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

**JUAN ZALDIVAR, *Applicant***

**vs.**

**COUNTY OF LOS ANGELES,**
**permissibly self-insured, *Defendant***

**Adjudication Numbers: ADJ11784547 (MF), ADJ12536627**
**Long Beach District Office**

# OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the Report and Opinion on Decision of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's Report and Opinion on Decision, both of which we adopt and incorporate, we will deny reconsideration.

We have given the WCJ's credibility determinations great weight because the WCJ had the opportunity to observe the demeanor of the witnesses. (*Garza v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determinations. (*Id*.)

For the foregoing reasons,

**IT IS ORDERED** that the Petition for Reconsideration is **DENIED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ DEIDRA E. LOWE, COMMISSIONER**

**I CONCUR,**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**November 5, 2021**

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

**JUAN ZALDIVAR**
**PERONA, LANGER, BECK, SERBIN & HARRISON**
**LOS ANGELES COUNTY COUNSEL**

**PAG/abs**

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

**REPORT AND RECOMMENDATION OF WORKERS' COMPENSATION JUDGE ON PETITION FOR RECONSIDERATION**

## I
## INTRODUCTION

The applicant, hereinafter "Petitioner", through his legal representative, filed a timely and verified Petition for Reconsideration to the September 1, 2021, Findings of Fact which found that under Cal. Penal Code §4017 and Cal. Gov. Code §25359 Petitioner and his jailer, County of Los Angeles, did not have an employment relationship and Petitioner could not collect workers compensation benefits.

Petitioner asserts that 1) the Court acted in excess of its powers, 2) the evidence (and Petitioner's trial brief) do not support the Findings, and 3) the Findings do not support the decision.

Court relies upon the reasoning and analysis set forth in its September 1, 2021, Opinion and Decision.

## II
## FACTS

At the time of Trial and upon Reconsideration, the real issue is whether an employment relationship could be gleaned from the two periods of incarceration when Petitioner was mandated to work in the kitchens with regular kitchen staff, under supervision, along with other non-violent offenders. Petitioner, and other inmates assigned kitchen duty, was allowed to eat the same food he served. There was no other benefit to the applicant. During the course of his incarceration, applicant alleges various cuts and bruises as a result of working in the kitchens. (See Opinion on Decision 9/1/21, p.1.)

The Court drew no negative inferences from the incarceration itself and only drew upon the testimony, and the County's directive in Order 91, at Trial. (See Exhibit C; Opinion on Decision 9/1/21, p. 2). Both Petitioner and the defense witness, whom the Court found to be credible, confirmed that Petitioner was selected for the position and did not "volunteer" in the traditional sense. The defendant's witness testified credibly that all inmates are mandated to work by the County. No bargaining occurred to imply consent or consideration, such as under the traditional employment relationship, and supervision was provided.

The Court found that an employment relationship could not be found for the Petitioner under the evidence presented at Trial.

## III
## DISCUSSION

The Court relied on the trial record and witnesses testimony at trial, and made a decision as is within its purview. The Labor Code requires the basic tenets of an employment relationship to exist before Petitioner can qualify for benefits, which the Court found lacking under Petitioner's

circumstances. Though Petitioner asserts that "Judge Feng failed to view the issues raised by applicant's counsel (both in his brief, and at trial) *de novo*," there is no obligation by the Court to view any argument *de novo* when there is ample statutory regulation, and case precedent that, in fact, should not be ignored by any WCJ. The Court actually acknowledged Petitioner's argument and dismissed it as being contrary to legislative intent. This is not the same as failing to view the argument *de novo* inasmuch as the Court failed to agree that Petitioner's argument had merit.

Specifically, Cal. Penal Code §4017 states "all persons confined in the county jail…may be required by an order of the board of supervisors or city council to perform labor on the public works.…" Such is the case with the County and its Order 91. Only those working in the "prevention or suppression of forest, brush or grass fires" are parceled out in the statute to be an employee. Cal. Gov. Code §25359 similarly states, "[t]he board may provide for the working of prisoners confined in the county jail under judgment of conviction of misdemeanors, under the direction of a responsible person…for the benefit of the public."

