WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ANWER ALI, *Applicant*

vs.

COMMAND INTERNATIONAL SECURITY SERVICES[1]; NORGUARD INSURANCE COMPANY, administered by BERKSHIRE HATHAWAY GUARD INSURANCE; PRESTIGE INTERNATIONAL SECURITY, INC.; NORTH RIVER INSURANCE COMPANY, administered by CRUM & FORSTER, *Defendants*

Adjudication Number: ADJ16473370
Van Nuys District Office

OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION

Defendant NorGuard Insurance Company seeks reconsideration of the Findings and Order (F&O), issued by the workers' compensation administrative law judge (WCJ) on October 22, 2024, wherein the WCJ found in pertinent part that applicant sustained injury arising out of and in the course of employment (AOE/COE) to his back and right foot on February 11, 2022, while employed by Command International Security, Inc. as a security guard. The WCJ also found that on the date of injury applicant was not an employee of defendant Prestige International Security, Inc.

Defendant contends that because there is no evidence that Command International Security paid applicant for the period that encompasses the date of injury (DOI), the WCJ erred in finding that applicant was defendant's employee at the time of his injury. Defendant also contends that the evidence shows that applicant was employed by Prestige International Security.

We received an Answer from applicant.

[1] As discussed below, defendant is identified under several different names in various pleadings and documents, including Command International Security, Inc., Command International Security Services, and Command International Security Co. We will abbreviate defendant's name to Command International Security for purposes of this decision.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have considered the allegations in the Petition, the Answer, and the contents of the Report with respect thereto.

Based on our review of the record, for the reasons stated in the WCJ's Report, which is adopted and incorporated herein, and for the reasons discussed below, we will grant the Petition and amend Finding of Fact No. 2 to reflect that at the time of the injury the employer's workers' compensation carrier was NorGuard Insurance Company administered by Berkshire Hathaway Guard Insurance Companies. Otherwise we affirm the decision of October 22, 2024.

I.

Former Labor Code section[2] 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b)
>
> (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
>
> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on November 19, 2024, and 60 days from the date of transmission is Saturday, January 18, 2025. The next business day that is 60 days from the date of transmission is Tuesday, January 21, 2025. (See Cal.

[2] All statutory references are to the Labor Code unless otherwise stated.

Code Regs., tit. 8, § 10600(b).)[3] This decision is issued by or on Tuesday, January 21, 2025, so that we have timely acted on the petition as required by section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Section 5909(b)(2) provides that service of the Report shall be notice of transmission.

Here, according to the proof of service for the Report by the WCJ, the Report was served on November 19, 2024, and the case was transmitted to the Appeals Board on November 19, 2024. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on November 19, 2024.

II.

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.'" (Lab. Code, §§ 3351, 3357.) We also note that 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*).)

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 ...." (Lab. Code, § 3351.) Under Labor Code

[3] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

> Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

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.) 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 3353 defines "independent contractor" as follows:

> "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.

(Lab. Code, § 3353.)

With respect to contractors on construction projects, Labor Code section 3351 and Labor Code section 2750.5 are read together. (*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].) In pertinent part, Labor Code section 2750.5 provides that:

> There is a rebuttable presumption affecting the burden of proof that a worker performing services for which a license is required ..., or who is performing such services for a person who is required to obtain such a license is an employee rather than an independent contractor ....

(Lab. Code, § 2750.5.)

We are not persuaded by defendant's arguments about the lack of an employer-employee relationship and note that "[t]he label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced. [Citations.]" (*Johnson v. Berkofsky-Barret Prods*. (1989) 211 Cal.App.3d 1067, 1072.)

Based on the record before us, tangled though it is, applicant was rendering service for another at the time he was injured. Applicant's testimony is corroborated by Juan Guerrero, a project manager for the developer where applicant was injured, who testified that applicant worked as a security guard. Applicant texted Mr. Guerrero with his arrival time and departure time, typically working seven days a week, from 3:30 p.m. to 7:30 a.m. the next day. (Minutes of Hearing and Summary of Evidence (MOH/SOE), May 17, 2023 trial, pp. 3-4.) Exhibit 2 contains over 100 pages of text messages between applicant and Mr. Guerrero, beginning in June 2021. The

vast majority of the messages say simply "Arrived at Broadway" or "Leaving from Broadway." (Exhibit 2, Multiple text messages to general contractor.) Relevant here, applicant texted that he was arriving/leaving every day from January 1, 2022, through February 11, 2022.

