WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ABUNDIO CHAVEZ, ***Applicant***

vs.

ANA SILVA MENJIVAR, aka ANA CHAVEZ, an individual, uninsured, ***Defendant***

Adjudication Number: ADJ10876135
Van Nuys District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the Findings and Order (F&O) issued on March 29, 2024, wherein the workers' compensation administrative law judge (WCJ) found that (1) while allegedly employed as a laborer on March 3, 2011, applicant allegedly sustained injury arising out of and occurring in the course of employment to the back and legs; and (2) applicant was not an employee of defendant.

The WCJ ordered that applicant take nothing on his claim.

Applicant contends that the WCJ erroneously (1) found that applicant did not testify credibly based upon inconsistencies in his testimony that were immaterial; and (2) violated applicant's right of due process by denying applicant's request to present a rebuttal witness.

We did not receive an Answer.

We received a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have reviewed the contents of the Petition and the Report. Based upon our review of the record, and for the reasons set forth below, we will grant reconsideration, and, as our Decision After Reconsideration, we will rescind the F&O and return the matter to the trial level for further proceedings consistent with this decision.

FACTUAL BACKGROUND

On September 26, 2023, the matter proceeded to trial on the following issues:

1. Injury arising out of and in the course of employment.
2. Parts of body injured.
3. AOE/COE.

4. Defendants object to any medicals not based on accurate history from Applicant.
5. Failure to timely report.
6. Labor Code Section 5400, and Labor Code Section 5402.

(Minutes of Hearing, September 26, 2023, p. 3:10-17.)

Also on that date, the court ordered that the trial issues be bifurcated so that the "issue of employment" would be tried and all other issues deferred. (*Id*., p. 3:18.)

In the Report, the WCJ states:

> As per CCR §10945(b), it is mandatory that a Petition for Reconsideration shall support its evidentiary statements by making specific references to the record. The instant Petition fails to do so. Accordingly, the Petition may be denied or dismissed as per CCR §10972, and/or the petitioner may be sanctioned and/or admonished.
>
> . . .
>
> The petitioner testified that he was employed by the defendant for three weeks. The petitioner testified that he had a co-worker whose name he could not recall. (The alleged witness was present at the applicant's attorney's office and identified himself to the court as Jeronimo Bonilla) The Petitioner testified that he and Mr. Bonilla worked for two weeks. Then the petitioner continued to work during the third week without Mr. Bonilla. (See MOH dated 2/27/24, pg. 2, lines 24- through pg. 3, lines 1-2).
>
> The petitioner testified that during the first week, he painted the home with his helper. The petitioner testified that he installed the fence in the third week, and the petitioner injured himself on his last day of work.
>
> . . .
>
> The undersigned did not find the petitioner to be a credible witness.
>
> . . .
>
> The defendant homeowner testified that she needed work done on a fence, and the fence did not need a new coat of paint . . . The petitioner performed work for her for two and a half days. (See MOH dated 2/27/24, pg.4, lines 1-2) The petitioner told her it was a small job that would take two to three days. (See MOH dated 2/27/24, pg. 4, lines 22-23)
>
> The 73 year-old defendant homeowner testified that she does not remember another man coming to the house to help the applicant with the fencing. . . .
>
> The undersigned found the defendant homeowner to be a credible witness.
>
> As per the credible testimony of the defendant homeowner, the petitioner told her that it was a small job that would take only 2-3 days, and the petitioner left after 2 ½ days. Based thereupon, the petitioner worked less than 52 hours. Accordingly, as per Labor Code §3352(a)(8)(A), the petitioner was not an employee of the defendant homeowner.
>
> The petitioner did not remember the name of his co-worker. (See MOH dated 2/27/24, pg. 2, lines 22-23) (The petitioner indicated that the coworker was in his

> attorney's office that day, and the alleged coworker identified himself to the court as Jeronimo Bonilla.) The defendant objected to allowing Mr. Bonilla to testify as he was not listed as a witness in the pre-trial conference statement. (See MOH dated 2/27/24, pg. 3, lines 15-18). The undersigned excluded the testimony of Mr. Bonilla, as he was not listed as a witness in the PTCS.
> . . .
> The Petitioner asserts "The defendant's testimony on 12/12/2023 is the first notice to the applicant that testimony of a rebuttal -witness would be required in response to the defendant's testimony that there was no other man coming to the house to help the applicant." (Petition for Reconsideration, April 23, 2024, pg. 3, lines 20-22). . . .
>
> The petitioner asserts that: "on 12/12/2023 the door was opened for rebuttal testimony (whether identified in the PTSC or not).
> . . .
> There is nothing in the undersigned's statement that would indicate that leave was being granted for the petitioner to amend the PTCS and/or Exhibit/Witness list to include new previously undisclosed witnesses, and/or that Labor Code §5502(d)(3) is nullified, and/or that the petitioner now has cart blanche to submit any previously undisclosed witness that he so desires.
> (Report, pp. 1-5.)

DISCUSSION

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, 5705(a);[1] *Borello v. Department of Industrial Relations*, 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." (§ 3351.) Any person rendering service for another, other than as an independent contractor or another excluded classification, is presumed to be an employee. (See § 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 does not fall within the

[1] Unless otherwise stated, all further statutory references are to the Labor Code.

definition of an "employee" because he or she is an employee independent contractor or otherwise excluded from the definition. (See *Cristler v. Express Messenger Sys. Inc*. (2009) 171 Cal.App.4th 72, 84 [74 Cal.Comp.Cases 167] (*Cristler*); *Narayan v. EGL, Inc*. (2010) 616 F.3d 895, 900 [75 Cal.Comp.Cases 724] (*Narayan*).)

Under these authorities, applicant bears the burden of proving that he rendered service for defendant, whereupon the burden shifts to defendant to rebut the employment presumption with proof that applicant is excluded from the definition of employee. (See § 5705(a)[2]; see, e.g., § 3352; In other words, after applicant demonstrates that he rendered service for defendant, defendant must show by a preponderance of the evidence that he rendered service in an excluded status. (C*alifornia Compensation Ins. Co. v. Workers' Comp. Appeals Bd.* (*Hernandez*) (1998) 63 Cal.Comp.Cases 844 (writ den.); *Lara v. Workers' Comp. Appeals Bd*. (2010) 182 Cal.4th 393, 402 [75 Cal.Comp.Cases 91].)

In this case, applicant testified that he and a helper, identified as Mr. Bonilla, worked for two weeks painting defendant's house, that he continued to work on a fence at the house for another week, and that he sustained injury on his last day of work. (Report, p. 2.) Defendant testified that applicant worked on a fence at her house but does not remember applicant receiving help from anybody else. (*Id*., pp. 2-3.) It follows that applicant established the legal presumption that he was an employee of defendant and shifted the burden of proof to defendant to rebut the presumption.

The question before us, then, is whether the record establishes that defendant met her burden of proving that applicant was not an employee. Since defendant testified that applicant "worked less than 52 hours," the WCJ concluded that defendant effectively established her section 3352 defense. But this conclusion was also based upon the ruling that applicant was barred by section 5502(d)(3) from presenting third-party testimony to rebut that defense. (Report, pp. 3-5.)

Section 5502(d)(3) provides:

---

[2] Section 5705 states in pertinent part: "The burden of proof rests upon the party . . . holding the affirmative of the issue. The following are affirmative defenses, and the burden of proof rests upon the employer to establish them: (a) That an injured person claiming to be an employee was an independent contractor or otherwise excluded from the protection of this division where there is proof that the injured person was at the time of his or her injury actually performing service for the alleged employer." (§ 5705(a).)

> If the claim is not resolved at the mandatory settlement conference, the parties shall file a pretrial conference statement noting the *specific issues in dispute*, each party's proposed permanent disability rating, and listing the exhibits, and disclosing witnesses. Discovery shall close on the date of the mandatory settlement conference. Evidence not disclosed or obtained thereafter shall not be admissible unless the proponent of the evidence can demonstrate that it was not available or could not have been discovered by the exercise of due diligence prior to the settlement conference.
> (§ 5502(d)(3) [Emphasis added].)

In this regard, the parties raised various claims and defenses for adjudication at trial and the WCJ ordered trial solely as to the issue of employment. (Minutes of Hearing, September 26, 2023, p. 3:10-18.) Notably, the parties' claims and defenses did not include the section 3352 defense on the issue of employment. (*Id.*) Since the defense was not raised, applicant was not required by section 5502(d)((3) to disclose Mr. Bonilla as a potential witness; and the ruling barring applicant from presenting rebuttal testimony was error. We thus conclude that the record fails to support the finding that applicant was not defendant's employee.

The Appeals Board has the discretionary authority to order development of the record when appropriate to provide due process or fully adjudicate the issues consistent with due process. (See *San Bernardino Community Hosp. v. Workers' Comp. Appeals Bd.* (*McKernan*) (1999) 74 Cal.App.4th 928 [64 Cal.Comp.Cases 986]; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121–1122 [63 Cal.Comp.Cases 261, 264–265].)

Because we have concluded that the record fails to support the finding that applicant was not an employee of defendant, we will rescind the F&O and return the matter to the trial level to develop the record on the issue of employment and the defenses thereto.

As the WCJ states in the Report, the Petition before us fails to make specific references to the record as required by WCAB Rule 10945(b). (Report, p. 1; Cal. Code Regs., tit. 8, § 10945(b).) We therefore remind applicant's attorney to include citations to the record for all evidentiary statements in any pleadings filed with the Appeals Board.

Accordingly, we will grant reconsideration, and, as the Decision After Reconsideration, we will rescind the F&O and return the matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Findings and Order issued on March 29, 2024 is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration, that the Findings and Order issued on March 29, 2024 is **RESCINDED** and the matter **RETURNED** to the trial level for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUNE 24, 2024

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

ABUNDIO CHAVEZ
EQUITABLE LAW FIRM
OFFICE OF THE DIRECTOR – LEGAL UNIT
ANA SILVA MENJIVAR AKA ANA CHAVEZ

SRO/*cs*

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