

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

JOSE JUAN VEGA BUCIO, *Decedent*

ELVIRA SANCHEZ DE VEGA *Applicant*

vs.

JUAN BERUMEN and

UNINSURED EMPLOYERS BENEFIT TRUST FUND, *Defendants*

Adjudication Number: ADJ11236899

Bakersfield District Office

**OPINION AND ORDER
GRANTING PETITION
FOR RECONSIDERATION**

Defendant seeks reconsideration of the Findings of Fact and Orders issued by the workers' compensation administrative law judge (WCJ) in this matter on July 26, 2023. In that decision, the WCJ found in pertinent part that decedent Jose Juan Vega Bucio was employed by defendant Juan Beruman at the time of his injury on March 12, 2017; that defendant Beruman was not insured for workers' compensation on March 12, 2017; that applicant's employment by Beruman was for less than 52 hours and that the cost of the labor was in excess of \$100.00; and that defendant was required to have a license when employing applicant for the type of work and did not have a license on March 12, 2017.

Defendant contends that decedent did not meet the requirements of Labor Code section 3715(b)(3) at the time of his injury because decedent's work was for less than 10 working days; that decedent must also meet the requirements in Labor Code section 3351 before Labor Code section 2750.5 is applicable; that defendant did not exercise control over decedent's work; and that although it admittedly has no application in the context of workers' compensation proceedings, Cal/OSHA concluded that there was no employer/employee relationship.

We received an Answer from applicant Elvira Sanchez de Vega.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ, recommending that the Petition for Reconsideration be denied.

We have reviewed the allegations in the Petition for Reconsideration and the Answer, and the contents of the Report. Based upon our preliminary review of the record, we will grant defendant's Petition for Reconsideration. Our order granting defendant's Petition for Reconsideration is not a final order, and we will order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law. Once a final decision after reconsideration is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code section 5950 et seq.

I.

We highlight the following legal principles that may be relevant to our review of this matter:

Employment relationships that result in workers' compensation liability are based upon an analysis of the definition of an employee, rather than upon the definition of the employer. (See *Heiman v. Workers' Comp. Appeals Bd. (Aguilera)* (2007) 149 Cal.App.4th 724 (*Heiman*).) Under Labor Code section 3357, "[a]ny person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee." Labor Code section 3351 defines "employee" 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. . ." Thus, unless it can be demonstrated that a worker meets specific criteria to be considered an independent contractor or fits within one of the several narrowly defined categories as an excluded employee, all workers are presumed to be employees.

Labor Code section 3351 (d) of section 3351 describes employees who have otherwise been termed "residential employees" or "casual employees." At the time of decedent's injury on March 12, 2017, subdivision (d) stated that:

Except as provided in subdivision (h) of Section 3352, any person employed by the owner or occupant of a residential dwelling whose duties are incidental to the ownership, maintenance, or use of the dwelling, including the care and supervision of children, or whose duties are personal and not in the course of the trade, business, profession, or occupation of the owner or occupant.

Labor Code section 3352 narrowly defines specific types of workers who are excluded from the definition of "employee," and subdivision (h) of section 3352 concerns residential

employees who are excluded from the definition of employee under certain conditions. At the time of decedent's injury on March 12, 2017, subdivision (h) stated in pertinent part that:

A person described in subdivision (d) of Section 3351 whose employment by the employer to be held liable, during the 90 calendar days immediately preceding the date of injury . . . comes within either of the following descriptions: (1) The employment was, or was contracted to be less than 52 hours.; (2) The employment was, or was contracted to be, for wages of not more than one hundred dollars (\$100). (Italics added.)

