

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

FRANCISCO MERLOS, *Applicant*

vs.

**JUAN VEGA; ROY A. BARILE, JONETTE L. BARILE;
and JOHN J. BARILE, uninsured, *Defendants***

**Adjudication Number: ADJ13449688
Marina del Rey District Office**

**OPINION AND DECISION AFTER
RECONSIDERATION**

We previously granted reconsideration¹ 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.

We have considered the allegations of the Petition for Reconsideration and the contents of the Report and the 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 the Opinion on Decision, both of which we adopt and incorporate, and for the reasons stated below, we will affirm the August 17, 2021 Findings of Fact and Order.

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

¹ Commissioner Lowe, who was on the panel that issued a prior decision in this matter, no longer serves on the Appeals Board. Another panelist has been assigned in her place.

another' is a covered 'employee.'" (Lab. Code, §§ 3351, 5705(a); *S. G. Borello & Sons, Inc. v. Dept. of Ind. 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." (Lab. Code, § 3351.) Any person rendering service for another, other than as an independent contractor or other excluded classification, is presumed to be an employee. (Lab. Code, § 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]; *Narayan v. EGL, Inc.* (2010) 616 F.3d 895, 900 [75 Cal.Comp.Cases 724].) 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.

Under these authorities, applicant bears the burden of proving that he rendered service for defendants, whereupon the burden shifts to defendants to rebut the employment presumption with proof that applicant did not work "under any appointment or contract of hire or apprenticeship." (Lab. Code, § 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 defendants, defendants must show by a preponderance of the evidence that he rendered service in an excluded status such as that of an independent contractor. (*California 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].)

In this regard, and for the reasons stated by the WCJ in the Report and Opinion on Decision, the record demonstrates that applicant proved that he sustained injury while performing services for defendant and thereby established his prima facie case that he is entitled to employment status. As a consequence, the burden shifted to defendants to prove that applicant was an independent contractor at the time of injury or otherwise excluded from employee status. Defendants did not carry their burden.

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.*)

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the August 17, 2021 Findings of Fact and Order is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 7, 2022

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

**FRANCISCO MERLOS
THE NITKA FIRM
SACKS & ZOLONZ
WARREN KAMM
OFFICE OF THE DIRECTOR-LEGAL UNIT (LOS ANGELES)**

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
ON PETITION FOR RECONSIDERATION**

I

INTRODUCTION

- | | | |
|-----|------------------------------------|--|
| 1. | Applicant's Occupation: | Laborer |
| 2. | Applicant's Age: | 50 |
| 3. | Date of injury: | 7/11/2020 |
| 4. | Parts of Body Injured: | Right leg |
| 5. | Manner in which injuries Occurred: | Specific incident |
| 6. | Identity of Petitioner: | Defendants, Roy A. Barile, Jonette L. Barile and John J. Barile |
| 7. | Timeliness: | The petition was timely filed. |
| 8. | Verification: | A verification is attached. |
| 9. | Date of Findings and Award: | 8/17/2021 |
| 10. | Petitioner's contentions: | The WCJ acted in excess of her powers by finding Applicant and Juan Vega to be employees of Roy A. Barile, Jonette L. Barile and John J. Barile. |

II

FACTS

Applicant, Francisco Merlos while employed by Juan Vega and allegedly employed by Roy A. Barile, Jonette L, Barile and John J. Barile on 7/11/2020, as a laborer sustained injury arising out of and in the course of his employment to his right leg. Additional body parts are deferred pending additional discovery. All the stipulations are hereby admitted as fact.

This matter proceeded to trial on 7/1/2021. The only issues presented at trial concerned whether or not Applicant and Juan Vega were employees of Roy A. Barile, Jonette L. Barile and John J. Barile. Three witnesses including Applicant, Roy A. Barile and Juan Vega testified at trial. The matter was submitted for decision on 7/1/2021. The WCJ issued her Findings of Fact and Order on 8/17/2021. Defendant, Roy A. Barile, Jonette L. Barile and John J. Barile (hereinafter to be referred to as Defendant's Barile) filed a timely and verified Petition for Reconsideration on

9/3/2021. UEBTF filed a verified Answer to Petition for Reconsideration on 9/16/2021. For the following reasons the Petition for Reconsideration should be denied.

III

DISCUSSION

As UEBTF correctly points out in their Answer, there is no dispute that on 7/11/2020, Applicant was an employee of Juan Vega when he sustained injury to his right leg. It is also undisputed that Applicant fell off a scaffold while attempting to replace wooden fascia on the second story of a private residence owned by Defendant's Barile. The only finding challenged by Petitioner was the finding that Applicant and Juan Vega were employees of the Defendant's Barile. Petitioner makes two arguments, the first contends that Juan Vega and the Applicant should have been determined independent contractors rather than employees. The second argument appears to be that there is substantial reason and good cause not to find the Bariles a special employer in the instant case. The arguments will be addressed in order.

The first argument that Applicant and Juan Vega should have been found independent contractors fails to take into consideration the unrebutted testimony of all of the witnesses, the evidence and the law that controls in this case.

The testimony of all three witnesses was consistent. The Applicant testified at trial that he arrived at the property in San Pedro where he was accompanied by Juan Vega and two other men that he met for the first time that day. The four men built the scaffolds, placed the ladder on top of the scaffold and Applicant fell from the scaffold injuring himself. The Applicant understood that his work assignment that day was to put in the new wood. (See Minutes of hearing and Summary of Evidence dated 7/1/2021, page 4, lines 17 to 25 and page 5, lines 1 to 3)

Roy Barile testified that he hired Juan Vega to perform repairs at the property in San Pedro he co-owned as part of a revocable trust with his wife and brother. He also testified that at the time he hired Mr. Juan Vega that he knew that the job would take at least two people. (See Minutes of hearing and Summary of Evidence dated 7/1/2021, page 5, lines 20 to 21, page 6, line 4 and page 9, line 18)

Juan Vega testified that he had been Mr. Barile's worker for quite some time and that they had known each other for 30 years. That he mostly performed landscape and gardening for him but also did other jobs for him 20% of the time. He also testified that he never had a contractor's license or advertised any of his services. Mr. Vega was hired by Mr. Barile to do the project of replacing the wooden fascia. He purchased the materials, removed the rotten fascia at the property along with three others and attempted to replace the fascia when the Applicant injured himself and Mr. Vega never completed the job. He confirmed that he was paid in full for the time and materials he had expended on the project by Mr. Barile. (See Minutes of hearing and Summary of Evidence dated 7/1/2021, page 10, lines 5 to 10, lines 15 to 20)

UEBTF points out in their Answer that Labor Code Section 3357 presumes that any person rendering a service for another other than an independent contractor is presumed to be an employee. Applicant was clearly rendering a service for the Bariles when he attempted to replace the wooden fascia at the property they owned. Petitioner contends that the evidence supports a

finding that Petitioner rebutted the presumption and Applicant and Juan Vega were independent contractors. However, as UEBTF points out in their Answer Labor Code Section 2750.5 states that any person performing any function or activity for which a license is required pursuant to Chapter 9 of Division 3 of the Business and Professions Code must have a valid contractor's license as a condition of being considered an independent contractor. 'Failure to have a valid contractor's license in such circumstances results in a conclusive presumption of employment.' *State Compensation Ins. Fund v. WCAB (Meier)* (1985) 40 cal. 3^d 5, 12.

UEBTF also points out that the only exemption to the licensing requirements is set forth in Business and Professions Code Section 7048 where the total contract price for labor materials is less than \$500.00. In the instant case, both Roy A. Barile and Juan Vega testified that Mr. Barile hired Mr. Vega to remove and replace the fascia at the property in San Pedro and that Mr. Vega would be paid based on their usual arrangement of time and materials. Despite the fact that Mr. Vega never completed the job due to Applicant's fall, Mr. Barile paid Juan Vega for 24 hours of labor and materials for a total amount of \$1,656.00. It should be noted that this amount paid not only exceeds the \$500.00 exemption amount but the amount paid was for a job that was not completed. Mr. Barile testified that he had to pay someone else to complete the job.

UEBTF also raises Labor Code Section 2750.5 that the presumption of employment extends to an employee of an unlicensed contractor. In the instant case, the parties stipulated that Applicant was an employee of the unlicensed contractor, Juan Vega.

Petitioners reliance on the ABC test referenced in the *Dynamex* case, even if applicable would still not result in the determination that Applicant and Mr. Vega were independent contractors. Under A, Mr. Barile admitted that he knew that the project would need at least two people to complete and C, Vega's usual and customary business was landscape and gardening and the project at issue was construction.

Based on the entire record, Applicant and Juan Vega were employees of Roy A. Barile, Jonette L. Barile and John J. Barile on 7/11/2020. Petitioner failed to rebut the presumption of employment.

Regarding the second argument raised by Petitioner. The WCJ joins in the Answer of UEBTF. "There is no basis in the law for suggesting the Board should deny applicant's remedy in workers' compensation because Petitioner's might be better off if applicant was a plaintiff in a theoretical civil case." (See Answer pages 2 and 3) The WCJ's only have jurisdiction over the issues presented before them. The public policy of holding those responsible for workers compensation injuries who reap the benefits of the work performed is served in this case. The WCJ's cannot be concerned with the potential ramifications of their judicial determinations upon a theoretical recovery for the Applicant in another forum or the limitation of personal liability for employers who fail to comply with workers compensation laws.

IV

RECOMMENDATION

As the Petition for Reconsideration fails to demonstrate good cause upon which to set aside the Findings and Award dated 8/17/2021, it is respectfully recommended that the Petition for Reconsideration be denied for lack of good cause as set forth above.

Respectfully submitted,

CIRINA A. ROSE
WORKERS' COMPENSATION JUDGE

OPINION ON DECISION

EMPLOYMENT BY ROY BARILE, J.L. BARILE AND JOHN J. BARILE OF JUAN VEGA AND FRANCISCO MERLOS:

Based on the entire record, the credible testimony of the Applicant and the credible testimony of the defense witnesses, Roy Barile and Juan Vega, it is found that Applicant and Juan Vega are employees of the employer, Roy A. Barile, Jonette L. Barile and John J. Barile, for the injury sustained by Applicant on 7/11/2020 to his right leg and other body parts that are deferred at this time and subject to further discovery.

The Applicant testified at trial that he worked for Juan Vega for about 14 years doing construction and gardening work. (See Minutes of Hearing and Summary of Evidence dated 7/1/2021 page 4, lines 14 to 16) On 7/11/2021 he was working at the triplex at issue with Juan Vega and two others that he had met for the first time that day. He testified that was hired to put in the new wood. (See Minutes of Hearing and Summary of Evidence dated 7/1/2021 page 5, lines 11 to 12) It is undisputed that Applicant fell from the scaffolding while attempting to replace the wood at the triplex at issue on 7/11/2021 and injured his right leg sustaining injuries that are the basis of this case.

Juan Vega testified that he had been Mr. Barile's worker for quite some time and he has known Mr. Barile for over 30 years. The services he performed for Mr. Barile included landscape maintenance/gardening and other sorts of jobs. (See Minutes of Hearing and Summary of Evidence dated 7/1/2021 page 10, lines 5 to 8)

In July 2020, Mr. Barile contacted him about a project to change the lumber on the side of the roof called the fascia. The lumber was rotted and needed to be replaced which involved using ladders, hammers and crowbars to loosen the rotten wood. He had to purchase lumber for the job and that lumber needed to be cut to a special size. Mr. Vega testified that he had a long standing arrangement with Mr. Barile wherein he was paid based on his labor and materials. Mr. Vega testified that he does not and never had a contractor's license and never advertised for his landscaping services or other jobs. (See Minutes of Hearing and Summary of Evidence dated 7/1/2021 page 10, lines 10 to 17)

Mr. Vega presented an invoice for the work done at the property at issue and Mr. Barile paid Mr. Vega for his services by check. (See Exhibit BB)

Mr. Vega's testimony was corroborated by the testimony of Mr. Barile, Mr. Barile testified that he hired Mr. Vega to do the work at the triplex, to replace the wood for painting before it was painted. (See Minutes of Hearing and Summary of Evidence dated 7/1/2021 page 6, lines 4 to 8) During the Mr. Barile never once had a discussion with Mr. Vega regarding his license status. Mr. Barile did not receive an estimate from Juan Vega as it was their practice of paying Mr. Vega based on time and materials after the project was completed. (See Minutes of Hearing and Summary of Evidence dated 7/1/2021 page 6, lines 11 to 14)

In the instant case, Mr. Vega did not complete the wood replacement project at the triplex after Mr. Merlos fall and resulting injuries. Mr. Barile paid the invoice without question. Finally, Mr. Barile testified that he knew that the job that he had hired Mr. Vega to do would take at least two people. (See Minutes of Hearing and Summary of Evidence dated 7/1/2021 page 9, lines 17 to 18)

Based on the testimony of the Applicant, Mr. Barile and Mr. Vega and the entire record, Juan Vega and Francisco Merlos are determined to be employees of Roy A. Barile, Jonette L. Barile and John J. Barile. Mr. Vega was rendering a service for Mr. Barile by removing and replacing the rotten wood at his triplex. The Applicant was hired by Mr. Vega to assist in rendering that service for Mr. Barile on 7/11/2020 when he fell off the scaffolding and injured himself. Defendant has failed to rebut the presumption of employment by establishing that either Mr. Vega or Applicant were acting as an independent contractor.

Dated: 8/17/2021

CIRINA A. ROSE
WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE