WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

YAHIR ESCOBAR PALOMARES, ***Applicant***

vs.

JOE ROMANO; MANUEL ANTONIO TORRES FERNANDEZ; UNEMPLOYED EMPLOYERS' BENEFITS TRUST FUND, ***Defendants***

Adjudication Number: ADJ17533727
Santa Rosa District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant in pro per Joe Romano seeks reconsideration of the Findings and Order (F&O) issued on August 22, 2024, wherein the workers' compensation administrative law judge (WCJ) found that applicant was an employee of Romano and that there was no special/general employment relationship at the time of applicant's injury.

Romano argues that applicant (1) "did not prove Romano was the employer" because Manuel Torres "hired him, set his pay, controlled his hours, and supervised [him]"; (2) was generally employed by Torres; and (3) is precluded from pursuing his claim because he failed to appear at previous court proceedings. (Petition, p. 3.)

We did not receive an Answer.

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

We have considered the allegations of the Petition and the contents of the Report. Based on our review of the record, and for the reasons stated below, we will deny the Petition.

FACTUAL BACKGROUND

In the Report, the WCJ states:

> Applicant claims to have sustained an industrial injury to the left side of his back on October 10, 2022 during the course of his employment as a laborer. . . .
>
> Mr. Romano is an entrepreneur and owns real estate. (MOH/SOE p. 12, line 27.) Mr. Romano is the president of Generator Joe, which designs and

manufactures generators. (MOH/SOE, p. 12, lines 28-29.) He is not a licensed contractor. (MOH/SOE p. 12, line 41.)

Mr. Romano put out a Craigslist ad for a framing contractor he wanted for building a deck. (MOH/SOE, p. 12, lines 41-43.) Mr. Torres interviewed for the job. (MOH/SOE p. 12, line 44.) It was Mr. Romano's understanding that Mr. Torres was licensed and insured. (MOH/SOE, p. 12, lines45-46.)
. . .
Mr. Torres initially contacted Mr. Romano in response to his Craigslist ad. (MOH/SOE, p. 10, lines 30-31.) His first job with Mr. Romano began September 5, 2022. (MOH/SOE, p. 11, line 47.)

Mr. Torres is not a licensed contractor. (MOH/SOE, p. 10, line 38.) Mr. Torres never had a company or issued a paycheck. (MOH/SOE, p. 11, lines 40-41.) He has never had his own employees. (MOH/SOE, p. 11, line 43.)
. . .
According to Mr. Torres, Mr. Romano gave the instructions to Mr. Torres who gave them to the workers. (MOH/SOE p. 12, lines 14-15.) Mr. Romano told Mr. Torres what specific equipment to buy (i.e. 3 401 blades for the 7" skills) and instructions (i.e. "Both of the guys need carpenter squares to cut with and carpenter squares to use as spacers. we (sic) are not cutting free hand"). (Def. Exh. T/Def. Exh. DDD.) Mr. Torres reported his hours and receipts for reimbursement to Mr. Romano ("Hey joe I had 15 hours this week plus the receipt I gave you .. don't leave me out from my pay check") (Def. Exh. T/Def. Exh. DDD.)

The applicant claims that Mr. Romano fired him. (MOH/SOE, p. 8, line 41.) Similarly, Mr. Torres testified that he told Mr. Romano he had to leave work for a family emergency in Mexico, and he never went back to work because Mr. Romano told him there was no work to be done. (MOH/SOE, p. 11, lines 21-23.)
. . .
The applicant allegedly sustained an injury on October 10, 2022 when he was lifting a beam while working on Mr. Romano's deck and felt pain in his low back. (MOH/SOE p. 8, lines 7-8; lines 13-14.) The house where applicant's alleged injury occurred was a rental property owned by Romano Family Trust. (MOH/SOE, p. 14, lines 41-42.)
. . .
According to Mr. Torres, Mr. Romano determined the rate of pay. (MOH/SOE, p. 11, line 27.) The applicant was paid by Generator Joe, a company of Mr. Romano's, on 10/15/22 and 10/22/22 in the amounts of $1,834.28 and $280.00, respectively, at $35 an hour. (MOH/SOE p. 8, line 21; p. 14, line 24; App. Exh. 7.) The applicant would write his hours on a piece of paper, and Mr. Romano would pay him. (MOH/SOE p. 8, lines 21-23.)
. . .

The applicant and Manuel Torres failed to appear at the Status Conference on April 27, 2023. (EAMS Doc. 76680608.) The applicant again failed to appear at the continued Status Conference on July 26, 2023. (EAMS Doc.76979525) A Notice of Intention to dismiss the application was issued by Judge Schaumberg. (EAMS Doc. 76979525.) In response to the Notice of Intent, the applicant wrote the following: "It feel a lot them. I ask a sorry by that I'm having hiders for get in to the coference (sic) need aid for get in. Thank you so much." (EAMS Doc. 76998485.)

The applicant filed a Declaration of Readiness to Proceed on October 6, 2023. (EAMS Doc. No. 77240357.) At the Status Conference, the applicant retained legal counsel. No further action was taken by Judge Schaumberg on the Notice of Intention to Dismiss the Application. (EAMS Doc. No. 77346058.)

This matter proceeded to trial on the sole issue of whether the proper employer was Joseph Romano or Manuel Torres.

. . .

It is undisputed that the house was a rental property owned by Romano Family Trust. (MOH/SOE, p. 14, lines 41-42.) By building the deck, the applicant was clearly rendering a service for the benefit of Joseph Romano, as owner of the house. Conversely, Manuel Torres did not own the rental property or reap any benefit from the work performed by the applicant.

. . .

An employee who is sent by the original employer to render service to another, under the joint control of both, has two employers. The characteristics of general and special employment are: a.) a loaned employee who is sent to perform labor for another; b.) joint participation in the work to the benefit of both the general and special employer; c.) some power, not necessarily complete or exercised, in each employer in the direction and control of the details of the work (*Meloy v The Texas Company* (1953) 18 CCC 313).

In *Kowalski v. Shell Oil Company* (1979) 23 Cal.3d 168, 174-175 [44 Cal.Comp.Cases 134], the California Supreme Court explained the concept of "general" and "special" employment as follows:

The possibility of dual employment is well recognized in the case law. "Where an employer sends an employee to do work for another person, and both have the right to exercise certain powers of control over the employee, that employee may be held to have two employers --his original or 'general' employer and a second, the 'special' employer." [Citation.] In Industrial Ind. Exch. v. Ind. Acc. Com. (1945) 26 Cal.2d 130, 134-135 [156 P.2d 926], this court stated that "an employee may at the same time be under a general and a special employer, and where, either by the terms of a contract or during the course of its performance, the employee of an independent contractor

comes under the control and direction of the other party to the contract, a dual employment relation is held to exist. [Citations.]"

Although the *Kowalski* case and its progeny emphasize control as the primary criterion in the determination of the existence of a special employment relationship, the following other relevant factors have also been enumerated:

(1) whether the borrowing employer's control over the employee and the work he is performing extends beyond mere suggestion of details or cooperation; (2) whether the employee is performing the special employer's work; (3) whether there was an agreement, understanding, or meeting of the minds between the original and special employer; (4) whether the employee acquiesced in the new work situation; (5) whether the original employer terminated his relationship with the employee; (6) whether the special employer furnished the tools and place for performance; (7) whether the new employment was over a considerable length of time; (8) whether the borrowing employer had the right to fire the employee and (9) whether the borrowing employer had the obligation to pay the employee.
(*Riley v. Southwest Marine, Inc*. (1988) 203 Cal.App.3d 1242, 1250.)

Conversely, certain circumstances tend to negate the existence of a special employment relationship. These include: "The employee is (1) not paid by and cannot be discharged by the borrower, (2) a skilled worker with substantial control over operational details, (3) not engaged in the borrower's usual business, (4) employed for only a brief period of time, and (5) using tools and equipment furnished by the lending employer." (*Marsh v. Tilley Steel Company* (1980) 26 Cal.3d 486, 492.)