It is undisputed that applicant worked for Command International Security in 2021 and from January 1, 2022, through January 25, 2022. According to petitioner, there is no direct proof that applicant had a continued relationship with Command International Security *after* January 25, 2022. Petitioner argues that applicant's last check was dated January 28, 2022; that the operating manager for Command International Security, Muhammad Zafar, testified that applicant was only paid by check; and that there is no other actual proof of payment from Command International Security after January 28, 2022. (MOH/SOE, August 31, 2023 trial, pp. 2-4.)

The absence of a check after January 28, 2022, merely indicates that applicant was not paid by way of check for any work that he may have performed after January 25, 2022. It has little probative value in terms of whether work was performed, particularly in the context of applicant's testimony, the testimony of Juan Guerrero, and the text messages in Exhibit 2.

With respect to petitioner's contention that applicant was an independent contractor, petitioner presented no evidence to support this argument, so clearly it did not meet its burden in this respect. Further, it is frankly at odds with the testimony and other evidence.

III.

All parties must identify their full legal name including the names of the employer, insurance company, and any third-party administrator and failure to do so may subject the offending party to sanctions. (Cal. Code Regs., tit. 8, §§ 10390, 10400, 10402; *Coldiron v. Compuware Corp*. (2002) 67 Cal.Comp.Cases 289 (Appeals Bd. en banc); *Coldiron v. Compuware Corporation* (2002) 67 Cal.Comp.Cases 1466 (Appeals Bd. en banc).) Moreover, all parties have an ongoing obligation to promptly update the official participant record if changes occur throughout the span of a case. (Cal. Code Regs., tit. 8, § 10205.5.) While it may be expedient to refer to an employer, insurer, or third-party administrator as simply "defendant," the parties must be clearly identified to ensure that an award is legally enforceable. (See Lab. Code, §§ 5806, 5807.)

In various pleadings and documents, defendant is identified as Command International Security, Inc., Command International Security Services, and Command International Security Co. Defendant's attorneys Samuel Santos and Hanna, Brophy, MacLean, McAleer & Jensen and defendant's insurance carrier NorGuard Insurance Company are reminded that it is their

responsibility to accurately identify their clients and to correct the official participant record forthwith.

Accordingly, we deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Order, issued by the WCJ on October 22, 2024 is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

***

2. At the time of the injury the employer's workers' compensation carrier was NorGuard Insurance Company administered by Berkshire Hathaway Guard Insurance Companies.

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WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ PAUL F. KELLY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JANUARY 21, 2025

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

ANWER ALI
LAW OFFICE OF F. MICHAEL SABZEVAR
HANNA BROPHY LAW FIRM

JB/*pm*

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I. INTRODUCTION

The injured employee is a 66-year-old security guard working on a construction site for a security company.

This trial was conducted to determine who employed Mr. Ali when he was injured on the job on 2/11/2022. Employment is the sole issue. While injury was also raised, there was no dispute on that issue and no appeal therefrom.

The Petitioner is the Defendant, Command International Security Services (insured by Berkshire Hathaway Ins. Co.), who has filed a timely and verified Petition for Reconsideration claiming that the undersigned erred by finding Command International Security Services to be Mr. Ali's employer on the date of injury and not Prestige International Security Services (insured by North River Ins. Co.).

The undersigned shall recommend that the Petition be denied.

II. FACTS

The Applicant was working as a security guard at a worksite under construction when he injured his right foot and low back on 2/11/2022.

The case first came on for trial on 5/17/2023 at which time only Commmand (sic) International Security Services (hereinafter referred to as Command) was the defendant claiming no employment.

The allegation by Applicant is that he worked for Command on the date of injury of 2/11/2022. The Applicant testified that the Defendant's agent, Mr. Aktar, gave him his work assignments, gave him his salary and could control his activities on the worksite where the Applicant worked (Minutes of Hearing, 5/17/2023).

Ex.1 and 2 show communications with the worksite and Mr. Aktar confirming work hours. The identity of the employer is not noted.

The Applicant testified that he worked at a singular construction job site as a security guard for Command. Command issued 1099 forms to the Applicant (Ex. A). Multiple paychecks from Command are in evidence that all pre-date the DOI (Ex. B & C). There are no checks given into evidence after 1/28/2022 (Minutes of Hearing, 5/17/2023 (pp. 5 - 6).

The operations manager for the worksite (Mr. Juan Guerrero) testified on 5/17/2023. He was employed by the construction company at the worksite. He testified that he "believed" that the construction company (Stelee Industries) had a contract with Prestige International Security Co. (hereinafter referred to as Prestige) to supply security for the jobsite where Applicant worked. He

has never heard of Command International Security. The source of this belief was not produced (Minutes of Hearing, 5/17/2023, pp. 3 - 4).

The operations manager for the Defendant Command, Muhammad Zafar, specifically indicates that Mr. Aktar was their employee who supervised the Applicant. Aktar specifically informed this witness that the Applicant left his employment with the Defendant on or about 1/25/2022 and took another job. Mr. Zafar testifies that Applicant's last day of work with Command was 1/25/2022, and his last paycheck was 1/28/2022 (Minutes of Hearing, 8/31/2023, pp. 2 - 4).

Zafar also testified that Aktar was terminated by Command on or about May, 2023 (p. 3).

Mr. Zafar does not know if Aktar also worked for Prestige.

The job duties supposedly performed for the Defendant are at sharp odds with what the Applicant states his duties were on the jobsite. Also, Applicant claims he only worked at one jobsite. Zafar had no knowledge of a contract for that worksite nor that he knew anything about that worksite (Minutes of Hearing, 8/31/2023, p. 3).

The Applicant testifies that he worked for Command International only. He was paid by them for all his work. He does not know who Prestige is. He was paid in cash by Mr. Aktar or his check was a direct deposit to Applicant by Aktar (Minutes of Hearing, 8/31/2023, p. 4).

At this point the undersigned issued an order taking the matter off calendar and issued a joinder of Prestige International Security Services along with its carrier, North River Ins. Co. Thus far Prestige had not been a party in this case.

The case returned to calendar for further trial after Prestige was allowed time to obtain counsel and perform discovery. The trial continued on 8/15/2024.

The CEO of Prestige, Mr. Fahim Memon, admits that they had a contract with the worksite confirming the testimony from Mr. Guerrero. However, he indicates that the Applicant was not their employee at all. Testimony indicates that their payroll process is different. Their employees are paid through a payroll company. He also indicates that Mr. Aktar worked for them "on and off" having last worked in 2021. (Minutes of Hearing, 8/15/2024).

There was no evidence of payments made by Prestige to the Applicant (Minutes of Hearing, 5/17/2023, p. 6).

Unfortunately, no one was able to produce Mr. Aktar to trial.

The owner of Prestige, Mr. Fahim Memon, identified his cousin, Nafees Memon, as the owner of Command. (Minutes of Hearing, 8/15/2024, p. 3). There was a lunch meeting between Nafees Memon and the Applicant sometime in June, [2022] regarding the injury herein wherein Mr. Nafees Memon wanted Command removed from this claim as the employer. It does not appear that much came of that meeting, and no more information pertinent to this trial was discussed (Minutes of Hearing, 5/17/[2022], p.7, lines 5 - 11).

III. DISCUSSION

The testimony here is quite contradictory. It is very difficult to determine who the correct employer was on the date of injury. The two companies are separately owned by Nafees Memon and Fahim Memon. They are cousins (Minutes of Hearing, 8/15/2023, p. 3. line 23).

Cal. Lab. Code sec. 3351 defines an employee:

> " '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…"

Cal. Lab. Code sec. 3357 states:

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

In this case the only "contract of hire" that is shown is between Applicant and Command International as set forth in the various paychecks and 1099 Forms. Command admits employment at least up to 1/25/2022, only two weeks before the injury.

Mr. Abkar was employed by Command and was Applicant's contact on the date of injury. Hence Mr. Abkar was certainly Command's agent who could control the Applicant's activities. The Applicant only knew Command as his employer as documented by the paychecks and 1099 forms. Mr. Abkar clearly acted as Command's agent in that he paid the Applicant as well as set forth by Applicant.

