WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MARIO CERVANTEZ, *Applicant*

vs.

RICK DUBOIS AND MARVIN VALERA; IND.,
and dba YOU LUCKIE DOG!
and YOU LUCKY DOG, a partnership, *Defendants*

Adjudication Number: ADJ10687754
Lodi District Office

OPINION AND DECISION AFTER RECONSIDERATION

The Appeals Board granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.

In the Findings and Orders of July 19, 2021, the Workers' Compensation Administrative Law Judge ("WCJ") found that on November 10, 2016, applicant was employed by "You Lucky Dog" as a dog groomer, and that on said date applicant sustained industrial injury to his right hand and to the third and fourth digits of his right hand.[1] The WCJ also found that applicant's earnings were minimum for purposes of temporary and permanent disability indemnity, but the WCJ deferred the issues of applicant's entitlement to temporary disability benefits and medical treatment.

Applicant, and defendants Rick Dubois and Marvin Varella individually and doing business as "You Luckie [sic] Dog!" and "You Luckie [sic] Dog, partnership" (hereinafter collectively referred to as "defendants"), filed timely petitions for reconsideration of the WCJ's decision.[2]

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[1] Applicant testified at trial that he injured fingers on his *left* hand, but Dr. Lin reported that applicant injured fingers on his *right* hand. (See, respectively, Summary of Evidence, 5/6/21, p. 6; report of Dr. Lin dated 5/2/19, applicant's Exhibit 2.) We will not disturb the WCJ's finding that applicant injured his right hand and the third and fourth digits of his right hand. If the body part is incorrect, the WCJ should correct it in further proceedings at the trial level, based on the WCAB's continuing jurisdiction.

[2] In his findings, the WCJ identified "You Lucky Dog" as the employer. In his Opinion on Decision, the WCJ indicates that the employer(s) are Rick Dubois and Marvin Varella, individually and doing business as "You Luckie

In applicant's petition for reconsideration, it is contended that the WCJ erred in finding that applicant had minimal earnings, and that the WCJ erred in failing to consider applicant's earnings from a second full-time job working as a dog groomer.

Defendants answered applicant's petition. The answer had been considered.

In defendants' petition for reconsideration, it is contended that defendants "were not in an employment relationship" with applicant, that the parties' "gross percentage lease agreement" was a "business arrangement analogous to a partnership or joint venture," that applicant was an independent contractor and thus ineligible for workers' compensation, that applicant's replacement of a bathtub for dogs did not require a contractor's license under the Business and Professions Code, and that even if applicant was an employee, his injury did not arise out of and occur in the course of employment because he unilaterally decided to replace the bathtub and to use a skill saw.

Applicant answered defendants' petition. The answer has been considered.

The WCJ submitted two Reports and Recommendations ("Reports"), one for applicant's petition for reconsideration and one for defendant's petition for reconsideration.

In reference to defendants' petition for reconsideration, we have considered the allegations of said petition and the contents of the WCJ's Report with respect thereto. Based on our review of the record, and for the reasons stated below and in the WCJ's Report, which we adopt and incorporate only to the extent set forth within this opinion, we will affirm the WCJ's finding that applicant was employed as a dog groomer by You Lucky Dog when he sustained industrial injury on November 10, 2016. (See *Allen v. Glendora Vill. Pets* (2010) Cal. Wrk. Comp. P.D. LEXIS 566 [rejecting "industry standard" that dog groomers are independent contractors]; *Martinez v. Chelo's Hair Fashion* (2014) Cal. Wrk. Comp. P.D. LEXIS 689 [hairdresser who paid 50% of her receipts to co-hairdresser/salon owner was an employee].)

Further, in affirming the WCJ's finding of employment herein, we have given the WCJ's credibility determination(s) great weight because the WCJ had the opportunity to observe the demeanor of the witness(es). (*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 determination(s). (*Id*.)

[sic] Dog!" and "You Lucky Dog, a partnership." In further proceedings at the trial level, the parties and the WCJ should make sure the named defendants are true and correct, and that the names are correctly identified in the case caption and in all documents generated in this proceeding.

In his Report on defendants' petition, the WCJ supported his finding of employment, in relevant part,[3] as follows:

[**WCJ'S FACTUAL BACKGROUND**]

> Applicant obtained work from Rick DuBois and Marvin Valera; ind., and dba You Luckie Dog! and You Lucky Dog, a partnership. Defendant claims Applicant is an Independent Contractor and Applicant claims employee status at the time of injury. There is no written independent contractor document. Defendant claims Applicant was sub-leasing part of his building to provide dog grooming services. Defendant at that building provides dog day care services. There is also no written lease agreement between Defendant and Applicant.
>
> Applicant was injured using Defendant's skill saw while replacing a bathtub [used] to bathe dogs. The old tub had issues including leaks and possible black mold. This tub was used as part of the dog grooming and for exit baths as part of the dog day care service. Defendant told Applicant to make whatever improvements he wanted. The testimony of Applicant and Defendant/employer is summarized in the minutes of hearing and summary of evidence dated 5/6/2021 (hereinafter MOH/SOE).
>
> Applicant had no business license for the grooming service and no separate business name of that service. […] Defendant's customers would ask for grooming services.
>
> Applicant did have another job working as an employee for Tracy Dog Grooming where he was working 40 hours a week and he was paid $18 an hour. Applicant was paid by check and was not provided a 1099. Defendant did not provide evidence a 1099 was ever provided.
>
> […]
>
> Applicant responded to an ad for a grooming position at Defendant/Employer (Defendant) "You Luckie Dog" either on the internet or information about a dog grooming position from his girlfriend who worked a couple of blocks away. (Minutes of Hearing and Summary of Evidence (MOH/SOE) page 4 line 1; Defendant's [exhibit] A, page 26.)
>
> There was no application for employment, no independent contractor contract or subtenant lease in writing. (Employer testimony, MOH/SOE page 7 lines 7-8 and lines 16-17.) It was all verbal.
>
> The parties [agree] that Applicant's pay was to be 60% of the gross receipts and 40% would go to Defendant. This was not in writing.

[3] We omit those parts of the WCJ's Report which are irrelevant and/or unhelpful to determining the issue of employment in this 2016 injury case, e.g., whether applicant was an employee pursuant to *Dynamex Operations W. v. Superior Court* (2018) 4 Cal.5th 903 [83 Cal.Comp.Cases 817]. (See Lab. Code, § 3351(i): "ABC" test of *Dynamex* to determine employee status, pursuant to Lab. Code § 2775, begins July 1, 2020 and does not apply retroactively.)

Defendant had Applicant come in and groom a hard to handle dog and hired him on the spot. (Defendant's [exhibit] A, page 29 and 30.) The defendant gave him business cards which were the Employer's business cards (always [with the employer's] logo) [and] all advertising had [the] "You Luckie Dog" logo with the statement: "You Luckie Dog now provides dog grooming services". [This included] nothing about Applicant's name or separate phone number. (Defendant's testimony; Applicant's [exhibit] 1, page 45 line 25 and page 46 lines 1-2.) This included posters and fliers. (Defendant's [exhibit] A, page 37 and 38.) Applicant was not allowed to market himself. (Defendant's [exhibit] A, page 38 lines 3-4 and Applicant's [exhibit] 1, page 36 lines 20-25.)

Customers had no physical access to Applicant's grooming. Everyone had to enter [the premises of] "You Luckie Dog" through the front counter. (Defendant's [exhibit] A, pages 35-36.) The only business name was "You Lucky Dog". No evidence from any source identified any other business name besides "You Lucky Dog." (Id., page 37 lines 2 through 4.) It is noted that Defendant testified in his deposition that there was a sign inside the lobby [that stated] "dog grooming by Mario."

The employer provided 95 to 97% of Applicant's grooming customers. Applicant was not allowed to call "You Luckie Dog" customers to drum up business. Applicant could not even provide discounts. All billing was controlled by Defendant.

Defendant has no records of Applicant's gross receipts or what he paid him, at all. (Applicant's [exhibit 1], page 25 lines 15-25 and page 26.)

Defendant's testimony in his deposition is that other than Applicant he had a friend Danny sort of helping with no clear statement of his pay. (Applicant's [exhibit 1], page 26.) […]

Applicant was injured on 11/10/2016. Defendant was uninsured for Workers' Compensation purposes.

Defendant had given permission to Applicant to make whatever improvements he want[ed]. Defendant denie[d] permission for the tub replacement but was aware Applicant was using the skill saw. (Applicant's [exhibit 1], page 34 and MOH/SOE dated 5/6/2021, page 7 lines 42-46.)

[…]

[Labor Code section] 3357 defines employee:

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

[…]

The seminal case from [our] Supreme Court remains [good law], *S. G. Borello & Sons. Inc. v. DIR (Borello)* (1989) 54 CCC 80. […]

The Court stated factors to be considered. The number one was the right of control. It is not the actual use of it but the right. It also made it clear a big picture overview of the facts were needed from case to case, not a simple analysis limited to control. The other factors were as follows;

(1) Whether the one performing services is engaged in a distinct occupation or business;

(2) The 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;

(3) The skill required in the particular occupation;

(4) Whether the principal or the worker supplies the instrumentalities, tools and the place of work for the person doing the work;

(5) The length of time for which the services are to be performed;

(6) The method of payment, whether by the time or by the job;

(7) Whether the work is a part of the regular business of the principal; and

(8) Whether the parties believe that they are creating the relationship of employer-employee.

[…]

[**WCJ'S DISCUSSION**]

In application to these facts it is difficult to support any finding of independent contractor. [Applicant] was improving the Defendant's/Employer's property/offices as allowed by the Employer per his own trial testimony. (MOH/SOE dated 5/6/2021, page 7 lines 42-46.) It is noted that in Defendant's deposition testimony the Employer leased this property.

Also benefiting or improving the Employer's business was the [tub's replacement by applicant], it leaked and was used for dog exit baths. (MOH/SOE, page 7 line 25.) Exit baths were used by the doggy day care business which is the [defendants'] business […]. Applicant would also use the tub for grooming which was the

independent contractor [status alleged by] Defendant […]. It was Defendant's property and business [that was] improved by Applicant.

The Defendant/Employer sent customers to Applicant. (MOH/SOE 5/6/2021, page 8 line 10-11.)

Employee status is presumed. [Labor Code section] 3357 […]

[…]

The Applicant was installing a tub which was elevated by wood for the dogs. The Defendant/Employer testified that he had authorized Applicant to make whatever improvements he wanted. Obviously the improvements were to the Defendant/employer's property or offices as testified. (MOH/SOE dated 5/6/2021, page 7 lines 42-46.)

[…] Applicant was replacing a tub directly for the benefit of the employer. In fact the employer had advised Applicant to make whatever improvements to the property he wanted by the employer's own testimony.

[…] Going further Defendant testified in Court he told Applicant to make whatever improvements he wanted. (MOH/SOE dated 5/6/2021, page 7 lines 42-46.) He did not testify make any improvements you want except the tub.

[…]

The *Borello* analysis, *supra*, [supports applicant's] employee status […].

- There is no evidence this employee had an outside business whatsoever. His outside work was an employee of a different dog grooming business.

- Applicant did not have a business license of any kind. Applicant did not have a business name for his dog grooming. (Defendant's [exhibit] A, page 53-54.) No other evidence was presented.

- Applicant credibly testified and explained why he did not have to get supplies on his own and why he had to get clippers if he broke them. This was an industry practice of employees. (Defendant's [exhibit] A, page 55 and page 56 lines 1-18.)

- Applicant had no control of where he worked. His work came from the front counter tracked by employer for billing or internally from boarded dogs who wanted grooming as part of the ·boarding. He could not develop his own customer base. (Defendant's [exhibit] A, page 35 lines 24-25; page 36 lines 1-16; and page 104 lines 4-8.)

- 97 to 99% of the dogs Applicant groomed came from boarding at "You Lucky Dog" (Defendant's [exhibit] A, page 57 lines 6-25 and page 58 lines 1-10.)

- Applicant had to be available for work Saturdays, Sundays or Mondays (Monday being his […] weekday off from his other job as an employee.

- Defendant directed his work activities. (Defendant's [exhibit] A, page 58.)

- Applicant felt the employer had the control to fire him. (Defendant's [exhibit] A, page 115 lines 15 – 25; page 116 lines 1-9; and page 56 lines 19-25.) No other evidence was presented to contradict this [belief] by Applicant. (Defendant's [exhibit] A, page 33 and page 34 lines 1-2.)

- Applicant could not advertise independent of his employer. All advertising [done] after Applicant was hired and after he stopped working for Defendant stated: "Dog grooming now available". (Defendant's [exhibit] A, pages 36-37.) Applicant's name was not part of it. (Defendant's testimony; Applicant's [exhibit 1], page 45 line 25 and page 46 lines 1-2.)

- Dog grooming is a special skill set but it is integral in attracting customers to Defendant's dog boarding.

[…]

In the end after review of all evidence and testimony Applicant explained his answers logically in the function of his employment duties. Defendant did not. Examples are plenty:

- Danny [was] a friend and a helper, according to Defendant. Applicant testified this friend was an on-site manager who controlled [and] assigned his workdays and services. (Defendant's [exhibit] D, page 33 lines 2 to 21.) […] Defendant's testimony about Danny is in Applicant's [exhibit] 1 at pages 23 and 28.) Danny was a friend who was paid depending on what he did [and who] helped [run] the Milpitas location. Danny did whatever [defendants] asked him to do. (Applicant's [exhibit] 1, page 46 and 47.)

- The employment relationship. […] Applicant testified extensively about the work environment and Defendant's control [of what applicant] had to do. (Defendant's [exhibit] A, pages 115, 116 and 117 lines 1-13.) He could not turn down work or he would lose his job. He had to come two days even [if] the work could be done in one day. Moving to Monday or Tuesday could cover eight dogs and the exit baths and grooming.

- Applicant's injury occurred at the Defendant's and Applicant's work site […].

[WCJ'S] CONCLUSION - APPLICANT WAS AN EMPLOYEE

There is nothing in writing. […] The absence of any writings is revealing as to the relationships here.

No independent contractor agreement. (Applicant's [exhibit] 1, page 14-15.)

No contract for the tub replacement.

No subtenant contract. (Applicant's [exhibit] 1, page 14-15.)

No W-2's or 1099 issued, [according to] Defendant's own testimony. (Defendant's [exhibit] A, page 53 lines 4-16; applicant's [exhibit] 1, page 51 lines 6-8 and lines 23-25.)

No gross receipts for Applicant 2016. (Applicant's [exhibit], 1 page 25 lines 15-25 and page 26.)

[This ends our adoption of the WCJ's Report on defendants' petition.]

We note that defendants further allege applicant's injury did not arise out of and occur in the course of employment. (Lab. Code, § 3600.) We reject the allegation because defendants fail to support it with any citation to relevant case law. We further note that when applicant was injured while attempting to install a new washtub for dogs, he already had been doing dog grooming for defendants for over a year. Applicant's attempted replacement of the washtub was incidental to his job as a dog groomer, not something that can be carved out of the employment relationship pursuant to a separate, make-believe contract. This conclusion is supported by *Reinert v. Industrial Acc. Com.* (1956) 46 Cal.2d 349 [21 Cal.Comp.Cases 78], wherein our Supreme Court repeated the well-settled rule that an injury is compensable if the employee is engaged in doing something the employee might reasonably have been expected to do while in the performance of his or her job duties. In *Reinert*, the injury of a girl scout counselor thrown from horse while riding in her free time was found to be compensable; the medium of exchange in which wages happened to be paid was a mere accidental circumstance that did not permit "clouding" of the course-of-employment issue. (*Reinert,* 46 Cal.2d at 355, internal quotations and citations omitted.)

Turning to applicant's petition for reconsideration, applicant contends that the WCJ erred in finding he had minimal earnings, and that his earnings from his other dog-grooming job must be considered.

In his Report, the WCJ concedes that at the time of injury, applicant had another job working as an employee for Tracy Dog Grooming where he was working 40 hours a week. Since applicant was working for two employers at the time of injury, we agree with the WCJ's Report that the issue of earnings must be determined in accordance with Labor Code section 4453(c)(2).

The statute provides: "Where the employee is working for two or more employers at or about the time of the injury, the average weekly earnings shall be taken as the aggregate of these earnings from all employments computed in terms of one week; but the earnings from employments other than the employment in which the injury occurred shall not be taken at a higher rate than the hourly rate paid at the time of the injury."

Although the WCJ's Report offers a recommended earnings calculation pursuant to section 4453(c)(2), we decline to adopt it because the WCJ has not determined whether applicant is entitled to any temporary or permanent disability. In effect, a present determination of applicant's earnings would amount to an advisory finding that may encourage piecemeal litigation, which should be avoided in further proceedings in this matter. Therefore, the WCJ should revisit the issue of earnings in connection with determining the issue of temporary and/or permanent disability in further proceedings at the trial level. Other than noting that the WCJ should determine all remaining issues in a unified decision, we express no final opinion on the issue of earnings. When the WCJ issues a final decision on that issue and the other ones which remain outstanding, any aggrieved party may seek reconsideration as provided in Labor Code sections 5900 *et seq*.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Orders of July 19, 2021 are **AFFIRMED**, except that Finding 3 and Paragraph (c) of the Orders are **AMENDED** to state as follows:

FINDINGS OF FACT

3. The issue of earnings is deferred pending further proceedings and determination by the WCJ at the same time as determination of temporary and/or permanent disability, with jurisdiction reserved at the trial level.

ORDERS

(c). The issue of earnings is deferred pending further proceedings and determination by the WCJ at the same time as determination of temporary and/or permanent disability, with jurisdiction reserved at the trial level.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that this matter is **RETURNED** to the trial level for further proceedings and determination of all outstanding issues by the WCJ, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JULY 1, 2024

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

MARIO CERVANTEZ
CENTRAL VALLEY INJURED WORKER LEGAL CLINIC
LAW OFFICES OF GARY NELSON
OFFICE OF THE DIRECTOR – LEGAL UNIT

JTL/*cs*

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