WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

RICHARD HERRERA, ***Applicant***

vs.

MICHAEL PAIVA; STATE FARM FIRE AND CASUALTY COMPANY, administered by SEDGWICK CLAIMS MANAGEMENT, ***Defendants***

Adjudication Number: ADJ12830624
Sacramento District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted defendant's Petition for Reconsideration to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.[1]

Defendant seeks reconsideration of the Findings of Fact issued on January 4, 2022, wherein the workers' compensation administrative law judge (WCJ) found that applicant was an employee of Michael Paiva on January 21, 2019.

Defendant contends that applicant performed work as an independent contractor and cannot be deemed to be an employee under Labor Code sections 3351 and 3357.[2] Defendant further contends that applicant cannot be presumed to be an employee under section 2750.5 because the evidence fails to establish that a contractor's license was required for applicant's work. Defendant further contends that the WCJ erroneously found that applicant testified credibly.

We did not receive an Answer from applicant.

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 Answer, and the contents of the Report. Based on our review of the record, and for the reasons stated below, as our Decision After Reconsideration, we will affirm the Findings of Fact.

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[1] Commissioner Lowe is no longer a member of the Workers' Compensation Appeals Board. Commissioner Capurro has been substituted in her place.

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

FACTUAL BACKGROUND

On November 9, 2021, the matter proceeded to trial as to the following issue: "Employment (independent contractor)." (Minutes of Hearing and Summary of Evidence, November 9, 2021, p. 2:10.)

The WCJ admitted an Employee Ledger for November 5, 2018 through January 23, 2019. (Ex. 1, Employee Ledger, November 5 2018-January 23, 2019.)

At trial, applicant testified that defendant created the Employee Ledger, which shows that applicant began work November 5, 2018 and worked through January 21, 2019, and was paid $30.00 per hour for 224.5 hours of work, or $6,712.50. (*Id*., p. 3:8-14.) He further testified that defendant paid him in cash at the end of every day and kept track of his lunch breaks. Defendant did not provide him with a Form1099. (*Id*.)

His work involved floor brackets, framing, roof sheathing, tile installation, and plumbing on defendant's residence. (*Id*., p. 3:19-25.) As to the framing, defendant designed the gable and walls and decided where the doors and windows would be placed. As to the plumbing, defendant directed him as to how the plumbing would run. In addition, he performed tile work and defendant showed him how he wanted the tile laid out, and at times instructed him how to accomplish this. (*Id*.) He almost never worked alone as defendant was almost always present. (*Id*., p. 4:1-2.) He brought the scaffolding to the residence, and both he and defendant installed it. (*Id*., p. 4:4-11.)

Defendant testified that he was on the property ninety-five percent of the time applicant was working there. (*Id*., p. 8:8-9.) He further testified that he noted applicant's lunch breaks on the ledger, but did not tell him when to take lunch. (*Id*., p. 8:9-18.) He would go over with applicant what work applicant needed to perform, but did not really supervise and instruct him, though applicant would occasionally ask a question. (*Id*., pp. 8:9, 9:2-3.)

In the Opinion on Decision, the WCJ states:

> Applicant sustained an injury on January 21, 2019. He alleges that he injured his lumbar spine, right knee and head when scaffolding collapsed while he was employed by Michael Paiva. . . .
>
> Mr. Paiva was remodeling his modular home and hired applicant to work on the house. Both applicant and Mr. Paiva testified that applicant performed work such as framing, tile work and plumbing. Applicant generally used his own tools. There is a dispute as to who controlled the work. Applicant was paid in cash, daily at the rate of $30 per hour . . .

Applicant performed services for the benefit of Mr. Paiva by working on Mr. Paiva's house. Mr. Paiva paid applicant for these services. Applicant has met his [initial] burden that he was an employee. . . .

Applicant did not have a contractor's license, or any type of business license . . .

[B]oth applicant and Mr. Paiva testified that on occasion, Mr. Paiva would instruct applicant how to do the job. Mr. Paiva purchased all of the materials and applicant supplied the tools. Applicant was paid hourly and was not requested to bid the job. After review of all of the testimony, it is concluded that applicant was an employee of Michael Paiva.
(Opinion on Decision, pp. 2-3.)

In the Report, the WCJ states:

Applicant sustained an injury on January 21, 2019 while working as a handyman for Michael Paiva. Applicant was helping Mr. Paiva remodel his modular home. Applicant alleged he was an employee; Mr. Paiva claimed applicant was an independent contractor.
. . .
The Petition for Reconsideration does note some factors that would point to applicant's status as an independent contractor. Notably defendant cites that applicant simultaneously worked other jobs, provided his own tools, and there was no set length of time that the job was to be done. . . . Both Mr. Paiva and applicant testified that there were occasions where Mr. Paiva would instruct applicant on how to do a job. Applicant was paid hourly and Mr. Paiva kept track of applicant's hours. Mr. Paiva purchased all of the materials. Hence, overall the defendant did not establish by a preponderance of the evidence that applicant was an independent contractor . . .

Applicant presented as a credible witness. Overall, most of the facts relied upon by the Court were derived from testimony that both applicant and Mr. Paiva testified to. There were very few disputed facts; the case was more about the application of the law.
(Report, pp. 1-3.)

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.) 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, both applicant and defendant testified that defendant had occasion to instruct applicant as to how to perform his work and defendant testified that he was present on the property ninety-five percent of the time applicant was performing work there, a period of at least two months and two weeks. (Report, p. 3; Minutes of Hearing and Summary of Evidence, November 9, 2021, p. 8:8-9.) It follows that defendant oversaw applicant's work; and, therefore, we conclude that he retained overall control over the details of that work.

In addition, the application of *Borello's* secondary factors suggest that applicant's work was that of an employee. (Report, p. 3.) In particular, the record (1) shows that defendant provided the materials and place of work; (2) does not show that applicant was engaged in a distinct occupation or business, was paid by the job, or exercised the skill required of a specialist without supervision; and (3) shows that defendant provided the materials and place of work while applicant provided his own tools. (Opinion on Decision, pp. 2-3; Minutes of Hearing and Summary of Evidence, November 9, 2021, pp. 3:8-9:3; Ex. 1, Employee Ledger, November 5 2018-January 23, 2019.) 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.

We turn next to defendant's contention that applicant cannot be presumed to be an employee under section 2750.5, which provides that if an unlicensed contractor is injured while performing work for which a license is required, there is a rebuttable presumption that the unlicensed contractor is an employee. (*State Compensation Ins. Fund v. Workers' Comp. Appeals Bd.* (*Meier*) (1985) 40 Cal.3d 5 [50 Cal.Comp.Cases 562].) However, having determined that applicant performed work as an employee and not an independent contractor, we are unable to discern how the issue of whether or not he may be presumed an employee could bear on our evaluation of the Petition. Accordingly, we reject as moot defendant's contention that applicant cannot be presumed to be an employee under section 2750.5.

We next evaluate defendant's contention that applicant's testimony was not credible on the grounds that it was inconsistent as to his prior training and demonstrated an unwillingness to pay taxes, obtain insurance, and refrain from working without a contractor's license. Here we concur with the WCJ that the testimonial evidence provided by the parties on matters relating to the *Borello* factors is substantially consistent. (Report, p. 3.) And, because we accord the WCJ's credibility determination great weight, and because the record contains no evidence of considerable substantiality warranting our rejection of her determination, we are unpersuaded that applicant's testimony was not credible. (*Garza v. Worker's Comp. Appeals Bd*. (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500].) Accordingly, we conclude that the WCJ's credibility determination is supported by the record.

Accordingly, as our Decision After Reconsideration, we will affirm the Findings of Fact.

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 January 4, 2022 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEBRUARY 13, 2023

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

RICHARD HERRERA
LAW OFFICES OF JOSEPH T. TODOROFF
ALBERT & MACKENZIE

SRO/*cs*

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