Hence it is clear that the Applicant was performing work for another as set forth by sec. 3357. That "other" was Mr. Abkar who was employed by Command.

No one told the Applicant that his employment with Command ended. Hence he continued to work for them.

The very troubling testimony shows that Prestige International had the security contract with the worksite. Command claims they did not. The worksite representative also confirmed that their contract was with Prestige and not Command.

The link to all this conflict is the mysterious Mr. Aktar whose activities seem to be ubiquitous between both potential employers. Both employers admit to his being part of their operations. Unfortunately, this witness cannot be produced.

Aktar was terminated by Command in May of 2023 (Min/Hrg, 8/31/2023, p. 3, line 16). Hence, according to Command's own testimony Aktar was working for Command or at the least was still in the employ of Command on the date of injury.

Prestige maintains that Aktar's employment with them ended in 2021 (Min/Hrg, 8/15/2024, p. 3, line 6).

The Applicant vehemently denies that he left Command's employment. He was paid by them for the services being performed on the date of injury.

Hence the undersigned found that Command International is the employer herein.

The fact that the worksite's contract for security services is in question does not affect this question before this Court. The Applicant was not performing services for the worksite but for the security company. Put bluntly, it is not relevant who had the contract with the worksite. What is relevant is who was the Applicant working for when injured.

The fact that Command employed the Applicant, and Applicant was paid by Mr. Aktar who was also in their employ is the best evidence that the services being performed at the time of injury were being performed for Command through their agent, Mr. Aktar. There is no payroll evidence to show Prestige was the employer even though they may have had a contract to perform security services at the worksite.

The information that the Applicant left Command's employment to work "somewhere else" is pure double hearsay with no source identified. The testimony that somehow Mr. Aktar "brought" the Applicant to Prestige is unsupported by any direct evidence.

Putting all this testimony together the preponderance of the evidence shows that Mr. Aktar was still employed by Command International in 2022, and that Applicant was paid by him on or about the date of injury (Minutes of Hearing, 8/31/2023, p. 4).

Just who had the contract to perform services at the worksite is a contractual issue between Prestige, Command and the worksite. But that dispute (if it exists at all) does not take away from the evidence that Command's agent, Mr. Aktar, was paying Applicant and controlling Applicant activities on the date of injury.

The preponderance of evidence shows that (1) Aktar was employed and therefore acting as agent for Command on the DOI, (2) Applicant was informed that his employer was Command, (3) Command admits it continued to employ Aktar as of the date of injury, (4) documents confirm that Command was paying salary to the Applicant, (5) Applicant continued to receive pay in the regular manner up to the date of injury, (6) there was no payments made to Applicant by Prestige, (7) Aktar was terminated by Prestige before the date of injury.

Command is essentially claiming that they terminated their employment contract with the Applicant. However a performance contract with no termination date can only be terminated unilaterally upon notice to the other party.

The Supreme Court in *Laeng v. WCAB* (1972) 6 Cal.3d 771; 37 CCC 185 made it clear that a contract of employment is broadly interpreted to include any activity within the "orbit of the risks of employment." Hence the fact that Defendant claims the employment relationship with Mr. Ali

terminated on 1/25/2022 does not dispel the fact that he rightfully continued to perform the same service when injured on 2/11/2022 as he was impliedly required to do. Those services performed on behalf of another still come under the heading of employment if those services provide a benefit to the employer. *Pomona College v. WCAB (Robusto)* (2009) 74 CCC 1284, writ denied.

Hence the preponderance of the evidence shows that Command was the Applicant's employer on the date of injury.

It is also alleged that the undersigned ought to have joined Abid Aktar as a potential employer herein. Since Command admits that Aktar was in their employ on the date of injury and that the Applicant took his instruction and pay form Aktar, the undersigned did not agree to join the unobtainable individual as a potential employer in this case.

The undersigned also inferred little significance from the lunch meeting between the owner of Command and the Applicant (Minutes of Hearing, 5/17/2023, p. 7, lines 5 - 11). While the meeting was curious, it did not produce any relevant evidence on the employment question.

IV. RECOMMENDATION ON PETITION FOR RECONSIDERATION

Based on the above facts and the conclusions made by the undersigned, it is respectfully recommended that the Petition for Reconsideration be DENIED.

Date: 11/18/2024

Dean Stringfellow
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE