WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

RONALD PERDOMO*, Applicant*

vs.

D&D PAINTING, INC.; REDWOOD FIRE & CASUALTY INSURANCE COMPANY, administered by BERKSHIRE HATHAWAY HOMESTATE COMPANIES*, Defendants*

Adjudication Number: ADJ14026834
Pomona District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the Findings of Fact issued on September 9, 2021, wherein the workers' compensation administrative law judge (WCJ) found that applicant was an employee of defendant on the date of his claimed injury.

Defendant contends that applicant is not entitled to the legal presumption of employment because he failed to establish that he rendered service on its behalf while under a contract for hire.[1]

We received 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 and in the Report, which we adopt and incorporate herein, we will deny reconsideration.

FACTUAL BACKGROUND

In the Opinion on Decision, the WCJ states:

> All defense witnesses testified that they did not know the applicant and that he was not ever hired to work for the employer, however, their testimony was contradictory on several issues detailed, below.

[1] We note that defendant argues that "applicant must show he was under a contract of hire" and that applicant "has not provided any evidence of a contract for hire." (Petition, pp. 5:9, 5:21-22.) As explained below, we conclude that while applicant holds the burden of proving that he rendered service to defendant, defendant holds the burden of proving that applicant was not under a contract of hire.

David Jacobo, president of the company, testified that Ronald Aguilar, his nephew, working there for over one year could hire people to work at the employer, but not without his knowledge, whereas, Ronald Aguilar testified that he could not hire anyone to work at D&D Painting and Drywall, contrary to the president's testimony.

Ronald Aguilar further testified that the company probably had jobs in Ventura during the period when applicant alleged he was injured at a project there, (MOH, SOE, 8-24-21 page 6, lines 7 through 8), while working for D&D, yet Sergio Giron, supervisor at D&D, testified that there were no projects in Ventura at that time. When asked if he would be surprised if another witness for the employer testified that there were jobs in Ventura at that time and the witness had no response (MOH, SOE, 8-24-21, page 9, lines 10 through 13).

The court asked if Sergio was supervising Mr. Linares, witness for applicant who worked with Mr. Perdomo, at all times and the witness testified that he would not be doing the work with Mr. Linares but was supervising him. He had previously testified that he would not know if Mr. Linares had someone working there with him. This testimony was contradictory.

The president could not estimate the number of employees at the company at the time of the applicant's alleged injury in October, 2020, nor could he state how many were employed in the last ten months, even though he does all of the hiring and firing (MOH SOE, 8-24-21, page 4, lines 4 through 7).

All witnesses for defendant knew Arnoldo Linares, applicant's witness, who testified that applicant was employed there and paid through a check Mr. Linares received, even though that witness was still working for the company at the time of his testimony (MOH, SOE, page 8, lines 19 through 21). The court found his testimony credible and likely true, given that he may have risked the loss of his job over said testimony.

Last, applicant could not provide the cell phone records for the number he called to speak with Sergio Nelson Duque Giron to see if there was work, but was able to provide the telephone number for Mr. Giron. Failure to produce check stubs or the cell phone records was somewhat troubling to the court, but defense witness testimony wherein the witnesses tended to contradict one another caused the court to find in applicant's favor . . .
(Opinion on Decision, pp. 3-4.)

DISCUSSION

We observe that California has a no-fault workers' compensation system. With few exceptions, all California employers are liable for the compensation provided by the system to employees injured or disabled in the course of and arising out of their employment, "irrespective

of the fault of either party." (Cal. Const., art. XIV, § 4.) The protective goal of California's no-fault workers' compensation legislation is manifested "by defining 'employment' broadly in terms of 'service to an employer' and by including a general presumption that any person 'in service to another' is a covered 'employee.'" (Labor Code §§ 3351, 5705(a)[2]; *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 354 [54 Cal.Comp.Cases 80].)

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.) 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*).) Consequently, all workers are presumed to be employees unless the hirer can demonstrate that the worker meets specific criteria to be considered an independent contractor.

In the present case, defendant contends that applicant is not entitled to the legal presumption of employment because he failed to establish that he rendered service on its behalf while under a contract for hire. Contrary to defendant's legal position, however, applicant bears the burden of proving that he rendered service for defendant, whereupon the burden shifts to defendant to rebut the employment presumption by proving that applicant did not work "under any appointment or contract of hire or apprenticeship." (See § 3351; *Parsons v. Workers' Comp. Appeals Bd.* (1981) 126 Cal.App.3d 629, 638 [46 Cal.Comp.Cases 1304].)

In other words, after applicant demonstrates that he rendered service for defendant, defendant must show by a preponderance of the evidence that he rendered service in an excluded status or under conditions that fall short of establishing a contract of hire. (C*alifornia Compensation Ins. Co. v. Workers' Comp. Appeals Bd.* (*Hernandez*) (1998) 63 Cal.Comp.Cases 844 (writ den.); *Lara v. Workers' Comp. Appeals Bd*. (2010) 182 Cal.4th 393, 402 [75 Cal.Comp.Cases 91].)

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

Pursuant to these authorities, we address the initial issue of whether applicant presented evidence sufficient to establish that he rendered service for defendant. The record in this regard reveals that the WCJ determined that applicant "rendered services to the employer of installing drywall" based upon the credible testimony of applicant and Mr. Linares. (Report, p. 3.) Moreover, the WCJ found Mr. Linares's testimony particularly significant in that it was given while he was "still working for the employer." (Report, p. 4.) By contrast, the WCJ did not find defendant's witnesses credible. (Opinion on Decision, pp. 3-4; see Report, pp. 3-6.) We give the WCJ's credibility determinations great weight because the WCJ had the opportunity to observe the witnesses' demeanor at trial. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318–319 [35 Cal.Comp.Cases 500, 504–505].) In addition, the record before us lacks evidence of considerable substantiality that would warrant our rejection of the credibility determinations. (*Id*.) Accordingly, we are unable to discern error in the WCJ's determination that applicant is legally presumed to be defendant's employee.

As to the issue of whether defendant presented evidence establishing that applicant did not work under a contract for hire, we observe that defendant may overcome the employment presumption by proving, "that the essential contract of hire required under the definition of employee in section 3351 is absent." (*Barragan v. Workers' Comp. Appeals Bd*., 195 Cal.App.3d 637, 643 (citing *Parsons*, *supra*, at 638).)

Here, as discussed above, the WCJ determined that the testimony of defendant's witnesses failed to establish that applicant was not employed because it was contradictory as to basic facts, including such as whether defendant had a condominium project in the area at the time applicant alleged and who among defendant's officials was responsible for hiring employees. (Opinion on Decision, pp. 3-4; Report, pp. 3-6.) Accordingly, we conclude that defendant failed to present evidence to establish that applicant did not work under a contract for hire.

Accordingly, we will deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Findings of Fact issued on September 9, 2021 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 22, 2021

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

RONALD PERDOMO
LAW OFFICES OF WILLIAMS, BECK & FORBES
HALLETT, EMERICK, WELLS & SAREEN

SRO/ara

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

REPORT AND RECOMMENDATION ON RECONSIDERATION

I.
INTRODUCTION

1. Date of Injury: October 26, 2020
   Allegedly Employed: D&D Painting and Drywall
   Alleged Parts of Body Injured: Head 198, right hand 330; back 420

2. Identity of Petitioner: Defendant
   Timeliness: Petition is timely
   Verification: Petition is verified

3. Date of Issuance of Findings of Fact: September 7, 2021

4. Petitioner's Contentions:

a. Per the Order, Decision or Award, the Board acted without or in excess of its powers;
b. That the evidence does not justify the Findings of Fact;
c. That the Findings of Fact do not support the Award.

II.
STATEMENT OF CASE

Ronald Perdomo alleged injury occurred on October 26, 2020 while allegedly employed at D&D Painting and Drywall, with the employer denying he was ever hired. Applicant had a partial application from this company and testified throughout that his friend Arnoldo Linares received a paycheck that included wages due the applicant as initially, applicant did not have a Social Security number to provide. Mr. Linares would cash the checks and then give the money to the applicant. WCJ found applicant's testimony and that of his witness, Arnoldo Linares, credible, particularly since the witness for applicant was working for the employer at the time he gave testimony against D&D Painting and Drywall as well as due to the contradictory testimony of the defense witnesses.

As such, WCJ found employment, based upon the more credible testimony of applicant and his witness.

It is from this decision that Petition for Reconsideration is filed.

III.
FACTS

One paystub was entered into evidence showing payment to Mr. Linares but not showing applicant on the paystub, who Mr. Linares said was also to have been paid. The amount of the check was $369.00 for a period of October 18, 2020 through October 24, 2020.

A controversy arose regarding whether or not applicant and Mr. Linares worked that week but Mr. Linares then testified on cross examination that he worked that same week and was not paid until the following week for two weeks of work, so that the paystub, Exhibit 2, would reflect payment only for applicant. Defense witness denied this but her testimony was confusing to WCJ.

There were three witnesses for defendant whose testimony was contradictory as noted in the WCJ Opinion on Decision. Testimony was that they did not know applicant, nor was he ever hired by them but gave conflicting testimony on a number of issues.

For instance as to whether or not there were condominium projects in Ventura in 2020, Sergio Giron testified that there were not such projects in Ventura for the company in 2020, while Ronald Aguilar testified that there were probably projects in Ventura in 2020. When asked if he would be surprised if another witness for defendant stated there were such projects in Ventura in 2020, Mr. Giron did not have a response.

The issue of hiring employees was a question for all but one of the defense witnesses. Here, though the president testified he tried to know all of the employees, he could not estimate (emphasis added) how many employees he had on the date of the alleged injury of October 26, 2020, nor the number of employees working there in the last ten months (MOH, SOE, July 1, 2021, page 4, lines 4 through 6). Nonetheless, he testified that applicant was not hired at his company.

As such, the undersigned found applicant was employed by D&D Painting and Drywall, having rendered services to the employer of installing drywall, given that confirmation of his employment was confirmed by his witness, (MOH, SOE, 7-1-21, page 8, lines 16 – 17), who was still employed by the company at the time his testimony was given.

WCJ noted that applicant and his witness gave certain testimony that was contradictory, such as that the check, Exhibit 2, applicant's witness initially testified was only for the applicant. He then testified that he did work that same week but received his check for two week's pay the next week, confirming that Exhibit 2 (mistakenly identified as Exhibit 1 in the body of the Minutes of Hearing, Summary of Evidence, dated 7-1-21) was only pay for the applicant and not for him (MOH, SOE, 7-1-21, page 8, lines 23 -24). Again, defense witness Diana Lara testimony doubted this but was confusing, as stated on page 4, below.

In the Opinion on Decision, it was stated that it did trouble the WCJ that no other paystubs were available for review, but again, since applicant has the presumption of employment, and testified along with a witness still working for the employer that Mr. Perdomo was employed by D&D, et al. WCJ found their testimony more credible and hence, that there was employment by the applicant, working on drywall.

IV.
DISCUSSION/ARGUMENT

Contention A: Applicant did not meet his burden of proving employment as the presumption requires the applicant to prove that he was rendering a service for the employer.

Defendant alleges in its petition that applicant did not prove he rendered a service for the employer, but WCJ disagreed as applicant testified to having provided drywall services at D&D Painting and Drywall.

WCJ relied on Labor Code Section 3357, stating, "Any person rendering service for another, other than an independent contractor, or unless expressly excluded herein is presumed to be an employee." In the case, herein, WCJ found that the testimony of applicant and his witness was credible regarding his actually working at a home project for the employer.

It is true that the applicant did not provide proof in the form of a paystub that he was working for the company, but he did provide a witness, still working for the employer when he gave his testimony, who WCJ found credible, that applicant was paid through a check written to Mr. Linares who then paid applicant after cashing the check.

Mr. Linares testified that he was paid for piecework and Ms. Lara testified she did not issue Mr. Linares a paycheck, despite it being her job to do payroll (MOH, SOE, 8-24-21, page 7, line 8). She testified that she knew of Mr. Linares, but did not issue him a paycheck as his supervisor, Sergio Nelson Duque Giron turned in timesheets for Mr. Linares for the piecework he did. Her testimony continued that she did not issue a paycheck to Mr. Linares but did create one for him (MOH, SOE, 8-24-21, page 7, lines 15–18). The testimony was confusing, at best.

Sergio Giron, supervisor of drywall at the company for twelve years, testified initially that he would not have known if Mr. Linares had someone working with him (MOH, SOE, 8-24-21 lines 9–11), and went on to state that he was supervising Mr. Linares at work and did not recall a project in Ventura (MOH, SOE, 8-24-21, page 9, lines 9–10) whereas defense witness Mr. Aguilar testified that there probably were condominium projects in Ventura in 2020 (MOH, SOE, 8-24-21, page 6, lines 6-7).

Mr. Giron, also testified that he supervised Mr. Linares at a project in Ventura but he could not recall when (MOH, SOE, page 8, lines 11–13) but did not believe it was in the last twelve months. Again, contradictory testimony from defense witnesses.

In addition, neither witness could testify or explain how it was that the applicant had the cellular telephone numbers not just for Mr. Aguilar, (MOH, SOE, 8-24-21, page 6, lines 9-11) but also for Mr. Giron (MOH, SOE, 8-24-21, page 8, lines 14-17). Given this was not explained, again, WCJ found their testimony less than credible.

<u>Contention B:</u> That a lack of findings underline that WCJ Bather acted in excess of her power when the Order issued.

Ronald Aguilar, nephew of the owner, David Jacobo, testified that he had the authority to hire *no one* (emphasis added) at D&D Painting and Drywall, (MOH, SOE, page 5, line 23), while the president of the company, witness, Mr. Jacobo, testified that Mr. Aguilar did have authority to hire for D&D, (MOH, SOE, 8-24-21, page 4, lines 20–21). Again, opposing testimony was given.

WCJ agrees that under LC 5705, applicant had the burden of proof that he was employed at D&D Painting and Drywall. However, proof in the form of his testimony WCJ found credible along with that of his witness, Mr. Linares, was sufficient to find applicant was employed.

Although petition alleges that a lack of evidence is fatal to the case, it seems to follow that applicant's testimony and that of his witness that WCJ found credible is evidence in support of applicant providing a service to the employer of putting in drywall, despite no "contract of hire with D&R Painting and Drywall. Cases are often decided on the issue of employment without a specific "contract of hire."

The testimony of Mr. Jacobo, Mr. Aguilar, Ms. Lara nor Mr. Giron was not enough to defeat applicant's claim that he was employed, particularly given the contradictory or confusing testimony of these witnesses.

The court's requirement mandates that in determining whether or not a person is an "employee," Labor Code Section 3202 mandates that the workers' compensation statutes should be liberally construed in favor of awarding compensation. Furthermore, as in ***Anaheim General Hospital v. WCAB (1970) 25 CCC 2, 4***, the court found that there is no special test, fact, or circumstance that conclusively defines, "employee," for all purposes such that each case must turn on its own circumstances. Here, the WCJ found that credible testimony of applicant and his witness were the basis for its findings.

V.
RECOMMENDATION

It is respectfully recommended that the Petition for Reconsideration be denied.

DATE: October 5, 2021

Helen Bather
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE