

**WORKERS' COMPENSATION APPEALS BOARD  
STATE OF CALIFORNIA**

**RAMIRO MEXICANO (Deceased), *Applicant***

**vs.**

**BARRETT BUSINESS SERVICES, administered by CORVEL, *Defendants***

**Adjudication Number: ADJ9130753  
Lodi District Office**

**OPINION AND ORDER  
GRANTING PETITION FOR  
RECONSIDERATION  
AND DECISION AFTER  
RECONSIDERATION**

Applicant seeks reconsideration of the Findings and Orders (F&O) issued by the workers' compensation administrative law judge (WCJ) on March 8, 2024, wherein the WCJ found that applicant was not an employee of defendants, Barrett Business Services, Inc. or RDR Production Builders, Inc. (RDR), on the date of his alleged injury. As a result, the WCJ ordered that applicant take nothing by way of his workers' compensation claim.

Applicant contends that he was employed by RDR at the time of his alleged injury. We received answers from defendants.

The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that we deny reconsideration.

We have considered the allegations of the Petition for Reconsideration (Petition), the answers, and the contents of the report of the WCJ with respect thereto. Based on our review of the record, and for the reasons discussed below, we will grant reconsideration, rescind the F&O, and return this matter to the WCJ for further proceedings and a new decision. This is not a final decision on the merits of any issues raised in the Petition and any aggrieved person may timely seek reconsideration of the WCJ's new decision.

**FACTUAL BACKGROUND**

Applicant claimed to have sustained injury to his right lower extremity and psyche while employed by RDR as a concrete finisher during the period May 5, 2013 to July 10, 2013. (App.

Exh. 7, QME Reports, p. 1; Pretrial Conference Statement, April 18, 2023.) It is noted that applicant passed away prior to trial.

On August 3, 2023, the matter proceeded to trial on the issue of employment. (Minutes of Hearing and Summary of Evidence (MOH/SOE), August 3, 2023; Further MOH, March 7, 2024, p. 2.) The evidence presented included the testimony of Mr. Darrell Parker, RDR's Safety and Compliance Manager, and Mr. Jose (Tony) Magana, RDR's foreman/concrete finisher. The trial court also admitted deposition testimony from applicant and Mr. Magana, as well as medical reports prepared by the Panel Qualified Medical Evaluator (QME), Dr. Eduardo Lin, M.D.

In his deposition, applicant testified that he was injured while working for RDR as a concrete finisher on a project located in Lake Tahoe between May 2013 and July 2013. Applicant explained that, in May 2013, Mr. Magana had approached him in a bar and offered to pay him in cash for the work while Barrett Business Services obtained a copy of applicant's green card and processed his formal job application. (App. Exh. 1, pp. 15-28.) As to his schedule, applicant testified that if he had to work three to four consecutive weekdays, he would stay at a hotel in Lake Tahoe with his coworkers and sometimes Mr. Magana. (*Id.* at pp. 39-41.)

During trial, Mr. Magana testified that he had worked for RDR for roughly 15 years and was "100 percent certain" that he had "never done work alongside Mr. Mexicano in [his] entire life." (WCAB Exh. X, pp. 27, 46.)<sup>1</sup> Mr. Magana denied approaching applicant in a bar in Lake Tahoe regarding the RDR project and also denied paying or offering to pay applicant in cash for work. (*Id.* at p. 30.) Mr. Magana stated that he was not aware that applicant had worked at any RDR job site in Lake Tahoe in 2013. (*Ibid.*) Mr. Magana stated that, between May 2013 and July 2013, he saw applicant in Lake Tahoe twice: once getting coffee with Mr. Magana's crew before the start of a work shift, and once walking in the street across from Mr. Magana's hotel late at night. (*Id.* at pp. 35, 41-43.)

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<sup>1</sup> During his deposition taken roughly six years prior to trial, Mr. Magana testified as follows:

- Q: And how did you meet Mr. Mexicano?  
A: He does side jobs, concrete, and in the past, I have helped him a couple of times.  
Q: When you say you have "helped him a couple of times," what does that mean?  
A: Just go help him when he needs help. You know, side jobs.  
Q: Oh, so you go and work with him?  
A: Yes. A couple of times that he needed help.

(App. Exh. 2, Deposition of Tony Magana, December 6, 2017, p. 9.)

Mr. Parker testified that applicant was never hired by Barrett Business Services or worked for RDR. (WCAB Exh. X, pp. 6-7.) Mr. Parker explained that he was “surprised” to receive applicant’s workers’ compensation claim because applicant was on a “no hire” list for failure to satisfy Barrett Business Service’s hiring criteria. (*Id.* at pp. 4, 11, 15.)

The trial court also admitted two medical reports issued by the QME, Dr. Lin, in July 2020 and December 2020. (App. Exh. 7.) Dr. Lin first interviewed applicant on July 16, 2020 and reviewed the limited medical record that he was provided. The interview addressed several factors, including “Work History, History of Present Injury, Disability Status, Temporary Total Disability, Subjective Factors of Disability, Objective Factors of Disability” and “Work Status.” In his report, Dr. Lin stated, in part:

Date of Injury: CT May 5, 2013 to July 10, 2013

\* \* \*

#### WORK HISTORY

According to Mr. Mexicano, he had been working for RDR Production Builders as a construction finisher for approximately three months....Part of his job included doing polishing, placing the framing, also performing some concrete work.

#### HISTORY OF PRESENT ILLNESS

According to Mr. Mexicano, he sustained work injury dated July 10, 2013. At that time, he was doing construction work doing grating on the floor and there was a small piece of rock that fell into his right boot....the rock did cause ulcer and skin damage in his right foot. The patient noted pain and discomfort and also limping, so he went to [the hospital]. He was treated with antibiotics without much help. He then went to another hospital for check up and he had developed a gangrene of right foot. Eventually, he had partial amputation of right foot due to gangrene of his right foot....The patient does have a history of diabetes, but never had prior ulcer or amputation history of the foot.

#### DISABILITY STATUS

It is my medical opinion that Mr. Mexicano did sustain work-related injury arising and occurring in the course of employment as a rock fell into his right shoe causing compression to his right foot ultimately led to right foot ulcer...He is still in a lot of pain and discomfort. So, the patient did sustain work-related injury arising and occurring in the course of employment due to a rock stuck inside of his right shoe causing friction and ulcer to his right foot. Ultimately, the patient developed gangrene and required amputation of the right foot.

(App. Exh. 7, pp. 1-2, underlining and upper case in original.)

After trial, the WCJ found that applicant was not an employee of RDR or Barrett Business Services and issued a take-nothing order. In the opinion on decision, the WCJ explained:

The evidence considered includes the testimony of witnesses at trial and by deposition....Also, the depositions of the Applicant Apps # 1 and Applicant's alleged foreman Jose Magana Apps#2 were admitted without objection....

Mr. Jose Magana, Applicant's foremen did testify at trial as did Mr. Darrell Parker Defendant's Safety and Compliance Officer.

The applicant testified that Jose Magana referred him to Barrett Business Services to apply for work and then said he would pay him cash until he got the paperwork hiring him. The applicant testified in his deposition that he was working for a week before he went to RDR to apply for work and continued up to the date of the alleged injury 7-10-13. pg.30-34, Apps #1.

Mr. Magana testified at trial (transcript) and his deposition Apps. #2. That he did not hire Applicant or pay Applicant cash under the table to work for him. He also testified that he helped Applicant in the past by lending him tools....

The specific decision is predicated on a review of all the testimony and documentary evidence. Specifically, I found no corresponding medical records referencing an injury at the motel being remodeled in Tahoe or any other injury. The medical records reference serious complications from Applicant's diabetes. This is the same as the Court considered RDR which was previously done and again reviewed here. So there is no mistake it was the testimony at trial (transcript supra.) and Magana deposition supra.

\* \* \*

The key in this determination is reading the whole trial testimony transcript and depositions. Transcript pages 27-30, 46, 52-54 and 54-59, 64-65 and Magana deposition Apps. #2 pages 9-18.

The Court has considered specifically Mr. Magana saw Applicant at the job site and one time walking across the job site. Apps #2.

But Mr. Magana also testified he never hired Applicant, could not hire him and did not agree to pay him cash for work until he was cleared by Barrett to be hired at any time.

(F&O, pp. 2-3.)

## DISCUSSION

We are asked to determine whether there is substantial evidence to support the WCJ's decision that applicant was not an employee of RDR or Barrett Business Services at the time of his alleged injury. We conclude that there is not.

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).)<sup>2</sup>

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.) Further, any person rendering service for another, other than as an independent contractor or other excluded classification, is presumed to be an employee. (See Lab. Code, § 3357.) Unless the hirer can affirmatively demonstrate that the worker meets specific criteria to be considered an independent contractor, all workers are presumed to be employees. (Lab. Code, § 5705 [burden of proof rests on the party holding the affirmative of the issue].)

A WCJ is required to "make and file findings upon all facts involved in the controversy and an award, order, or decision stating the determination as to the rights of the parties. Together with the findings, decision, order or award there shall be served upon all the parties to the proceedings a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made." (Lab. Code, § 5313; see also *Blackledge v. Bank of America, ACE American Insurance Company* (2010) 75 Cal.Comp.Cases 613, 621-622 (Appeals Board en banc).) The WCJ's opinion on decision "enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful." (*Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc) [issues must be decided by the WCJ in a subsequent opinion consistent with the mandates of due process].)

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<sup>2</sup> Unless otherwise stated, all further statutory references are to the Labor Code.

In this case, we are unable to ascertain the reasons or grounds upon which the WCJ determined that applicant was not an employee of RDR or Barrett Business Services. First, the WCJ failed to cite *any* applicable statutes or case law regarding the presumption of employment or the fact that defendants had the affirmative burden of proof on the issue of non-employment. (Lab. Code, § 5705; *Lantz v. Workers' Comp. Appeals Bd.* (2014) 226 Cal.App.4th 298, 313 [79 Cal.Comp.Cases 488].) Additionally, without deciding the merits of the issue, we do note that the record, even as it currently stands, contains evidence of employment, including that: 1) applicant was in Lake Tahoe during the dates of the RDR project at issue; 2) applicant was performing work consistent with the project's needs; and 3) applicant's testimony regarding the date and nature of the alleged injury matched the information contained in the QME's report, wherein Dr. Lin found injury AOE/COE. With respect to defendant's evidence, it is unclear why the WCJ viewed Mr. Magana's deposition and trial testimony as "key" evidence of non-employment, given the inconsistencies and inconclusive statements therein. Upon return to the trial level, the WCJ may wish to reread these transcripts prior to issuing a new decision.<sup>3</sup>

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.* (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].)

For the foregoing reasons, we conclude that the WCJ should develop the record as to the issue of employment. When the matter returns to trial, defendant should bear in mind that it holds the burden of proof to defeat the presumption of employment. Accordingly, we grant reconsideration, and, as our Decision After Reconsideration, we rescind the F&O and return the matter for further proceedings consistent with this decision.

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<sup>3</sup> We also note that pages are missing from applicant's deposition transcript, marked as Applicant's Exhibit 1.

For the foregoing reasons,

**IT IS ORDERED** that the Petition for Reconsideration of the Findings and Orders issued by the WCJ on March 8, 2024 is **GRANTED**.

**IT IS FURTHER ORDERED**, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Orders issued on March 8, 2024 is **RESCINDED** and the matter is **RETURNED** to the WCJ to conduct further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**I CONCUR,**

**/s/ KATHERINE WILLIAMS DODD, COMMISSIONER**

**/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**MAY 20, 2024**

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

**RAMIRO MEXICANO  
CENTRAL VALLEY INJURED WORKER LEGAL CLINIC  
KROLOFF, BELCHER, SMART, PERRY & CHRISTOPHERSON  
PARK GUENTHART  
OFFICE OF THE DIRECTOR – LEGAL UNIT**

**AH/cs**

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