WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

LUIS CALDERA, *Applicant*

vs.

PORTUGUESE FRATERNAL SOCIETY OF AMERICA/SES HALL; OAK RIVER INSURANCE administered by BERKSHIRE HATHAWAY HOMESTATE COMPANIES, *Defendants*

Adjudication Number: ADJ13119319
Lodi District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the March 25, 2025, Findings of Fact and Orders (F&O) wherein the workers' compensation administrative law judge (WCJ) found, in relevant part, that the applicant was an employee of Portuguese Fraternal Society of America and SES Hall on March 29, 2018 when he sustained injury arising out of and in the course of employment to the left wrist. All other issues were deferred.

Defendant contends that the WCJ's finding of employment status was contrary to the law and not supported by evidence, that the WCJ failed to consider factors for determining employment status pursuant to *S. G. Borello & Sons, Inc. v. Dept. of Ind. Relations* (1989) 48 Cal.3d 341 [54 Cal.Comp.Cases 80] (*Borello),* and that the WCJ misapplied Labor Code section 2750.5.

Applicant filed an answer asserting that the applicant was credible and that the defendant had not met their burden to rebut a finding of employment.

The WCJ provided a Report and Recommendation on Petition for Reconsideration(Report) which recommends that defendant's petition be denied. The Report also notes a discrepancy between the carrier and employer as stipulated at trial and the carrier noted in the caption of the Petition for Reconsideration. There has been no attempt to correct the record by defendant, so we will not disturb the stipulation that Oak River Insurance is the correct carrier for Portuguese

Fraternal Society of America and SES Hall. (See Cal. Code Regs., tit. 8, 10400; *Coldiron v. Compuware Corp.* (2002) 67 Cal.Comp.Cases 289)

We have considered the allegations of the Petition for Reconsideration and the Answer and the contents of the Report. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, and for the reasons discussed below, we will deny reconsideration.

FACTS

The applicant sustained injury to his left wrist while working as a painter on March 29, 2018. Applicant alleged that he was an employee of the Portuguese Fraternal Society of America and SES Hall when the injury occurred.

The parties proceeded to trial on February 24, 2025. (Minutes of Hearing and Summary of Evidence (MOH/SOE, 2:4-8). Defendant argued that the applicant was an independent contractor, but defendant submitted no documentary evidence except the transcript of applicant's deposition (Exhibit A) and presented no witnesses to testify.

Applicant prepared and submitted a quote to Mr. Orland Toste of $1700.00 for labor to complete a job painting the SES Hall. (MOH/SOE, 3:20-21; Exhibit 1.) There is no testimony as to the role of Mr. Toste for the Portuguese Fraternal Society of America or SES Hall, but the quote was accepted and applicant agreed to do the work. (MOH/SOE, 3:21-22). The applicant testified that he did not have a contractor's license or a business license, nor did he tell anyone that he had a license. (MOH/SOE, 3:18-19 and 3:24-25).

Three checks were paid by defendant PFSA Council #116 to applicant. (Joint Exhibit 2.) Applicant testified that he was given one check in the amount of $1000.00 on March 29, 2018, the day the injury occurred. (MOH/SOE, 4:4-5.) Applicant was given a check to buy supplies. (MOH/SOE 4:4-5.) There is another check dated April 3, 2018, in the amount of $500.00 paid to "Orlando Toste," and applicant testified that this check was for reimbursement of supplies per Mr. Toste. (MOH/SOE, 4:8-10.) The third check was payable to applicant in the amount of $1650.00, $50.00 short of the agreed upon quote. Applicant was able to keep leftover paint to compensate for the $50.00. (MOH/SOE, 4:6-7.)

