrs. Hernandez's testimony also reflects that she when she first started working for the Pathak's it was every 15 days, about 2 hours a day, and then it changed when Mrs. Pathak called her to tell her that Mrs. Pathak wanted her the everyday and wanted Mrs. Hernandez to be her assistant (**Summary of Evidence dated 5/2/2022, page 4, lines 17-18**). However, Mrs. Hernandez also testified that Mrs. Pathak would communicate with her in English which she tried to understand but she does not understand English (**Summary of Evidence dated 5/2/2022, page 4, lines 13-14**). At first she was paid every two weeks and was paid \$95 to \$120 but does not remember (**Summary of Evidence dated 5/2/2022, page 4, lines 19-20**). At some point she then started doing both the Pathak's home and their office/business, Peninsula Luggage, and was paid \$3,300.00 a month (**Summary of Evidence dated 5/2/2022, page 4, lines 22-23**). Mrs. Hernandez further testified that she would have her husband Eugenio come to the Pathak home and offices to clean as well (**Summary of Evidence dated 5/2/2022, page 5, lines 19-20**). She also testified that Mrs. Pathak would many times supervise her at Peninsula Luggage and would tell her to check for spider webs in the comers (**Summary of Evidence dated 5/2/2022, page 5, lines 14-15**). Based on the testimony of the other defense witnesses, it does not appear that any of them actually supervised the cleaning services performed by either Carmen Hernandez or Eugenio Hernandez Aguilar or set any specific schedule for them to follow.

In connection with Fortune Securities, according to Ms. Hernandez's testimony, she worked her own schedule (**Summary of Evidence dated 5/2/2022, page 9, lines 11-12**) and did not have a uniform (**Summary of Evidence dated 5/2/2022, page 9, line 23**). The testimony of the owner of Fortune Securities, Yin Yi Chen, confirms he did not supervise or control the work done by C&E and they did not report on a regular schedule or at a specific time (**Summary of Evidence dated 5/3/2022, page 4, lines 8-10**).

At Calstar, Mrs. Hernandez testified that she decided how to do her work (**Summary of Evidence dated 5/3/2022, page 10, lines 23-24**). Calstar did ask them to come on Fridays, but she went based on her availability (**Summary of Evidence dated 5/2/2022, pages 10-11, lines 25-1**). Mr. Joshi testified that he had a Dry Cleaning Business until October 2015 because he sold the business (**Summary of Evidence dated 5/3/2022, page 5, lines 18-19**). He recalled that Carmen Hernandez was a person that did cleaning with her husband and they owned a company for cleaning services (**Summary of Evidence dated 5/3/2022, page 5, lines 19-20**). He last used Carmen Hernandez at the end of either October or November 2012 (**Summary of Evidence dated 5/3/2022, page 5, line 21**). Carmen Hernandez only provided services for him twice according to Mr. Joshi (**Summary of Evidence dated**

5/3/2022, page 5, line 23). He further testified that Ms. Hernandez provided cleaning services at his condo one time after his sister (Mayuri Pathak) referred her and asked that he give her a chance **(Summary of Evidence dated 5/3/2022, page 5, line 23-24).** She worked for 4 hours and he paid her the price she requested for \$100 in cash **(Summary of Evidence dated 5/3/2022, page 5, lines 24-25).** He testified that she did general cleaning services at his condo **(Summary of Evidence dated 5/3/2022, page 6, lines 3-4).** Additionally when he took over the dry cleaners, Cerritos Cleaners in 2012, he testified that Ms. Hernandez again worked about 4 hours doing "sweeping, mopping, wiping down counters, cleaning a small restroom", and he only used her for a total of 8 hours from 2010-2012 **(Summary of Evidence dated 5/3/2022, page 6, lines 5-14).** Mr. Joshi also worked at Peninsula Luggage prior to 2012 when he worked there **(Summary of Evidence dated 5/3/2022, page 7, line 5).** According to his testimony, when he was promoted in 2003, he knew Carmen Hernandez and her husband would show up at the warehouse on Mondays but he did not know their schedule **(Summary of Evidence dated 5/3/2022, page 7, lines 17-18).** From 2003-2012, he only saw them cleaning the warehouse once or twice and no one really supervised them because they know what they were doing **(Summary of Evidence dated 5/3/2022, page 7, line 19).** He further testified that Mrs. Hernandez and her husband did not clean the entire facility because they were basically there to clean the front office including dusting, vacuuming and cleaning restrooms **(Summary of Evidence dated 5/3/2022, pages 7-8, lines 25-1).** He did supervise employees at the warehouse when he was there **(Summary of Evidence dated 5/3/2022, page 8, line 10).** He is not sure if the office manager told the Hernandez's what to do the first time, then they would just do what needed to be done **(Summary of Evidence dated 5/3/2022, page 8, lines 13-14).** He is not sure what Mr. and Mrs. Hernandez were told each time they were at the warehouse **(Summary of Evidence dated 5/3/2022, page 8, line 15).**

Deanne Thome testified that she used the cleaning services of Carmen and Eugenio and they cleaned her home (Summary of Evidence dated 5/3/2022, page 10, lines 21-22). According to her testimony, they did not represent themselves as a business and did not give her any invoices **(Summary of Evidence dated 5/3/2022, page 10, line 22).** She is familiar with C&E Cleaning and this is Mr. and Mrs. Hernandez' business card (Summary of Evidence dated 5/3/2022, page 10, lines 23-24). However, according to their business card, they did hold themselves out as a business. They would clean her home every two weeks and in the last her they worked for her they were paid \$90 to \$100 **(Summary of Evidence dated 5/3/2022, page 10, line 23-25).** Ms. Thome testified that she and the Hernandez's agreed to the day of the week and every other week they would come to clean unless there was a vacation (Summary of Evidence dated 5/3/2022, page 11, lines 7-8). She did not recall if Mrs. Hernandez ever changed the times, but if there was a change Ms. Hernandez would let her know **(Summary of Evidence dated 5/3/2022, page 11, line 9).** Ms. Hernandez was provided a key to her house and she did not instruct them on how to do their services **(Summary of Evidence dated 5/3/2022, page 11, line 10).** She just asked them to clean specific areas and they did the rest **(Summary of Evidence dated 5/3/2022, page 11, lines 12-13).** To her knowledge the

Hernandez's cleaned her house for approximately an hour to 90 minutes (**Summary of Evidence dated 5/3/2022, page 11, lines 10-11**).

The third factor noted in *Borello*, supra, examines the skill required in the particular occupation. While there is some skill in cleaning homes and offices, it is not to the extent that it requires any classes or license other than using the proper cleaning supplies and equipment for the job. Here the applicants were engaged in cleaning both homes and offices and there was no specific testimony evidence regarding their skill or a lack of skill in performing their cleaning/janitorial services.

Next pursuant to *Borello*, supra, the question is whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work. As notes above, Ms. Hernandez testified that she and her husband had their own janitorial service before, E&C Cleaning Services, about 25 years ago (**Summary of Evidence dated 5/2/2022, page 6, lines 22-23**). They cleaned both offices and homes and had their own supplies and equipment (**Summary of Evidence dated 5/2/2022, page 6, line 24**). When at the Pathak's offices, Ms. Hernandez testified that she used her own broom, bucket and a toilet brush (**Summary of Evidence dated 5/2/2022, pages 6-7, lines 25-1**). She would mop the warehouse and otherwise she cleaned with Mrs. Pathak's cleaning supplies (**Summary of Evidence dated 5/2/2022, page 7, lines 1-2**). However, she also noted that she would have her own cleaning supplies with her, but if Mrs. Pathak was there, she would use Mrs. Pathak's supplies (**Summary of Evidence dated 5/2/2022, page 7, lines 7-8**). No one told her she had to use the cleaning supplies at the Pathak's (**Summary of Evidence dated 5/2/2022, page 7, lines 10-11**). Ms. Hernandez noted with Fortune Securities, she would provide the cleaning supplies (**Summary of Evidence dated 5/2/2022, page 9, lines 9-10**). The testimony of owner of Fortune Securities, Yin Yi Chen, confirms that C&E brought their own cleaning products (**Summary of Evidence dated 5/3/2022, page 4, lines 9-10**). Ms. Hernandez also testified to using her own supplies and tools at Calstar and only once they offered her a bucket (**Summary of Evidence dated 5/2/2022, page 10, lines 24-25**). Shivang Joshi testified that he used Carmen Hernandez at the end of 2012 and recalled that Mrs. Hernandez and her husband owned a company for cleaning services (**Summary of Evidence dated 5/3/2022, page 5, lines 20- 21**). Mr. Joshi further testified that Mrs. Hernandez brought her own equipment and chemicals (**Summary of Evidence dated 5/3/2022, page 6, lines 4-5**). According to the testimony of Ms. Thome, Mr. and Mrs. Hernandez brought their own cleaning supplies. (**Summary of Evidence dated 5/3/2022 , page 11, lines 11-12**).

The fifth factor noted in *Borello*, supra, examines the method of payment, whether by the time or by the job. Here based on the testimony of all witnesses, it appears that it was by the job and not by time. The trial testimony of Carmen Hernandez did not reveal any type of hourly rate charged for the cleaning services. Based on the testimony of all the defense witness, Mr. and Mrs. Hernandez were paid for the job they did when they worked at each one of the alleged defendants and the amounts rarely changed. If the payments did change, it appeared to be based on an invoice or

a change in the set amount. (See Applicant's Exhibit 1 (EAMS DOC ID #34533398), Joint Defense Exhibit 5 and 7 (EAMS DOC ID #36276537 & #36276535), Defense Exhibit A, G, and J (EAMS DOC IDs #36302741, #39407229, & #38692058).

Another factor for consideration pursuant to *Borello*, supra, is whether or not the work is a part of the regular business of the principal. Here based on all the testimony at trial, none of the defendants held themselves out as any type of cleaning or Janitorial Service. Peninsula Luggage is business that sells luggage and the owners, The Pathak's are homeowners and the owners of Peninsula Luggage. Fortune Securities is a securities brokerage firm. Calstar Insurance agency is an insurance service for commercial, auto, and home owners' policies. Shivang Joshi owned a condo/home and a Dry Cleaning business as well as being employed by Peninsula Luggage for a portion of the time. Todd and Deanne Thome were homeowners.

The last factor enumerated by *Borello*, supra, is whether or not the parties believe they are creating the relationship of employer-employee. In this matter the intent of the parties is at odds. As noted in *Borello* at page 349, "[T]he label placed by the parties on their relationship is not dispositive ... " (citations omitted.) Here all of the defendants testified that they did not think Mr. and Mrs. Hernandez were employees and none of them took any taxes out of the checks applicants were given which does not necessary mean that they were independent contractors. However, it does appear that overall, Mr. and Mrs. Hernandez were engaged in the business of cleaning houses and offices/businesses. Their tax return, albeit only one tax return for 2017 (Joint Defense Exhibit 3, (EAMS DOC ID#36266539) even notes that their principal business was "Housekeeper" and they only noted business income, no salary or wages were noted on the return. This tax return was the last return prior to Petitioner EUGENIO HERNANDEZ AGUILAR's death in July 2018. No other tax returns, or 1099 forms were offered into evidence to document the earnings of the petitioners during the alleged dates of injury. It was also noted that the ending date of the continuous trauma for Petitioner CARMEN HERNANDEZ was September 2018 approximately two months after her husband's death. (Report, pp. 1-9.)

DISCUSSION

A petition for reconsideration must be filed and received by the Appeals Board within twenty days of the service of the final order (plus an additional five days if service of the decision is by any method other than personal service, including by mail, upon an address in California). (Lab. Code § 5903; Cal. Code Regs., tit. 8, § 10605; *Oliver v. Structural Services* (1978) 43 Cal.Comp.Cases 596.) This time limit is jurisdictional and, therefore, the Appeals Board has no authority to consider or act upon an untimely Petition for Reconsideration. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1076 [65 Cal.Comp.Cases 650, 656];

Rymer v. Hagler (1989) 211 Cal.App.3d 1171, 1182; *Scott v Workers' Comp. Appeals Bd.* (1981) 122 Cal.App.3d 979, 984 [46 Cal.Comp.Cases 1008, 1011]; *U.S. Pipe & Foundry Co. v. Industrial Acc. Com. (Hinojoza)* (1962) 201 Cal.App.2d 545, 549 [27 Cal.Comp.Cases 73, 75-76].)

