WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

CESAR SOSA, *Applicant*

vs.

CGL, INCORPORATED; CHARLES A. GARAVITT, an individual and substantial shareholder of CGL, INCORPORATED; MARTIN FIERRO, an individual, *Defendants*

Adjudication Numbers: ADJ8481630
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 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, 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*.)

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." (Lab. Code, § 3357, italics added.) "[T]he fact that one is performing work and labor for another is prima facie evidence of employment and such person is presumed to be a servant in the absence of evidence to the contrary." (*Narayan v. EGL, Inc.* (2010) 616 F.3d 895, 900 [75 Cal.Comp.Cases 724].)

As conceded by defendant in its Petition, once a prima facie case of "employee" status is established, *the burden shifts to the employer to affirmatively prove* that the worker was "an

independent contractor or otherwise excluded from protection under the [Workers'] Compensation Act." (*Johnson v. Workmen's Comp. Appeals Bd*. (1974) 41 Cal.App.3d 318, 321 [39 Cal.Comp.Cases 565]; Lab. Code, §§ 3202.5, 5705(a).) An independent contractor is defined for the purposes of workers' compensation as "any person who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished." (Lab. Code, § 3353.) The question of whether a worker is an employee, or an independent contractor is one of fact. (*Estrada v. Fedex Ground Package System, Inc.* (2007) 154 Cal.App.4th 1, 10-11.) Here, the WCJ found applicant's testimony to be credible, and considering the evidence in the record, defendant has not met its burden to show that applicant was an independent contractor.

Thus, we see no basis in the record before us to disturb the WCJ's conclusion that applicant was an employee of defendant CGL, Inc., at the time of his claimed injury on July 31, 2012. Accordingly, we deny defendant's Petition for Reconsideration.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ NATALIE PALUGYAI, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

KATHERINE A. ZALEWSKI, CHAIR
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 14. 2023

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

CESAR SOSA
LAW OFFICES OF DENNIS FUSI
JOHNSON TRIAL LAW
OFFICE OF THE DIRECOR, LEGAL

LN/*pm*

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I. INTRODUCTION

Defendants — an alleged uninsured employer and its substantial shareholder [The employer is corporate entity CGL, INCORPORATED (GCL), with CHARLES A. GARAVITT as its substantial shareholder.] — has filed a timely and verified [Petitioners filed two Petitions for Reconsideration, apparently identical, except only one of them has the signed verification.] petition for reconsideration on May 16, 2023 to this judge's decision served on April 26, 2023, which made a finding of employment for the industrial injury. [Applicant, age 41, alleges industrial injury to his neck, back, right upper and lower extremities, right arm, right leg, right foot, right knee, and right ankle. The alleged injury was sustained from a fall while working in a warehouse used by the alleged employer.] As of the dictation of this Report, there has been no answer filed by applicant CESAR SOSA or the Uninsured Employers' Benefit Trust Fund (UEBTF).

Defendants contends the evidence does not justify the findings of fact, and the findings of fact do not support the opinion. Defendants do not directly discuss in its Petition, how the findings of fact were in conflict with the evidence. Instead, defendants argue that the findings and evidence do not justify a finding of employment consistent with the *Borello [S.G. Borello & Sons v. Department of Indus. Rel.* (1989) 48 Cal. 3d 341 [54 Cal. Comp. Cases 80] factors. The Petition contends the judge misapplied the factors, and a proper application would result in a finding of no employment.

Given the inherent fluidity of the *Borello* factors, and the nature of the Petition, this Report will set forth with limited editorial changes the Opinion and Decision previously issued. The judge then recommends a denial of the Petition.