Applicant testified that Mr. Toste provided the schedule for completing the work and supervised the work including reviewing the applicant's work. (MOH/SOE, 4:9-11 and 20-22.) Applicant testified that he hired people to help him complete the work and paid those people with

the money he received. (MOH/SOE, 4:12-13.) There was no testimony about how long the project took, except applicant testified that there was no time frame provided. (MOH/SOE, 4:23-24.) Applicant testified that he was not told what supplies to purchase for the project, but he used the checks he was given to purchase the supplies. (MOH/SOE, 4:17-18.) There was no testimony about applicant's professional background or work as a painter prior to this job.

DISCUSSION

I

Former Labor Code section 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, Labor Code 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 Labor Code 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 May 8, 2025, and 60 days from the date of transmission is July 7, 2025. This decision is issued by or on July 7, 2025, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code 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. Labor Code section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on May 1, 2025, the Report was then amended on May 7, 2025, and served on May 8, 2025, and the case was transmitted to the Appeals Board on May 8, 2025. Service of the original Report and transmission of the case to the Appeals Board did not occur on the same day. Thus, we conclude that service of the Report did not provide accurate notice of transmission under Labor Code section 5909(b)(2) because service of the Report did not provide actual notice to the parties as to the commencement of the 60-day period on May 1, 2025.

However, a notice of transmission was served by the district office on May 8, 2025, which is the same day as the transmission of the case to the Appeals Board on May 8, 2025. Thus, we conclude that the parties were provided with the notice of transmission required by Labor Code section 5909(b)(1), and consequently they had actual notice as to the commencement of the 60-day period on May 8, 2025.

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; *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. (Lab. Code, § 5705(a); *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.) 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].) 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.)

In this case, applicant is a "contractor" pursuant to the Business & Professions Code section 7026.1(a)(2)(A) which requires a license for any person "who undertakes, offers to undertake, purports to have the capacity to undertake, or submits a bid to construct any building or home improvement project, or part thereof." Business and Professions Code section 7058 (a) states, " a specialty contractor is a contractor whose operations involve the performance of construction work requiring a special skill and whose principal contracting business involves the use of specialized building trades or crafts." Applicant was not exempt from the licensing requirement pursuant to Business & Professions Code section 7048 as the aggregate contract was over $500.00 and was not a part of a larger project. The applicant here qualifies as a contractor requiring a license as he submitted a bid for a painting job that would be considered home improvement for the SES Hall pursuant to that cost over $500.00 in labor and materials.

Thus, the employment status in this case is subject to the specific presumption of employment in Labor Code section 2750.5:

There is a rebuttable presumption affecting the burden of proof that a worker performing services for which a license is required pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, 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. Proof of independent contractor status includes satisfactory proof of these factors:

(a) That the individual has the right to control and discretion as to the manner of performance of the contract for services in that the result of the work and not the means by which it is accomplished is the primary factor bargained for.

(b) That the individual is customarily engaged in an independently established business.

(c) That the individual's independent contractor status is bona fide and not a subterfuge to avoid employee status. A bona fide independent contractor status is further evidenced by the presence of cumulative factors such as substantial investment other than personal services in the business, holding out to be in business for oneself, bargaining for a contract to complete a specific project for compensation by project rather than by time, control over the time and place the work is performed, supplying the tools or instrumentalities used in the work other than tools and instrumentalities normally and customarily provided by employees, hiring employees, performing work that is not ordinarily in the course of the principal's work, performing work that requires a particular skill, holding a license pursuant to the Business and Professions Code, the intent by the parties that the work relationship is of an independent contractor status, or that the relationship is not severable or terminable at will by the principal but gives rise to an action for breach of contract.

In addition to the factors contained in subdivisions (a), (b), and (c), any person performing any function or activity for which a license is required pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code shall hold a valid contractors' license as a condition of having independent contractor status.

For purposes of workers' compensation law, this presumption is a supplement to the existing statutory definitions of employee and independent contractor and is not intended to lessen the coverage of employee under Division 4 and Division 5.

(Lab. Code, § 2750.5)

At the outset, this code unequivocally requires a license as a condition for finding independent contractor status. (*Cedillo v. Workers' Comp. Appeals Bd*. (2003) 106 Cal.App.4th 227 [68 Cal. Comp. Cases 140]; *Travelers Ins. Co. v. Workers' Comp. Appeals Bd.* (*Taylor*) (1983) 147 Cal. App. 3d 1033 [48 Cal. Comp. Cases 774]) As such, we are expressly precluded from concluding that the applicant was an independent contractor. Still, we will discuss factors (a)-(c) below.

In this case, the defendant has failed to meet any of the factors outlined in Labor Code section 2750.5 (a), (b), and (c). Subsection (a) requires applicant to have the right to control and

discretion as to the manner of performance of the contract. The result of the work is the primary factor bargained for not the means of performing the work. In this case, the applicant provided testimony that Mr. Toste supervised his work, reviewed his work, and provided the schedule for which the work could be completed each day. (MOH/SOE, 4:9-11 and 20-22) This testimony was unrebutted and the WCJ found the witness credible. (*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 as the defendant did not proffer any other evidence to show that the defendant had no control or that applicant had total control over the performance of the work. (*Id*.)

Part (b) requires a showing that the individual is customarily engaged in an independent business. Again, neither party took testimony from the applicant as to his past or present employment or even his expertise as a painter. The most relevant testimony was that the applicant did not have a business license and did not tell people that he had a business. (MOH/SOE, 3:18-19 and 3:24-25) There is no evidence in the record to support the applicant having an independent business of any kind, much less a professional painting business.

Last, part (c) provides a subset of factors akin to those outlined in *Borello* that, when considered cumulatively, provides the framework for determining whether independent contractor status is firmly established. The evidence leans heavily toward a finding that the applicant was an employee based on these factors. No evidence was provided that the applicant had any personal investment in either a business or in this project. He was paid for his labor and either was paid up front or reimbursed for materials totaling $1500.00. The purchased materials were then the property of the employer paid for with the employer's money not the applicant's. In fact, part of the applicant's ultimate renumeration was $50.00 worth of leftover paint in lieu of salary. The applicant could not have accepted the remainder of the contract payment in his own materials, so it must have belonged to the employer. Further, there was no testimony that the applicant had his own paintbrushes, much less any other material necessary for painting. As mentioned previously, there was no evidence that the applicant had any special training or skill as a painter. The bid and testimony provided no clarity about either party's understanding of the ability to end employment or the term of employment. Some of the factors tend toward independent contractor status such as the applicant hiring help and being paid for the completion of the job rather than another method.

However, in the totality of the factors these are given less weight thereby defeating a finding of independent contractor status.

Defendant argues that the *Borello* factors should be considered. Defendant seems to argue that Labor Code section 2750.5 does not apply but provides no legal basis or reasoning for this position. We emphasize that it is defendant's burden to show that applicant was an independent contractor, yet defendant presented no witness testimony and no documentary evidence as to the issue of *Borello*, or as to the issue of Labor Code section 2750.5. As such, the presumption of employment cannot be rebutted.

Accordingly, we deny the Petition for Reconsideration.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 7, 2025

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

LUIS CALDERA
GUY MEDFORD
MICHAEL SULLIVAN

TF/md

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

WORKERS' COMPENSATION APPEALS BOARD OF THE
STATE OF CALIFORNIA Case No. ADJ13119319

Case Name:	LUIS CALDERA vs. PORTUGUESE FRATERNAL SOCIETY OF AMERICA/SES HALL insured by OAK RIVER INSURANCE COMPANY
Workers' Compensation Administrative Law Judge:	Irene R. Bowdry
Date of Injury	March 29, 2018

REPORT AND RECOMMENDATION ON
PETITION FOR RECONSIDERATION
AMENDED TO INCLUDE THE TRANSMISSION DATE

INTRODUCTION

Manner of Injury:	Deferred
Date of Injury:	March 29, 2018
Body Parts Injured:	Deferred
Occupation:	Painter
Occupational Group Number:	Deferred
Age on Date of Injury:	Deferred
Date of Findings and Award:	March 24, 2025
Petitioner:	Defendant-Berkshire Hathaway Homestate Companies
Timeliness of Petition for Reconsideration:	Timely
Verification of Petition for Reconsideration:	Verified

PETITIONER'S CONTENTIONS

Petitioner alleges that the WCJ acted in excess of his powers, that the evidence does not justify the findings of fact, and that the findings of fact do not support the order, decision or award.