Here, as stated in the Report, the F&O was issued on January 29, 2024, and applicants filed their Petition twenty-five days later on February 23, 2023. (Report, p. 2.) Therefore, the Petition is timely and subject to our jurisdiction. Accordingly, we will address its merits.

We observe that 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.” (Lab. Code § 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 Lab. Code § 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.)

In applying these authorities to the record before us, we note that the Report states that "there is a presumption of employment if a person is rendering service to another," and that it was necessary here for the WCJ to determine whether or not each applicant was employed by each of the "numerous alleged employers" by applying *Borello's* analytical framework to the "entire record." (Report, pp. 2-4.)

Although the Report's summary of the procedural and substantive law is correct as far as it goes, the record otherwise fails to show that the WCJ applied the law as required. First, as we have explained, once an applicant establishes that he or she has rendered service for an alleged employer, he or she is presumed to be an employee and the burden shifts to the alleged employer to affirmatively prove its independent contractor defense. (See *Cristler, supra*; *Narayan, supra*.)

However, the Report does not show that the WCJ evaluated the evidence in light of the burden of proof imposed upon each alleged employer for whom an applicant has rendered service, stating merely that applicants "no doubt could have been considered presumed employees of the Pathak[[]s." (Report, p. 3.) This renders the record undeveloped as to whether or not each applicant

was found entitled to the legal presumption of employment as to each alleged employer—and the record is thus unclear as to whether and on what evidence the alleged employers rebutted the presumption where applicable.

Second, as we have explained, the authorities require that the WCJ consider *Borello's* primary factor: the right to control test, which focuses on whether an alleged employer required an applicant to obey instructions or be subject to discipline or termination. (*JKH Enterprises, supra; Toyota Motor Sales, supra.*)

However, the Report does not show that the WCJ considered the right to control factor: It does not identify the right to control test, analyze whether or not each applicant's work for each alleged employer involved receiving and obeying instructions or being subject to discipline or termination, or apply any *Borello* criterion other than those criteria listed as "secondary" factors. (Report, pp. 3-9; *Borello, supra*, at pp. 351-353.)

Labor Code section 5313 requires the WCJ to state 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 [2010 Cal. Wrk. Comp. LEXIS 74].) 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 (Hamilton)* (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*, at p. 478), and must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [113 Cal. Rptr. 162, 520 P.2d 978, 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.)

We conclude that the record before us is insufficient to ascertain the WCJ's reasons or grounds for finding that applicants were not employed by the alleged employers herein. Accordingly, we conclude that the F&O should be rescinded and the matter returned to the trial level for development of the record as to the issue of whether each applicant was employed by

each alleged employer. (See *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [65 Cal.Rptr.2d 431, 62 Cal.Comp.Cases 924]; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [72 Cal.Rptr.2d 898, 63 Cal.Comp.Cases 261] (finding that the Appeals Board has the discretionary authority to develop the record when appropriate to fully adjudicate the issues).)

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

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Joint Findings of Fact and Order/Joint Opinion on Decision issued on January 29, 2024 is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Joint Findings of Fact and Order/Joint Opinion on Decision issued on January 29, 2024 is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 23, 2024

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

**CARMEN HERNANDEZ
LAW OFFICES OF SOLOV & TEITELL
TESTAN LAW
THE HANOVER LAW OFFICE
LAW OFFICES OF LYDIA B. NEWCOMB
COLEMAN, CHAVEZ & ASSOCIATES
LAW OFFICES OF JOE MOBASSERNIA
TOBIN LUCKS
ALBERT & MACKENZIE
CW LAW
PURINTON LAW**

SRO/cs

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