A county jail inmate injured while performing work that is mandated as part of a sentence is not an employee and cannot received workers' compensation benefits as a result of said injury. (*Parsons v. Workers Comp. App. Bd*. (1981) 46 Cal. Comp. Cases 1304; *Reynolds v. Workers Comp. App. Bd.* (1984) 49 Cal. Comp. Cases 264 (writ denied); *Borda v. Workers Comp. App. Bd*. (1996) 61 Cal. Comp. Cases 262 (*writ denied*); *Busbin v. Workers Comp. App. Bd.* (1981) 46 Cal. Comp. Cases 611 (*writ denied*)). This is not quite the "chain gang," as Petitioner colloquially puts it. Instead, the legislature has indicated that inmates can be required to work, which, according to the evidence, was the case with Petitioner, and they are not automatically considered employees unless factors of an employment relationship exist. (*Parsons v. Workers' Comp. Appeals Bd.* (1981) 126 Cal.App.3d 629).

The Court found neither consent, nor consideration existed. It is obvious that selectees are not there of their own volition. But, insofar as Petitioner argues not every inmate can obtain this position, the Court notes that the other side of that argument is that not every non-violent offender is chosen for the kitchen, and instead, the inmates are chosen at the discretion of the jailers. It is an incidental privilege for the lucky. The bonus meals were an incidental "perk" to incarceration for a non-violent offender who happened to be chosen for kitchen duty. Petitioner did not "volunteer," in the common definition of that word, and, he derived no reduction of sentence or anything of substantive value.

The Court also found that not choosing dangerous felons to wield kitchen knives was to ensure the safekeeping of everyone involved and that responsible people were in fact supervising the inmates by Petitioner's own admission at trial and by confirmation of the defense witness. For the purposes of Petitioner's definition of "safe keeping," again, the Court reiterates that minor/first aid injuries are possible, even foreseeable, while inmates are tasked to work for the "public benefit," i.e. feeding officers, clearing brush, doing paperwork.

Petitioner's argument alone is not enough to imply that an employment relationship exists where the facts show that there is no employment relationship here. Conjectural, circumstantial evidence cannot rebut uncontradicted testimony. (*Garza v. Workers' Comp. App. Bd.* (1970) 3 Cal. 3d 312).

## IV
## RECOMMENDATION

The Court respectfully requests affirmation that the Court's decision was based on substantial evidence, that the Court's Findings remain undisturbed, and that there is no basis for Reconsideration, and that the Petition for Reconsideration be denied.

DATE: September 23, 2021

**Julie Feng**
Workers' Compensation Judge

## OPINION ON DECISION

At the time of trial, the parties stipulated that applicant, while an inmate (OGN 460) on October 1, 2018, (ADJ11784547) at Los Angeles California by the County of Los Angeles at the Los Angeles County Men's Central Jail, claims to have sustained injury arising out of and in the course of his alleged employment (AOE/COE) to his lumbar spine, tailbone or coccyx, head neck and bilateral shoulders, and again on July 21, 2019, (ADJ12536627) to his right foot and toes, right lower extremity.

They further stipulated that the applicant's initial period of incarceration was August 8, 2018, through October 12, 2018, and for the second period from July 5, 2019, through August 2, 2019. During the course of both incarcerations applicant was assigned kitchen duty as a "trustee ODR cook" for the officer's dining room.

At the time of trial the sole issue for both cases was whether the applicant could be considered an employee of the defendant as an exception to Cal. Penal Code §4017 and Cal. Gov. Code §25359.

## WHETHER APPLICANT CAN BE CONSIDERED AN EMPLOYEE OF THE COUNTY:

City and county jail prisoners may qualify for workers' compensation benefits if they fall within the general definition of the term "employee" pursuant to Labor Code §3351. County prisoners and jail inmates are not deprived of their civil rights as are *state* prisoners. No negative inferences can be drawn from the fact that the applicant was in custody since he retained all of his civil rights and he must be judged like any other citizen in deciding whether he comes within the workers' compensation laws.[1]

The traditional features of an employment contract are (1) consent of the parties, (2) consideration for the services rendered, and (3) control by the employer over the employee.[2] In the instant case, applicant admitted that officers had "chosen" him for kitchen duty, and this was not something inmates could apply for, or bargain into. The applicant admits that being chosen was considered a "benefit" for a prisoner because it would allow him to eat better than his fellow inmates for the duration of his incarceration, and therefore, he was eager and willing to do it. His only qualification was that he was a non-violent offender.[3] By virtue of the fact that he was chosen, and could not apply for the position, the relationship cannot be considered as a *de facto* employment relationship.

The statutory compulsion under Penal Code §4017 to work negates any consensual employment relationship. As in *Parsons*, it was not so much a choice on the applicant's end so much as it was accepting an act of penal leniency by the County.[4] His kitchen duty made no difference on his sentence and provided no credits. The presumption of employment is overcome

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[1] *Parsons v. Workers' Comp. Appeals Bd.* (1981) 126 Cal.App.3d 629, 635.

[2] *Id*. at 638.

[3] Summary of Evidence 7/21/21, 2:10-11; 3:1-2, 5-7, 12-13.

[4] *Parsons v. Workers' Comp. Appeals Bd.* (1981) 126 Cal.App.3d 629, 639.

if the essential contract of hire, express or implied, is not present under Labor Code §3351.[5] The Court finds that applicant's kitchen duty was incidental to his incarceration, not the result of any implied bargain or negotiation between petitioner and the County in writing or otherwise. As the defense witness testified, all inmates are required to work somewhere as a condition of incarceration, a rule that is verified in Exhibit C. By virtue of Order 91 being in place, the sole purpose is to exempt inmates in the applicant's position from qualifying for workers compensation benefits.[6] As such, the Court finds the County has met its burden of proof.

Applicant's brief argues his position was voluntary, though his testimony shows he was chosen, which is different from volunteering. Being chosen was either a matter of luck or a matter of the officer's preference among the non-violent offenders. Furthermore, the applicant was required by law to serve his terms in jail, where the basics of food, clothing and medical would be provided to everyone, regardless.[7]

Herein, it is the *quality* of the food that applicant argues was his consideration. Notably, he had no store money to purchase commissaries, otherwise. The alternative, in his opinion, was truly awful. Being assigned kitchen duty was a privilege, and the choice between food with ingredients that could be identified versus food that was questionable in origin is not so much a choice, as opposed to simply being a matter of self-preservation or a desire for a better quality of life, such as it was, in jail. But the privilege could be also revoked any time by his jailors for any perceived violations.[8] As such, this one-sided benefit is an act of penal leniency, rather than the product of a contract. The Court does not find the relationship consensual, or that the applicant's meals were sufficient as consideration, insofar as they were incidental to the incarceration.

Notwithstanding the fact that the employment relationship is negated by statute, in its brief, applicant argues that he was under no direct requirement to work under Order 91 if he was not directly supervised by a "responsible person", if he was physically unable to do so or if his "safe keeping" may be endangered. The Court disagrees with applicant's interpretation of Order 91. The qualifications for the term "may be required" as expressed in Order 91, does not allude to "voluntary" work, but instead, alludes to inmates who are physically unable to perform the work, or, where the jailor cannot guarantee his/her "safe keeping" for whatever reason. Here, "safe keeping" means the care and control of someone in custody.

As for supervision, the applicant admitted that he was supervised. The record reflects that there was both civilian and official supervision of inmate kitchen staff, as common with all inmates performing work.[9] When he was physically unable to perform the work, the applicant was able to stop kitchen duty for a few days, with the caveat that he would have to eat regular inmate food during that time. [10]

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[5] *Jones* v. *Workmen's Comp. Appeals Bd*. (1971) 20 Cal.App.3d 124, 128.

[6] Summary of Evidence 7/21/21, 4:1-4.

[7] *Parsons v. Workers' Comp. Appeals Bd.* (1981) 126 Cal.App.3d 629, 639.

[8] Summary of Evidence 7/21/21, 3:8-9, 11-13.

[9] Summary of Evidence 7/21/21, 2:19-21, 4:16-18.

[10] Summary of Evidence 7/21/21, 3:10-12.

Furthermore, the applicant's interpretation of "safe keeping" is overbroad and untenable from a policy perspective and in effect, would defeat the statutory purpose. Though first aid injuries, such as cuts, burns and bruises may occur in the kitchen, the applicant's "safe keeping" was not endangered by virtue of the fact that he worked only with other non-violent offenders, despite the fact that there were knives present, and they were all supervised by civilian custody assistants and actual professional kitchen staff, if not officers.[11]

**CONCLUSION:**

Based on the above analysis, the Court does not find that the applicant was an employee of the County of Los Angeles during his two periods of incarceration.

DATE: September 1, 2021

Julie Feng
Workers' Compensation Judge

[11] Summary of Evidence 7/21/21, 2:18-21; 5:1-4.