Workers' compensation insurance coverage is required for all those who employ one or more employees. (Bus. & Prof. Code, § 7125.2; *Wright v. Issak* (2007) 149 Cal.App.4th 1116 [72 Cal.Comp.Cases 438].) With respect to contractors on construction projects, Labor Code section 2750.5 applies to workers' compensation, and Labor Code section 3351, subdivision (d) is read together with Labor Code section 2750.5. (*Cedillo v. Workers' Comp. Appeals Bd.* (2003) 106 Cal.App.4th 227 [68 Cal.Comp.Cases 140]; *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Meier)* (1985) 40 Cal.3d 5 [50 Cal.Comp.Cases 562].) Labor Code section 2750.5 provides that when a worker is "performing services for which a license is required" or is "performing such services for a person who is required to obtain such a license" that worker is presumed to be an employee rather than an independent contractor. In order to successfully prove independent contractor status, a person must satisfy certain factors set forth within section 2750.5, and, additionally, must "hold a valid contractors' license as a condition of having *independent contractor status.*" (Lab. Code, § 2705.5, italics added; *Cedillo v. Workers' Comp. Appeals Bd.*, supra, 106 Cal.App.4th 227; *Blew v. Horner* (1986) 187 Cal.App.3d 1380 [51 Cal.Comp.Cases 615].) A contractor's license must be valid at the time of the worker's injury. (See *Zellers v. Playa Pacifica, Ltd.* (1998) 61 Cal.App.4th 129 [63 Cal.Comp.Cases 48].)

"For workers' compensation purposes, under section 2750.5, the hirer of a contractor for a job requiring a license is the statutory employer of the unlicensed contractor. In addition, the hirer is the statutory employer of those workers employed by the unlicensed contractor. Accordingly, the presumption that the person who employs the unlicensed contractor is the employer is conclusive." (*Cedillo v. Workers' Comp. Appeals Bd.*, supra, 106 Cal.App.4th 227, 233; see *Rinaldi v. Workers' Comp. Appeals Bd.*, supra, 196 Cal.App.3d 571; *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Meier)*, supra, 40 Cal.3d 5; see also *Sanders Construction Co., Inc. v. Cerda* 175 Cal.App.4th 430, 435.)

Thus, when status as an independent contractor is lost for lack of a license, the unlicensed contractor becomes both the employee and the employer, and when the unlicensed contractor lacks workers' compensation insurance coverage, the "ultimate hirer" who does have workers' compensation insurance coverage becomes liable. (*Cedillo v. Workers' Comp. Appeals Bd.*, *supra*, 106 Cal.App.4th 227; *Hernandez v. Chavez Roofing, Inc.* (1991) 235 Cal.App.3d 1092 [56 Cal.Comp.Cases 650]; *Rinaldi v. Workers' Comp. Appeals Bd.*, *supra*, 196 Cal.App.3d 571.)

We observe that our preliminary review indicates that defendant's argument that Breuman did not have the right to control decedent's work is specious. 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 . . . [italics added.]" (*Borello v. Dept. of Ind. Relat.* (1989) 48 Cal.3d 341, 350 [54 Cal.Comp.Cases 80].) "[T]he 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]" (*Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 875 [269 Cal.Rptr. 647] (*Toyota Motor Sales*). Right to control can be shown by considering whether a worker must obey instructions and whether the worker is subject to consequences, including discipline or termination, for failure to do so. (*Toyota Motor Sales, supra*, 220 Cal.App.3d at p. 875; see *Borello, supra*, 48 Cal.3d at p. 350; *Narayan v. EGL, Inc.* (2010) 616 F.3d 895, 900 [75 Cal.Comp.Cases 724] (*Narayan*).) 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. [italics added.]" (*Toyota Motor Sales supra*, 220 Cal.App.3d at p. 875.)

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] (*JKH Enterprises*); see *Borello, supra*, 48 Cal.3d at pp. 355-360; *Air Couriers, Intl. v. Emp. Dev. Dept.* (2007) 150 Cal.App.4th 923, 937 [59 Cal.Rptr.3d 37] (*Air Couriers*).) Here, defendant retained the right to terminate decedent, and in fact, worked along with decedent on the tree removal.