In summary, Petitioner is claiming that the WCJ erred in finding the following:

1. The WCJ's finding of employment status is contrary to law and not supported by substantial evidence.
2. The WCJ failed to properly apply secondary factors under Borello.
3. The WCJ misapplied Labor Code section 2750.5.
4. The WCJ's findings regarding supervision and control are not supported by substantial evidence.

DISCUSSION—RESPONSE TO PETITIONER'S CONTENTIONS

The reasoning behind the decision was set out in the opinion on decision. The following is a response, which includes relevant modified portions of the opinion on decision, in order to address the specific contentions of Petitioner.

FACTS

The parties stipulated on the record, Portuguese Fraternal Society of America/SES Hall were both insured by Oak River Insurance Company on the date the applicant sustained an injury on March 29, 2018. On the day of trial, Defense counsel entered their appearance on the record for Oak River Insurance, carrier for Portuguese Fraternal Society of America/SES Hall as Michael Sullivan & Associates by Alcides Cabrera. The only issue submitted for trial was whether the applicant performed the duties of a painter as an employee or independent contractor.

The Petition for Reconsideration filed by Alcides Cabrera with Michael Sullivan & Associates, includes a caption wherein the named defendant is Portuguese Fraternal Society of America insured and administered by Berkshire Hathaway Homestate Companies. The defendant named throughout the Petition for Reconsideration is also referenced as Portuguese Fraternal Society of America insured and administered by Berkshire Hathaway Homestate Companies. There is some discrepancy within the Petition for Reconsideration as to the correct name of the alleged employer and who insured and administered the claim.

ANALYSIS

QUESTION #1. Is the finding of employment contrary to law and not supported by substantial evidence?

ANSWER: No, the evidence supports the finding of employment and that Defendant failed to meet its burden of proof to rebut the presumption.

Lab. Code section 3351 states, “”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,…”. Lab. Code section 3357 states, “Any person rendering service for another, other than an independent contractor, or unless expressly excluded herein, is presumed to be an employee.”

The finding of employment can be established if the applicant is credible and meets his burden of proof by establishing the alleged employer exerted control and supervision over the work performed. S.G. Borello & Sons v. Department of Industrial Relations (1989) 48 Cal. 3d 341, 769 P. 2d 399, 256 Cal. Rptr. 543, 54 Cal. Comp Cases 80.

The credibility of witnesses and the weight of evidence are questions of fact for the WCJ to answer. While the Appeals Board is not bound by the credibility determinations made by a WCJ, those findings are entitled to great weight. This is due to the fact that the WCJ had the opportunity to observe the demeanor of the witnesses and weigh their statements in connection with their manner

on the stand. A WCJ's findings of credibility can only be rejected in the face of considerable substantive evidence to the contrary. In this case, Applicant's testimony was unembellished and unrebutted. Applicant was found to be a credible witness.

The burden of proof is a fundamental aspect of workers' compensation litigation. The party holding the affirmative on an issue has the burden of proof (See Labor Code, Section 5705). The level of proof required in workers' compensation matters is a "preponderance of the evidence" (See Labor Code, Section 3202.5). Preponderance of the evidence means "evidence that, when weighed with that opposed to it, has more convincing force and the greater probability of truth." Stated another way, preponderance of the evidence means that the evidence on one side outweighs the evidence on the other side. It simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence. The liberal construction required by Labor Code, Section 3202 does not relieve a party from meeting its evidentiary burden of proof.

In this case, the applicant provided unrebutted testimony of a supervisor named Mr. Toste, with SES Hall, whom allowed the Applicant access to the facility to be painted and supervised the Applicant's work. The employer did not testify. The Applicant's testimony was not rebutted and the applicant was found to be a credible witness. The Applicant did not produce testimony in a speculative manner, he did not guess. The Applicant's testimony was credible, persuasive, unrebutted, and convincing. The testimony of the applicant was deemed substantial evidence. LeVesque v. WCAB(1970) 1 Cal. 3d 627, 83 Cal. Rptr. 208, 463 P.2d 432, 35 Cal. Comp. Cases 16, Hegglin v. WCAB (1971) 4 Cal. 3d 162. The applicant met his burden of proof to establish he was an employee based upon substantial evidence.

QUESTION #2. Did the WCJ fail to apply the secondary factors under Borello?

ANSWER: No, the evidence supports the finding that the secondary factors were considered and applied based upon substantial evidence.

Under *Borello, supra*, a defendant can meet their burden of proof to rebut a presumption of employment if they present substantial evidence establishing the defendant did not exercise control and the manner in which the services were provide. The secondary factors addressed in *Borello, supra*, are subject to the facts presented in each case and on a factual case by case manner. The secondary factors are intertwined and their weight depends upon the particular combinations. Consideration must also be given to the application of the Workers' Compensation Act. In *Borello, supra*, emphasis is placed upon the purpose of the Act… "to spur increased industrial safety and in return, to insulate the employer from tort liability for his employees' injuries..". Additionally, consideration is given to the primary factory of control and the secondary factors along with the facts of each case and how the factors are intertwined.

As stated in *Borello, supra*,

"This is the balance to be struck when deciding whether a worker is an employee or an ***independent contractor*** for purposes of the Act. We adopt no detailed new standards for examination of the issue. To that end, the Restatement guidelines heretofore approved in our state remain a useful reference. The standards set forth for contractor's licensees in section 2750.5 (see fns. 5, 6, *ante*,

at pp. 351–352) are also a helpful means of identifying the employee/contractor distinction. The relevant considerations may often overlap those pertinent under the common law."

In this case, the applicant's unrebutted, credible testimony supported the finding of an employer-employee relationship based upon the testimony that the defendant controlled the time for the applicant to show up for work, the supplies were purchased with money provided by the employer and the applicant's work was supervised by Mr. Toste, the employer. Defendant did not produce Mr. Toste at trial, to provide testimony. The fact that the supplies were purchased by the defendant is convincing evidence that the Applicant was not running a painting business or entered into a painting contract with the defendant.

QUESTION #3. Did the WCJ misapply Labor Code section 2750.5?

ANSWER: No, the evidence supports Labor Code section 2750.5 was not misapplied.

Labor Code section 2750.5 states, …"there is a rebuttable presumption affecting the burden of proof that a worker performing service for which a license is required pursuant to Chapter 9 (commencing with Section 7000) Division 3 Business & Profession Code is an employee rather than an independent contractor. The conditions to establish independent contractor status is set forth under Lab. Code section 2750.5 (a)(b) and (c).

Under Bus. Prof. Code section 7048, a contractor's license is required for labor and material exceeding $500.00. In this case, the applicant testified he did not have a contractor's license and the labor was $1,700.00. There was no evidence presented that the applicant was normally engaged in providing painting services through and established entity. Defendant did not present any witnesses to establish the applicant operated an established business providing painting services. Defendant did not present any evidence to rebut the presumption the applicant was an employee set forth under Lab. Code section 2750.5.

For purposes of Workers' Compensation law, the presumption under Lab. Code 2750.5 is a supplement to the existing statutory definition of employees and independent contractor, and is not intended to lessen the coverage of employees under Division 4 and Division 5. Lab. Code 3352(a) and Lab. Code 2750.5 operate together to establish the applicant was an employee. The applicant does not fall into any category of exclusion under Lab. Code section 3352.

Joint Exhibit 1, Proposal, referenced by Defendant as the Bid, was not found to be substantial evidence to establish the applicant was an independent contractor. The Bid does not state the applicant would provide supplies, the bid was not executed by anyone and there is no reference to a contractor's license. Joint Exhibit 1 lacks substantial evidence to prove the applicant was an independent contractor.

The applicant testified the cost of labor was $1,700.00. A cost for supplies is not stated in the Proposal nor who would pay for the supplies. The applicant testified he received money from defendant, SES Hall to purchase the paint; this amount was separate from the cost for labor. The applicant testified he was paid $1,650 for the labor, which was $50.00 short. He was compensated for the $50.00 with the leftover paint; paid for by SES Hall. There was no rebuttal evidence or

testimony presented to dispute how the applicant was paid.

Under Lab. Code 3357, there is a presumption that any person rendering service for another, other than an independent contractor, or unless specifically excluded under the statute, is presumed to be an employee. Defendant argues the applicant was customarily engaged in an independently established painting business, as evidenced by his ability to prepare a "formal bid" and his understanding of industry practices regarding payment for labor and materials. Defendant presented no evidence to establish the applicant's ability to prepare a formal bid, the elements of a formal bid, if in fact the proposal, joint Exhibit 1, could be defined as a formal bid or the applicant's understanding of industry practices and the relevancy of the applicant's understanding to rebut the presumption the applicant was an employee. Defendant presented no substantial evidence to establish the independent contractor status was bona fide. Defendant did not establish the factors listed in Lab. Code section 2750.5(a)(b) or (c) and Lab. Code section 3357 to rebut the presumption of employee.

QUESTION #4. Is the WCJ's finding of supervision and control supported by substantial evidence?

ANSWER: Yes, the evidence supports the finding of supervision and control is supported by substantial evidence.
Substantial evidence is evidence not based upon speculation, guess or surmise. In this case, the applicant's testimony was found to be credible and there was no other testimony or relevant facts to rebut the applicant's testimony. Consideration was given to each factor of testimony provided by the applicant. *LeVesque, supra, Hegglin, supra*.

As stated above, the applicant was found to be credible. The applicant testified Mr. Toste told the applicant when to show up for work. He testified Mr. Toste oversaw his work and controlled the time the applicant could provide the services. The applicant testified, Mr. Toste supervised his work. The applicant testified he was paid $500.00 for reimbursement of supplies. The applicant testified he never told Orlando he had employees. The applicant also testified that he asked someone to help him and paid those that helped him out of the money he received under the Proposal. Mr. Toste gave the applicant the money to buy the paint. Even though the applicant testified he was not told what supplies to purchase, based upon the applicant's testimony, Mr. Toste exerted control over the services provided. Based upon the applicant's testimony the applicant did not set his own hours and defendant had the retained the right to control the applicant's schedule. The control over the services provided is the primary factor addressed under *Borello, supra*, to establish an employer-employee relationship. Secondly, defendant did not present any evidence to establish the applicant had an established business and painting services were rendered regularly as in integral part of a business operated by the applicant'. The applicant's unrebutted testimony supported substantial evidence of supervision and control. Defendant did not present any witnesses to rebut the applicant's testimony or establish secondary factors under

Borello, supra.

CONCLUSION

The findings and order issued in this matter are clear, concise, and supported by substantial credible evidence.

RECOMMENDATION

It is respectfully recommended that the Petition for Reconsideration be denied. DATE EAMS

FILE TRANSMITTED TO THE APPEALS BOARD: May 8, 2025

Dated: 5/07/2025

/s/ Irene R. Bowdry
Irene R. Bowdry
WORKERS' COMPENSATION JUDGE