II. FACTS

A. *Introduction (as Presented in Opinion on Decision)*

This matter concerns alleged employment about eleven years ago, when applicant claims to have sustained industrial injury in July 2012. Applicant and defendant Garavitt provided testimonial evidence addressing the issue. In general, this judge credits applicant's over defendant's testimony, particularly with regard to the nature of the various relationships between applicant, Garavitt and his corporation, and other persons (alleged employer MARTIN FIERRO and Shaoul Levy). The judge credits applicant's testimony that he

received money and other items for service from defendant, even though defendant asserts such was only provided rarely. So, although other issues such as industrial injury, nature and extent of such, earnings, and disability remain outstanding, the judge concludes that applicant was employed by GCL, for reasons set forth below.

B. ***Procedural History***

On August 13, 2012, applicant via his former counsel filed an application for adjudication (application), claiming industrial injury occurring two weeks previously, on July 31, 2012. That application alleged that "CGL" was the uninsured employer. Although there is no proper proof of service accompanying the application, [See EAMS Doc ID 6384798, a purported proof of service, unsigned and not setting forth names and addresses of persons or entities served.] the principal owner of CGL, Charles Garavitt, testified that he was aware of this claim against his company in 2012. [Summary of Evidence, p. 4, ll. 15-16.]

Eventually, CGL, Inc. was served personally (through its agent for service of process) on June 19, 2016, service upon which applicant successfully petitioned to have the Uninsured Employers' Benefit Trust Fund (UEBTF) joined. [See EAMS Doc ID 19076643.]

Through counsel, CGL, Inc. filed an answer dated July 29, 2016, wherein it asserted it did not employ applicant, but asserted that Martin Fierro was the employer.[8] In response to this, applicant amended the application to also assert that Fierro was his employer.[9] Applicant was never able to locate Fierro, and had him served by publication in March and April of 2019. [See EAMS Doc ID 29376101, a petition to join UEBTF dated May 30, 2019. It is unclear why this petition was made, given UEBTF had been previously joined.]

Eventually, this matter would proceed to an evidentiary hearing, held on February 1, 2023. The matter was submitted after time expired for the non-appearing defendant, Fierro, being served with a Notice of Intent to Submit this matter for decision.

C. ***Testimony and Evidence***

Applicant first called GCL's principal Garavitt as a witness. GCL is no longer operational, but used to be in business as a wholesale buyer. The company obtained items for resale through auctions with U.S. Customs. Garavitt denied that his company had any employees or payroll, wages, or benefits to individuals.

Garavitt claimed he was introduced to applicant through Martin Fierro, who was also operating in the same business.

GCL had two facilities, one in Cerritos where the injury [Although injury is disputed by the parties, the evidence suggests that there is no dispute that at minimum, an arguably injurious event occurred on July 31, 2012.] occurred, and in Palmdale. Prior to the injury, Garavitt contracted with Fierro regarding the Palmdale location for remodeling the building. Fierro would report to Garavitt progress made with this project. However, Garavitt did not pay Fierro for the work done at that facility. The project was ultimately unsuccessful due to a fire at that facility.

Fierro told Garavitt that he had hired applicant to assist with this remodeling project. Garavitt claimed that he did not employ applicant there, although it was possible that applicant transported product from the Cerritos facility to Palmdale. Garavitt also believed that applicant was involved in the insurance claim that was made for the fire, as a witness to the fire.

Garavitt was at that facility every day. He denied that applicant ever worked at that facility. Garavitt acknowledged, however, that applicant was at the facility on the date of claimed injury.

At the time of injury, applicant was working by dismantling GCL's racks [the record is not clear whether GCL owned the racks or these were owned by another individual or entity.] when he was injured. Garavitt had asked Fierro to perform work in the facility, and so he believed applicant was working for Fierro.[Marked for identification was Defendant's Exhibit (DX) 1, a purported declaration by Fierro that he had employed applicant. This was not admitted, nor was it requested to be admitted.] Garavitt believed that applicant was a handyman who made his living performing transportation services and repairing, including presumably dismantling of shelving.

When applicant was injured, Garavitt asked Fierro to respond to the incident. Garavitt was not present at the time of the injury, but a friend of his who was volunteering to help him out was present at that time.

The owner of the building where the injury occurred was Shaoul Levy, according to Garavitt. He claimed that it was Levy who hired Fierro to perform work in the building, not himself or his corporation. Garavitt believed that Fierro was a licensed contractor, or at lease believed that Levy would not hire Fierro without such a license.

Around the time of the claimed injury, there were two checks written to applicant from a company known as Charlie's Wholesale, LLC, an out-of-state, Missouri corporation. [See Applicant's Exhibit (AX) 1.] Garavitt could

not recall why these checks were written to applicant. Charlie's Wholesale had employees, but applicant was not one of them. Charlie's Wholesale was also in the same business as CGL. Garavitt denied giving cash to applicant. Regarding Fierro, Garavitt paid for his services with merchandise.

Applicant testified next at trial. He considered himself to be an employee of CGL, but he also did some work for Fierro. Garavitt hired him after Fierro introduced the two of them to each other.

Applicant said he was employed at the Palmdale facility to receive merchandise transported from Cerritos. He was usually paid in cash, but sometimes by check. He at times moved the merchandise himself. Applicant claimed that he had obtained business and other licenses for CGL in Palmdale. Applicant also claimed that he was to hire people for the facility, and that at times, he paid them with his own money, and at times he was given money by Garavitt to pay them.

Once the fire occurred, according to applicant, Garavitt told him to help with the insurance claim. He used photographs that he had taken prior to the fire to help determine what merchandise was destroyed.

Garavitt transferred applicant to the Cerritos location about a month after the fire. Regarding the checks in evidence, applicant claimed that he was owed more money.

Fierro was supposed to pay him, but eventually Garavitt promised to pay him what was owed, once the insurance claim was resolved. He complained that Fierro was not being honest with him, but that he believed Garavitt and wanted to help grow his business. He also stated that he did not work for Fierro, but he was independent. But, applicant also believed he was an employee of GCL. He acknowledged that applicant did work on his own, and was his own boss, aside from when he was working for GCL.

Regarding the injury at Cerritos, applicant stated that he was on a ladder, preparing to load merchandise for transportation to another facility in Fontana. Applicant would transport such merchandise at times with his own truck from Cerritos to Fontana.

On cross examination, applicant believed he had been paid about $2,000 for six months of work, and given merchandise valued at $12,000. He thought he had received maybe up to 21 pallets of merchandise from Garavitt over a period of time.

D. *Summary of Legal Conclusions in Prior Decision*

As more fully set forth in this Report in Section III, the judge noted that Labor Code Sections [all statutory references hereafter concern the Labor Code] 3351, 3353, and 3357 provide a general framework for employment issues. However, as set forth by the state supreme Court in 1989, *Borello* factors set forth more detailed and important guidelines for determining employment. Applying those factors, applicant was employed by defendants at the time of injury. Of particular note was that although Garavitt contended CGL never provided money or other goods for applicant's services, and that applicant was paid by Fierro or others, applicant was more credible in testifying that Garavitt did provide money and services. The judge also concluded that there should be no order to further develop the record. [See, e.g., *Perkins v. Knox,* 2022 Cal. Wrk. Comp. P.D. LEXIS 18 (appeals board panel decision). Petitioners do not argue that a remand order for further development should be an alternative remedy if the board does not reverse the employment finding. Therefore, this possibility will not be addressed further.] Finally it was noted that other issues for trial were deferred; petitioners do not argue for findings on those.

III.
DISCUSSION

The Petition does not challenge the judge's conclusion about applying *Borello* in this matter, but contests how it was applied to the evidence in this case. The Petition also, to some extent, tracks how the judge set forth applying the *Borello* factors. Thus, what follows will be the legal analysis set forth by the judge in the Opinion on Decision, with a few editorial changes, followed by (when relevant) petitioners' challenges to the analysis.

A. *Legal Analysis*

1. *Employment – Legal Standard*

There are a few statutory rules for determining whether an individual should be considered an employee or an independent contractor for purposes of workers' compensation claims. First,

" 'Employee' means 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.]

In contrast to status of an "employee,"

" 'Independent contractor' means any person who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished." [§ 3353.]

Regarding whether a person would be an employee or independent contractor, the Labor By statute, there exists a presumption for finding employment:

"Any person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee." [§ 3357.]

Notwithstanding these simple statements of the law of employment in workers' compensation, case law has provided a lot more factors to consider. Of greatest relevance is the state Supreme Court's 1989 decision of *Borello*, with this decision and later ones summarized in great detail in the Court's 2018 decision of *Dynamex. [Dynamex Operations W. v. Superior* Court (2018) 4 Cal. 5th 903 [83 Cal. Comp. Cases 817*].* Although the later decision arguably, significantly changed the law of employment from *Borello*, it appears that the former decision still controls with regard to workers' compensation claims. "Since the Dynamex Court did not overturn the *Borello* standard for determining an applicant's employment status with respect to the requirement of providing workers' compensation benefits, and expressly limited the application of the ABC test to the determination of employment status with regard to wage orders, we conclude that the *Borello* standard applies here." *Perkins v. Knox* (2018) 84 Cal. Comp. Cases 44, 50 (appeals board panel decision)]

In addition, although the Labor Code was amended effective in September 2020 regarding the legal employment test, including citation to both *Borello* and *Dynamex*,[§ 2775] this would not apply to a date of injury in 2012.[*Garcia v. County of Fresno,* 2022 Cal. Wrk. Comp. P.D. LEXIS 369, *26, fn. 4 (appeals board panel decision); *Ciprian v. Larry D. Smith Corr. Facility,* 2022 Cal. Wrk. Comp. P.D. LEXIS 346, *10, fn. 3 (appeals board panel decision).]

Therefore, the judge concludes that the *Borello* factors apply to this matter.

B. *Borello* Factors

1. *Right to Control*

> "[T]he right to control work details is the 'most important' or 'most significant' consideration." [*Borello*, 48 Cal. 3d at p. 350 [54 Cal. Comp. Cases at p. 85].]

Notably, this factor is focused not merely on actual control of work details, but the *right* to control. Given that applicant was performing work on shelving used in CGL's business, and absent any details as to why CGL had no or little control over applicant's work, this judge concludes that this factor is more suggestive of employment rather than independent contractor.

Petitioners acknowledge the importance of this factor, [see Petition, p. 2, ll. 12-13; p. 5, ll. 18-21.] but argues that because there was no evidence that Garavitt was present at the time of the injury, and was in no position to direct applicant's work at the time of injury, then this factor ought to favor the employer. But *Borello* refutes petitioners' argument, which determined that harvest workers or "share farmers" were employees, even though the employer "maintain[ed] no field supervisor and [did] not direct the harvester's work." [*Borello*, 48 Cal. 3d at p. 347 [54 Cal. Comp. Cases at p. 83.]] The focus on the *right to control* is in workers' compensation requires "consideration of the remedial purpose of the statute, the class of persons intended to be protected, and the relative bargaining position of the parties." [*Id*., 48 Cal. 3d. at p. 353 [54 Cal. Comp. Cases at p. 88].] To summarize, the laborer-type work applicant was performing in this case was similar to the higher skilled farm workers in *Borello*.

2. *Right to Discharge at Will*

> "'[S]trong evidence in support of an employment relationship is the right to discharge at will, without cause.' " [*Id*., quoting *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 949, quoting *Empire Star Mines Co. v. Cal. Emp. Com* (1946) 28 Cal.2d 33, 43 (original citations omitted).]

The evidence did not establish whether there was a right to discharge applicant (either directly from CGL or another person or entity). However, there is a presumption of at-will employment in California. [§ 2922 ("An employment, having no specified term, may be terminated at the will of either party on notice to the other. Employment for a specified term means

an employment for a period greater than one month."); *Malmstrom v. Kaiser Aluminum & Chem. Corp.* (1986) 187 Cal.App.3d 299, 315 ("This section creates a rebuttable presumption that an employment contract is terminable at will.").] Therefore, this judge concludes that this factor favors a finding of employment in this matter.

Petitioners argue that this reasoning is erroneous, by essentially presupposing the conclusion that there was an employment contract. [Petition, p. 3, ll. 13-26.] In reading *Borello*, it appears that petitioners have a point, as a lack of evidence regarding the right to discharge at will would counsel against employment. But this was the case in *Borello*, where employment was found even though there was no evidence that the farm workers in that case could be discharged at will. [*Borello*, 48 Cal. 3d. at p. 368 [54 Cal. Comp. Cases at p. 101] (dissenting opinion).] Thus, although this factor favors independent contractor status, it has limited force, and does not mean other factors cannot direct a conclusion of employment.

3. <u>*Applicant Engaging in Distinct Occupation or Business*</u>

> "[W]hether the one performing services is engaged in a distinct occupation or business." [*Id*., 48 Cal. 3d at p. 350 [54 Cal. Comp. Cases at p. 85], citing *Tieberg, supra*, at 949; *Empire Star Mines, supra,* 28 Cal.2d at pp. 43-44; see Rest.2d Agency, § 220.]

On the date of injury, applicant was performing work on dissembling shelving, and in general (crediting applicant's testimony) he was performing other duties that benefitted CGL. However, applicant also testified that he would perform work elsewhere around this time. But there was no evidence that applicant was engaged in any particular occupation or business, but instead would work as a general handyman or assistant. Therefore, this factor also favors employment.

Petitioners contend this factor favors its position because applicant's services were "not the wholesale business in which Defendants were engaged." [Petition, p. 4, ll. 8-9.] Petitioners misstate the focus *Borello*, which is on the services provided by the alleged employee, not the alleged employer. [See footnote 32.]

4. *Work Performed With or Without Supervision*

> "[T]he 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." *[Borello*, 48 Cal. 3d at p. 350 [54 Cal. Comp. Cases at p. 351].]

The evidence established that applicant, both on the day of injury and otherwise, was working without direct supervision. However, this factor appears directed more at whether such work applicant was performing would normally be done "in the locality" under direction of a principal or supervision. No evidence suggests how applicant's work in general would be performed. Thus, this factor does not favor either employment or independent contractor status.

Petitioners do not comment on this decision's application of this factor.

5. *Required Skill*

> "[T]he skill required in the particular occupation." [*Id.]*

The evidence established that applicant required no particular skill in performing the work he was doing at the time of injury. Thus, this factor favors employment. Petitioners acknowledge that applicant was performing a "low-skill" job but that this "does not automatically mean that he is an employee." [Petition, p. 4, ll. 19-20.] While a correct statement, nothing in the decision suggests that all of the *Borello* factors weigh against employment except for the lack of required skill.

6. *Tools and Place of Work*

> "[W]hether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work." [*Borello*, at 48 Cal. 3d at p. 350 [54 Cal. Comp. Cases at p. 351].]

This factor suggests both employment and independent contractor status. On the one hand, the evidence established that applicant provided "instrumentalities [and] tools" for this work, but on the other hand, the injury occurred in CGL's warehouse. Therefore, this factor is neutral on the issue.

Petitioners do not dispute the factual conclusions of the decision, but argue that this factor ought to weigh against employment. [Petition, p. 5, ll. 1-5.] But in *Borello*, this factor was factually similar, with the farm workers in that case "supply[ing] his own tools and his own transportation to and

from the field," [*Borello*, at p. 346 [54 Cal. Comp. Cases at p. 82].] with the work performed at the employer's location.

7. *Duration of Services*

> "[T]he length of time for which the services are to be performed." [*Id*., 48 Cal. 3d at p. 350 [54 Cal. Comp. Cases at p. 351].]

The evidence established that applicant performed work on an ongoing basis for CGL, with this judge crediting applicant's evidence on this point, versus Garavitt who asserted applicant did not do much of anything for the company. Therefore, on the date of injury, applicant had previously been working for the benefit of CGL, and it was anticipated he would continue to do so. This was not a case where applicant was employed specifically to disassemble shelving and nothing else. Therefore, this factor favors employment.

Petitioners agree that this factor favors a finding of employment, but contend that this is the only factor favoring such. [Petition, p. 5, ll. 17-20.]

8. *Method of Payment*

> "[T]he method of payment, whether by the time or by the job." [*Borello*, 48 Cal. 3d at p. 350 [54 Cal. Comp. Cases at p. 351].]

No evidence was offered by either applicant or CGL regarding exactly how applicant was to be paid. Applicant testified that he believed he was or should be paid by either CGL or Garavitt or Fierro, but he was not paid regularly, and he provided no details regarding how his wages or earnings should be determined. Although there is evidence of two checks to applicant from Garavitt, [Although the checks reveal that a different corporation was the payor on the checks, such corporation was controlled by Garavitt just like CGL, and was in the same line of business.] neither party could recall exactly why the checks were written. As applicant did not establish whether payment was by time or by the job, this factor favors independent contractor status.

Petitioners do not comment on this factor.

9. *Work Part of Regular Business*

> "[W]hether or not the work is a part of the regular business of the principal." [*Borello*, 48 Cal. 3d at p. 350 [54 Cal. Comp. Cases at p. 351].]

On the day of injury, applicant was not performing work that was a part of CGL's regular business, which was purchase and sales of various products. But, in general, again crediting applicant's testimony over Garavitt's, applicant had been in the past performing work that was within CGL's regular business, and his work on the day of injury was a necessary part of that business (in the process of moving the business location). Therefore, this factor favors employment.

Petitioners argue that this factor should favor independent contractor status, because moving its business was not part of its "regular" business as a wholesaler. [Petition, p. 5, ll. 6-15.] This contention is belied by the evidence which showed that, for a long period of time involving more than one facility, petitioners were involved in moving their business. But at any rate, this is a minor factor, albeit one notable for its difference from the *Borello* case, where the alleged employer and employees alike were clearly involved in farming.

10. *Belief in Employment Relationship*

> "[W]hether or not the parties believe they are creating the relationship of employer-employee." [*Id.*]

Garavitt testified that he did not believe an employer-employee relationship was created between him (or GCL) and applicant. And applicant was rather ambiguous over whether he regarded himself as an employee of CGL, or Garavitt, or Fierro. Therefore, this factor favors independent contractor status.

Petitioners do not comment on this factor.

11. *Employment — Conclusion*

The challenged decision noted that the Labor Code provides a presumption of employment whenever "[a]ny person [is] rendering service for another." Obviously, applicant was providing services for CGL at the time of his injury. It also appears that applicant was performing services for Fierro and/or the owner of the facility, but the main beneficiary of applicant's services was CGL. Although Garavitt testified to his believe that applicant was really employed by those other individuals, there was no evidence provided regarding applicant being paid by either of them, or the terms of the alleged contracts between CGL and these other persons.

If the facts revealed by the credible testimony were different, it would make sense that applicant was employed by Fierro, who in turn was hired by CGL (or the property owner) to perform such work. However, applicant testified credibly that he did not receive consistent payment for services by either Fierro or CGL and that he relied more upon CGL than Fierro for payment (including in-kind payment with products). Thus, applicant was employed by CGL.

Petitioners contend this ultimate finding of fact was erroneous as set forth above. The appeals board is empowered to re-weigh the factors if it wishes, noting that credibility is not a great factor in this case. However, it should be noted that applicant was performing work which not only was of limited skill, it concerned much less skill that what was apparent by the employees in *Borello*. So although noting that *Borello* is not a tremendously clear opinion [Certainly the supreme court would agree with this observation, as this is what motivated their later decision in *Dynamex*.] concerning how to evaluate a typically fact-heavy issue like employment, on reconsideration, employment should be upheld.

IV.
RECOMMENDATION

The judge respectfully recommends that the appeals board deny reconsideration.

Date: June 1, 2023

JOHN A. SIQUEIROS
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE