WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

GABRIEL RODRIGUEZ, *Applicant*

vs.

ADVANCED RAINGUTTERS, INCORPORATED, a California corporation; THAO VAN NGUYEN, an individual; TRAM D. LU BAO, an individual; CIGA for CASTLEPOINT NATIONAL INSURANCE COMPANY, formerly known as TOWER INSURANCE COMPANY OF NEW YORK, in liquidation; JOHNNY MONTEALEGRE, an individual, a substantial shareholder of ADVANCED RAINGUTTERS, INCORPORATED, *Defendants*

Adjudication Number: ADJ9945889
Van Nuys District Office

OPINION AND DECISION
AFTER RECONSIDERATION

We previously granted reconsideration in order to allow us time to further study the factual and legal issues in this case. We now issue our Opinion and Decision After Reconsideration.[1]

Defendants Advanced Raingutters and Johnny Montealegre seek reconsideration of the Findings of Fact issued on October 28, 2020, wherein the workers' compensation administrative law judge (WCJ) found that (1) applicant was not employed by Thao Van Nguyen or Tram D. Lu Bao; (2) applicant was employed by "California" Raingutters and Johnny Montealegre, as an individual and substantial shareholder of Advanced Raingutters;[2] and (3) all other issues are deferred.

Defendants contend that (1) the WCJ violated their rights of due process by setting the issue for trial solely as to employment without their agreement as signatories to a pre-trial conference statement and by failing to strike applicant's testimony at the initial trial proceeding after rescinding the findings issued thereon; (2) applicant was an employee of Thao Van Nguyen and could not have been their employee; and (3) applicant's claim is barred by the statute of limitations.

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[1] Chair Zalewski, who was on the panel that issued a prior decision in this matter is unavailable to participate further in this decision. Commissioner Lowe was assigned in her place

[2] Finding of Fact number 2 reads as follows: "2. The applicant was employed by California Raingutters, Inc., a California Corporation, Johnny Montealegre, an individual, and Johnny Montealegre, as a substantial shareholder of Advanced Raingutters, Incorporated a California Corporation." As explained below, the use of the word "California" and not "Advanced" before the word "Raingutters" in finding number 2 appears to be a clerical error.

We received Answers from applicant and CIGA.

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

We have considered the allegations of the Petition, the Answers, and the contents of the Report. Based upon our review of the record, we will affirm the Findings of Fact, except that we will amend finding number 2 to conform to the WCJ's finding that applicant was employed by Advanced Raingutters.

FACTUAL BACKGROUND

While allegedly employed by defendants as a roofer on October 18, 2013, applicant claims injury to his head, brain, spine, lower extremities, upper extremities, psyche, sleep disorder, sexual dysfunction, internal, hearing and sense of taste.

On October 1, 2019, the matter proceeded to trial solely as to the issue of employment. (Minutes of Hearing and Summary of Evidence and Notice of Intent to Sanction and Notice of Intent to Submit, October 1, 2019, p. 3:11.)

The parties stipulated that on the date of applicant's injury Thao Van Nguyen and Tram D. Lu Bao were insured by CIGA, or Castlepoint National Insurance Company, formerly known as Tower Insurance Company of New York, in liquidation. (*Id.*, p. 3:8-9.)

The WCJ admitted an October 15, 2013 proposal from Advanced Raingutters and an undated proposal from Advanced Raingutters into evidence. (*Id.*, p. 3:19-23.) Submitted to Mr. Van Nguyen, the October 15, 2013 proposal is for roof repair work in the amount of $2,400.00. (Ex. A, Advanced Raingutters Proposal, October 15, 2013.) Also submitted to Mr. Van Nguyen, the undated proposal specifies raingutter work in the amount of $2,600.00. (Ex. B, Advanced Raingutters Proposal, Undated.)

At trial, applicant testified that on his first day on a job in Covina for Advanced Raingutters, he fell to the ground from his ladder, hit his head and lost consciousness. (Minutes of Hearing and Summary of Evidence and Notice of Intent to Sanction and Notice of Intent to Submit, October 1, 2019, p. 4:13-24.) About a year before his injury, a foreman named Lucas hired him to work on a job-by-job basis for Advanced Raingutters, which is owned by Johnny Montealgre. (*Id.*) Lucas would pay him up to $200.00 in cash for each day he worked. (*Id.*) He spoke to the owner of the premises where he was working the day of his injury, but the owner did not indicate he would pay him. (*Id.*, pp. 4:25-5:1.)