Moreover, if it applies, Labor Code section 2750.5 presumes that a worker is an employee, and whether defendant can rebut that presumption by asserting that decedent was an independent contractor is conditioned on decedent having a license. Here, neither decedent nor defendant had a license.

Labor Code section 3715(b) applies when an uninsured homeowner is the putative employer of an applicant. (See Cal. State Auto. Ass'n Inter-Insurance Bureau v. *Workers' Comp. Appeals Bd. (Hestehauge)* (2006) 137 Cal.App.4th 1040, 1045 [71 Cal.Comp.Cases 347]. Subdivision (b) states in relevant part that:

Notwithstanding this section or any other provision of this chapter except Section 3708, any person described in subdivision (d) of Section 3351 who is (1) engaged in household domestic service who is employed by one employer for over 52 hours per week, (2) engaged as a part-time gardener in connection with a private dwelling, if the number of hours devoted to the gardening work for any individual regularly exceeds 44 hours per month, or (3) engaged in casual employment where the work contemplated is to be completed in not less than 10 working days, without regard to the number of persons employed, and where the total labor cost of the work is not less than one hundred dollars (\$100) (which amount shall not include charges other than for personal services), shall be entitled, in addition to proceeding against his or her employer by civil action in the courts as provided in Section 3706, to file his or her application with the appeals board for compensation. . . .

Here, it is undisputed that decedent's pay was to exceed \$100.00, and it is undisputed that Breuman was uninsured.

Labor Code section 2700 states that: The provisions of this division shall not limit, change, or in any way qualify the provisions of Division 4 of this code but shall be fully operative and effective in all cases *where the provisions of Division 4 are not applicable.*" (Italics added.) Labor Code section 2750.5 concludes by stating that: "For purposes of workers' compensation law, this presumption is a supplement to the existing definition of employee and independent contractor and is not intended to *lessen* the coverage of employees under Division 4 and Division 5." (Italics added.)

Our preliminary review raises many issues. Section 3715(b) refers to the definition of an employee in section 3351(d), and section 3351(d) makes an exception to the definition of an employee in section 3352(a)(8), where the person's employment is for less than 52 hours or for less than \$100.00. Here, decedent's work was expected to be completed within one day, so that it appears from our preliminary review that defendant has met its initial burden. Thus, we will grant

defendant's Petition for Reconsideration to enable us to further review the record and the statutory and decisional law.

II.

It is well established that decisions by the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) "The term 'substantial evidence' means evidence which, if true, has probative force on the issues. It is more than a mere scintilla and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion...It must be reasonable in nature, credible, and of solid value." (*Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd. (Bolton)* (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566], emphasis removed and citations omitted.)

Decisions of the Appeals Board "must be based on admitted evidence in the record." (*Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) An adequate and complete record is necessary to understand the basis for the WCJ's decision. (Lab. Code, § 5313; see also Cal. Code Regs., tit. 8, § 10787.) "It is the responsibility of the parties and the WCJ to ensure that the record is complete when a case is submitted for decision on the record. At a minimum, the record must contain, in properly organized form, the issues submitted for decision, the admissions and stipulations of the parties, and admitted evidence." (Hamilton, supra, 66 Cal.Comp.Cases at p. 475.) The WCJ's decision must "set[] forth clearly and concisely the reasons for the decision made on each issue, and the evidence relied on," so that "the parties, and the Board if reconsideration is sought, [can] ascertain the basis for the decision[.] . . . For the opinion on decision to be meaningful, the WCJ must refer with specificity to an adequate and completely developed record." (Id. at p. 476 (citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal. 2d 753, 755 [33 Cal.Comp.Cases 350]).)

The WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on an issue. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) The Appeals Board has a constitutional mandate to "ensure substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd.*

(2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) The Board may not leave matters undeveloped where it is clear that additional discovery is needed. (Id. at p. 404.)

Based on our preliminary review, it appears that further development of the record may be appropriate.

III.

Finally, we observe that under our broad grant of authority, our jurisdiction over this matter is continuing.

A grant of reconsideration has the effect of causing “the whole subject matter [to be] reopened for further consideration and determination” (*Great Western Power Co. v. Industrial Acc. Com. (Savercool)* (1923) 191 Cal. 724, 729 [10 I.A.C. 322]) and of “[throwing] the entire record open for review.” (*State Comp. Ins. Fund v. Industrial Acc. Com. (George)* (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].) Thus, once reconsideration has been granted, the Appeals Board has the full power to make new and different findings on issues presented for determination at the trial level, even with respect to issues not raised in the petition for reconsideration before it. (See Lab. Code, §§ 5907, 5908, 5908.5; see also *Gonzales v. Industrial Acci. Com.* (1958) 50 Cal. 2d 360, 364.) “[t]here is no provision in chapter 7, dealing with proceedings for reconsideration and judicial review, limiting the time within which the commission may make its decision on reconsideration, and in the absence of a statutory authority limitation none will be implied.”; see generally Lab. Code, § 5803 [“The WCAB has continuing jurisdiction over its orders, decisions, and awards. . . . At any time, upon notice and after an opportunity to be heard is given to the parties in interest, the appeals board may rescind, alter, or amend any order, decision, or award, good cause appearing therefor.”].)

“The WCAB . . . is a constitutional court; hence, its final decisions are given res judicata effect.” (*Azadigian v. Workers’ Comp. Appeals Bd.* (1992) 7 Cal. App. 4th 372, 374 [57 Cal. Comp. Cases 391; see *Dow Chemical Co. v. Workmen’s Comp. App. Bd.* (1967) 67 Cal.2d 483, 491 [62 Cal.Rptr. 757, 432 P.2d 365]; *Dakins v. Board of Pension Commissioners* (1982) 134 Cal.App.3d 374, 381 [184 Cal.Rptr. 576]; *Solari v. Atlas-Universal Service, Inc.* (1963) 215 Cal.App.2d 587, 593 [30 Cal.Rptr. 407].) A “final” order has been defined as one that either “determines any substantive right or liability of those involved in the case” (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers’ Comp. Appeals Bd. (Pointer)* (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers’ Comp. Appeals*

Bd. (Kramer) (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]), or determines a “threshold” issue that is fundamental to the claim for benefits. Interlocutory procedural or evidentiary decisions, entered in the midst of the workers’ compensation proceedings, are not considered “final” orders. (*Maranian v. Workers’ Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) [“interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not ‘final’ ”]; Rymer, *supra*, at p. 1180 [“[t]he term [‘final’] does not include intermediate procedural orders or discovery orders”]; *Kramer, supra*, at p. 45 [“[t]he term [‘final’] does not include intermediate procedural orders”].)

Labor Code section 5901 states in relevant part that:

No cause of action arising out of any final order, decision or award made and filed by the appeals board or a workers’ compensation judge shall accrue in any court to any person until and unless the appeals board on its own motion sets aside the final order, decision, or award and removes the proceeding to itself or if the person files a petition for reconsideration, and the reconsideration is granted or denied. ...

Thus, this is not a final decision on the merits of the Petition for Reconsideration, and we will order that issuance of the final decision after reconsideration is deferred. Once a final decision is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code sections 5950 et seq.

IV.

Accordingly, we grant defendant’s Petition for Reconsideration, and order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law.

For the foregoing reasons,

IT IS ORDERED that defendant’s Petition for Reconsideration of the Findings of Fact and Orders issued by a workers’ compensation administrative law judge on July 26, 2023 is **GRANTED**.

IT IS FURTHER ORDERED that a final decision after reconsideration is **DEFERRED** pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 17, 2023

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

**ELVIRA SANCHEZ DE VEGA, Dependent
PEREZ, WILLIAMS, MEDINA & RODRIGUEZ
TOBIN • LUCKS LLP
OFFICE OF THE DIRECTOR, LEGAL**

AS/mc

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