Mr. Van Nguyen testified that he owns the house in Covina where applicant's accident occurred. (*Id.*, p. 5:11-13.) He signed the contract noted as Exhibit B, and signed an additional contract noted as Exhibit A for roofing repairs Johnny Montealegre told him were required. (*Id.*, p. 5:13-23.) After applicant's injury, Mr. Montealegre and a man named Lucas completed the work. (*Id.*) Other than his contracts with Advanced Raingutters, which he understands is owned by Mr. Montealegre, he had no contracts for work on his house. (*Id.*)

On October 25, 2019, the WCJ issued findings of fact and orders which, as explained in further detail below, were rescinded on November 22, 2019. (Findings of Fact and Orders, October 25, 2019; Order Rescinding Findings of Fact and Orders – Notice of Trial, November 22, 2019.)

On January 21, 2020, the matter proceeded to continued trial as to the following issues:

> 1. Employment. If employment is found as to the homeowners, Labor Code Section 3352(h) is raised. As to Advanced Raingutters, Incorporated and/or Johnny Montealegre, he asserts he is not the employer. Advanced Raingutters, Incorporated and Johnny Montealegre allege that the Declaration of Readiness is filed on the issue of the dismissal of CIGA and not on employment. The Court will again point out that it sent out its own notice setting the matter for employment on 11/26/19 without any response by any party.
>
> 2. Prior stipulations were not signed at the prior MSC, so the alleged employer Advanced Raingutters, Incorporated and/or Johnny Montealegre . . . is alleging that he has not been afforded due process as to the issue of employment.
>
> 3. Advanced Raingutters, Incorporated and/or Johnny Montealegre, a substantial shareholder or an individual, also claims statute of limitations as the injury occurred in 2013 and the defendant was not notified of the claim timely.
> (Minutes of Hearing (Further) and Summary of Evidence, January 21, 2020, p. 3:7-17.)

At the continued trial, Mr. Montealegre testified that he does not own Advanced Raingutters and that it was never in the roofing business. (*Id.*, p. 3:24-25.) His brother, Kenneth Montealegre, owned the company. (*Id.*, p. 4:1-2.)

On the date of applicant's injury, he was working for Advanced Raingutters at Mr. Van Nguyen's house to perform raingutter work. He has never performed roofing work. Also present was a "con guy" named Lucas who would take money for jobs he did not complete. (*Id.*, p. 4:11-16.)

He did not write the proposal identified as Exhibit A, which was for roof repair work and was prepared on his company's letterhead. (*Id*., p. 4:21-22.)

(His testimony was not completed at the January 21, 2020 proceeding because his attorney had a family emergency and the proceeding was suspended.) (*Id*., p. 5:3-4.)

On October 13, 2020, the matter again proceeded to continued trial. (Further Minutes of Hearing and Summary of Evidence, October 13, 2020, p. 1.) Mr. Montealegre testified that he and Lucas worked a few days on raingutters at the property owned by Mr. Van Nguyen, that the roofing work was a separate job, and that Lucas had access to the company letterhead that was on the dashboard of his vehicle. (*Id*., p. 3:15-17.) Applicant never worked for him. (*Id*., p. 3:18.) He was not aware of the contract for roofing work which Lucas obtained without his knowledge or consent. (*Id*., p. 4:13-14.)

In the Report, the WCJ states:

> The threshold issue before the Court is employment.
>
> Applicant was injured while working at a residence, allegedly having been hired by a third party.
> . . .
> At the [MSC] hearing of 7/25/19, the Court noted:
>
> "Trial set over Defendant Raingutter's objection. DOR filed by Kegel Tobin Ventura on 10/30/18 regarding disputed issue of homeowners. Continued from MSC on 1/28/2019 by WCJ Pollak with joinder of UEBTF Oakland. Continued from MSC on 4/11/2019 by WCJ Pollak. Defendant Raingutter appeared at deposition 03/22/2019 and questioned applicant. General appearance found."
>
> The parties were to prepare a Pre-Trial Conference statement and set the matter for trial. Although the parties obtained a trial date, the attorney for Petitioners . . . , Bita Haiem, refused to complete and/or sign the Pre-Trial Conference Statement.
> . . .
> The matter was set for trial on October 10, 2019 . . .
>
> Bita Haiem . . . failed to appear at the hearing.
>
> Sam Malekian (representative) for Bita Haiem informed the Court that Ms. Haiem was not feeling well and did not desire to attend the hearing.
> . . .
> Mr. Malekian left the court before the trial started, and without informing the Court and/or permission of the Court.

In the absence of Bita Haiem, . . . the Court proceeded to trial as to the issue presented.

The Court issued a Notice of Intent as against Bita Haiem . . . for costs and sanctions . . . for failure to appear at the hearing and for abandoning a hearing.

The Court issued a Notice of Intent to Submit the case.

The Court received a response to the Notice of Intent to Submit from Petitioners by way of its/their "Objection to Notice of Intent Sanction (sic) and Notice to Submit and Verification" dated 10/16/19.

The Court issued its Findings of Fact and Opinion on 10/24/19.

Petitioners . . . filed a Petition for Reconsideration on 11/7/19.
. . .
The undersigned rescinded the Findings and Orders and set the matter back on the trial calendar on notice, dated 11/21/19.

The Court issued an amended trial notice . . . noting:
. . .
The court issues notice that the following issue will be tried on that date:

1. Employment

All other issues are deferred

There was no objection to the amended trial notice dated 11/26/19.
. . .
At the trial date of . . . 1/21/20, the parties did appear, <u>including</u> counsel for Advanced Raingutters . . . and/or Johnny Montealegre . . .

The parties were Ordered to complete and sign the erstwhile incomplete Pre-trial Conference Statement, which they did just before the lunch hour.
. . .
The Court found the testimony of defendant Thao Van Nguyen to be both credible and reliable. He was forthright and did not evade any questions.
. . .
The Court found the testimony of Mr. Montealegre to be less than candid, self-serving and unreliable. Mr. Montealegre was evasive and lacked credibility consistently and regularly throughout his testimony . . .
. . .
The trial resumed ultimately on 10/13/2020 . . .
. . .

> The Court again heard the testimony of Gabriel Rodriguez, the injured worker. He was cross-examined by all parties.
> (Opinion on Decision, pp. 2-20.)

DISCUSSION

We turn first to defendants' contention that the WCJ violated their rights of due process by setting the issue for trial solely as to employment without their agreement as signatories to a pre-trial conference statement. More specifically, defendants argue that because they objected to trial of any issue other than CIGA's petition for dismissal, because they did not initially agree to complete a pre-trial conference statement, and because "If there is no Pre-Trial Conference Statement filled out the day of the Mandatory Settlement Conference, then no trial can be held," trial of the employment issue constituted a violation of their rights of due process. (Petition, pp. 4:28-5:18.)

WCAB Rule 10787 provides, in pertinent part, as follows:

> (a) The parties shall submit for decision all matters properly in issue at a single trial and produce at the trial all necessary evidence, including witnesses, documents, medical reports, payroll statements and all other matters considered essential in the proof of a party's claim or defense. However, a workers' compensation judge may order that the issues in a case be bifurcated and tried separately upon a showing of good cause.
> (See Cal. Code Regs., tit. 8, former § 10560, now § 10787 (eff. Jan. 1, 2020).)

In addition, WCJs are specifically empowered to handle proceedings as appropriate and necessary to ensure substantial justice in an expeditious fashion and have broad discretion to accomplish this mandate. (See Lab. Code, §§ 133, 5700; Cal. Code Regs., tit. 8, former § 10348, now 10330 (eff. Jan. 1, 2020); Cal. Const., art. XIV, § 4.)

In this regard, the WCJ determined that the "threshold issue . . . is employment" based upon allegations that applicant sustained injury while working at Mr. Van Nguyen's residence for a third party. (Report, pp. 2, 11.) Since CIGA stands in the shoes of Mr. Van Nguyen's insurer, Tower, and any claims against Tower could be subject to dismissal upon proof that its insured did not hire applicant, a decision on the employment issue could determine (1) whether CIGA should be dismissed; (2) what, if any, other parties could be liable on applicant's claim; and, (3) in the event that no other parties could be held liable, whether defenses such the statute of limitations are moot. (See Minutes of Hearing and Summary of Evidence and Notice of Intent to Sanction and

Notice of Intent to Submit, October 1, 2019, p. 3:8-9.) Accordingly, we concur with the WCJ's decision to hold trial solely on the issue of employment.

We are also unpersuaded that the WCJ's decision to hold trial solely on the issue of employment without defendants' initial agreement as signatories to a pre-trial conference statement was in violation of defendants' rights of due process.

Here, the record shows that defendants' counsel, Ms. Haiem, appeared at the third mandatory settlement conference of July 25, 2019, agreed to a trial date, and declined to complete a pre-trial conference statement. (Report, pp. 5-6.) Ms. Haiem failed to appear at the October 1, 2019 trial, and the WCJ issued findings of fact and orders following that proceeding and then rescinded them on November 21, 2019. (Report, pp 6-7.) On November 26, 2019, the WCJ issued an amended notice of trial, notifying the parties that trial would be held solely on the issue of employment, with all other issues deferred. (Report, p. 8.) Defendants did not object to this notice, appeared at the January 21, 2020 trial, signed the pre-trial conference statement, and presented testimony in their own defense on that date and again at the continued proceeding of October 13, 2020. (Report, p. 9.)

It is thus clear that defendants were on notice of the initial trial date but failed to appear; and, thereafter, received notice of another proceeding at which they exercised their opportunity to present a defense. Hence the record is without grounds to support the contention that trial of the employment issue violated defendants' rights of due process. (See *Katzin v. Workers' Comp. Appeals Bd*. (1992) 5 Cal.App.4th 704, 711-12 [57 Cal.Comp.Cases 230] [stating that a fundamental requirement of due process in any proceeding to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections].)

We next address defendants' contention that the WCJ's failure to strike applicant's testimony at the initial trial proceeding after rescinding the findings and orders thereon violates their rights of due process. Here, defendants cite no legal authority, and we are aware of none, for the proposition that the WCJ is required to strike a record of proceedings in the event that findings or orders based thereon are rescinded. Further, as stated above, the record fails to show that defendants were denied notice and an opportunity to be heard with respect to the proceeding. Moreover, although defendants' counsel failed to appear at the proceeding, the WCJ provided defendants two subsequent opportunities at which they could cross-examine applicant and otherwise present their defense. (Minutes of Hearing (Further) and Summary of Evidence, January

21, 2020, p. 3:7-17; Further Minutes of Hearing and Summary of Evidence, October 13, 2020, p. 1; Report, p. 20.) Accordingly, we are unable to discern merit to defendants' argument that the WCJ's failure to strike applicant's testimony at the initial trial proceeding violates their rights of due process.

We next address defendants' contention that applicant was an employee of Mr. Van Nguyen and could not have been their employee. Here, applicant testified that he was employed by defendants and not the homeowner, Mr. Van Nguyen. (Report, p. 14.) Further, Mr. Van Nguyen testified that he hired defendants to perform roofing repair work which occasioned applicant's accident, testimony which the WCJ found credible and reliable. (Report, pp. 14-15.) On the other hand, while Mr. Montealegre testified that defendants did not perform roofing repair work, that their enterprise was limited to raingutters, and that they had not employed applicant, the WCJ concluded that his testimony was consistently lacking in credibility. (Report, p. 16.) Since the WCJ had the opportunity to hear the witnesses' testimony and observe their demeanor at the proceedings, we accord his credibility determinations great weight. (See *Garza v. Worker's Comp. Appeals Bd*. (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500].)

Additionally, contrary to defendants' argument, the panel decision in *Arambul v. Ortiz*, 2020 Cal. Wrk. Comp. P.D. LEXIS 33,[3] has no bearing on the evidence concerning employment in this case. There the facts show that an employment relationship arose when a homeowner directly hired a housepainter who was injured at the homeowner's residence. Here the record lacks evidence that Mr. Van Nguyen hired applicant but contains substantial evidence that defendants hired him. Accordingly, we are unable to discern merit to the argument that that applicant was an employee of Mr. Van Nguyen and could not have been defendants' employee.

Turning to defendants' contention that applicant's claim is barred by the statute of limitations, we note that the Findings of Fact contains no determination as to that issue and states explicitly that all issues other than employment are deferred. Given the absence of a final decision as to defendants' statute of limitations defense, there are no grounds for reconsideration on that issue. (See Labor Code § 5900; see also *Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180;

[3] Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See G*ee 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].)

Safeway Stores, Inc. v. Workers' Comp. Appeals Bd. (*Pointer*) (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410, 413]; *Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075, [65 Cal.Comp.Cases 650, 650-651, 655-656].) Accordingly, we are unable to discern merit to the argument that the WCJ erroneously failed to find that applicant's claim is barred by the statute of limitations.

Lastly, we recognize that the word "California," not "Advanced," appears before the word "Raingutters" in finding number 2. Given that the name California Raingutters does not appear elsewhere in the record and that the Findings of Fact otherwise identify Advanced Raingutters as applicant's employer, we conclude that this use of the word "California" to identify applicant's employer was a mistake made in the recording of the WCJ's finding. Since a mistake made in the recording of a judgment rendered by the WCJ is a "clerical error" which we may correct at any time without need of a further hearing, we will amend finding number 2 to conform to the WCJ's finding that applicant was employed by Advanced Raingutters. (See *In re Candelario* (1970) 3 Cal.3d 702, 705; *Toccalino v. Workers' Comp. Appeals Bd.* (1982) 128 Cal.App.3d 543 [47 Cal.Comp.Cases 145, 154–155]; *Morgan v. Board of Equalization* (1949) 89 Cal.App.2d 674, 682.)

Accordingly, we will affirm the Findings of Fact, except that we will amend finding number 2 to conform to the WCJ's finding that applicant was employed by Advanced Raingutters.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings of Fact issued on October 28, 2020 is **AFFIRMED**, except that it is **AMENDED** as follows.

FINDINGS OF FACT

* * *

2. The applicant was employed by Advanced Raingutters, Inc., a California Corporation, and Johnny Montealegre, as an individual and substantial shareholder of Advanced Raingutters, Inc., a California Corporation.

* * *

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 8, 2021

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

GABRIEL RODRIGUEZ
ROBERT ROBIN & ASSOCIATES
LAW OFFICES OF BITA N. HAIEM
KEGEL TOBIN & TRUCE

SRO/oo

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