Here, Petitioner asserts that "Defendant Romano believes that Torres is the primary employer even though he was operating illegally and fraudulently." (Petition p. 5.) The court disagrees. The requisite elements of a special/ general relationship are unsubstantiated and lack evidentiary support in this case. In such a relationship, the general employer, or Mr. Torres, as asserted by petitioner, hires and pays the wages of an employee. Instead, the hours worked were turned into Mr. Romano for payment. (MOH/SOE, p. 7, line 18.) Mr. Romano determined the rate of pay. (MOH/SOE, p. 1 l, line 27.) The paychecks were paid by Joe Romano, under his company, Generator Joe. (App. Exh. 7.)

At the time of his injury, the applicant was not subject to the control of both Mr. Romano and Mr. Torres, another essential characteristic of a general/special employment. Although Mr. Romano testified that Mr. Torres hired everyone and was "driving the boat", the record compels the opposite conclusion. (MOH/SOE, p. 12, lines 46-47.) The applicant credibly testified that Mr. Romano would tell Mr. Torres what needed to be

> done and they would do it. Mr. Torres did not provide his own instruction. (MOH/SOE, p. 10, lines 13- 15.)
>
> Mr. Torres would find other employees at the behest of Mr. Romano and then provide their contact information to Mr. Romano. (Def. Exh. A/Def. Exh. FFF.) Mr. Romano would tell the employees, including Mr. Torres what days they would work, depending on the weather and supplies. (Def. Exh. HHH.) The period of employment was temporary in nature, until the deck was completed. (MOH/SOE, p. 8, lines 32-33.)
> . . .
> [T]he applicant and Mr. Torres were found to be credible witnesses at trial. There is nothing in the Petition for Reconsideration to disrupt that court's finding.
> (Report, pp. 1-9.)

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 September 17, 2024, and 60 days from the date of transmission is November 16, 2024. The next business day

that is 60 days from the date of transmission is November 18, 2024. (See Cal. Code Regs., tit. 8, § 10600(b).)[1] This decision is issued by or on November 18, 2024, 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 September 17, 2024, and the case was transmitted to the Appeals Board on September 17, 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 Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on September 17, 2024.

II.

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)[2]; *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 354 [54 Cal.Comp.Cases 80].)

---

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

> 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.

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

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.) Section 3351(i) includes "any individual who is an employee pursuant to Section 2775." Further, any person rendering service for another, other than as an independent contractor or other 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 is an independent contractor. (*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)*.) Thus, unless the hirer can demonstrate that the worker meets specific criteria to be considered an independent contractor, all workers are presumed to be employees.

Section 2775(b) states in pertinent part:

> (1) For purposes of this code and the Unemployment Insurance Code, and for the purposes of wage orders of the Industrial Welfare Commission, a person providing labor or services for remuneration shall be considered an employee rather than an independent contractor unless the hiring entity demonstrates that all of the following conditions are satisfied:
>
> (A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.
>
> (B) The person performs work that is outside the usual course of the hiring entity's business.
>
> (C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

Here, on the question of whether Romano has demonstrated that applicant was free from his control and direction in the performance of the work, applicant and Torres testified that Romano (1) would instruct applicant and Torres regarding what tasks needed to be done and when they should be performed; (2) directed Torres as to which tools applicant would use; (3) decided which workers would be hired or fired; and (4) owned the property where applicant was working at the time of injury. (Report, pp. 2-3, 6, 8-9.)

The WCJ determined that applicant and Torres testified credibly, and we accord her determination great weight because she observed their demeanor at trial. (*Id.*, p. 9; *Garza v. Worker's Comp. Appeals Bd*. (1970) 3 Cal. 3d 312 [35 Cal.Comp.Cases 500].)

On the question of whether Romano has demonstrated that applicant's work was outside Romano's usual course of business, it is undisputed that the work involved an improvement to a rental property owned by Romano. (*Id*., pp. 3, 6.) It follows that applicant's work was within Romano's usual course of business.

On the question of whether Romano has demonstrated that applicant was customarily engaged in an independently established trade, the record reveals that applicant was working as a laborer and lacks evidence that he engaged in any established trade. (*Id*., pp. 1-9.)

Thus, Romano has not met his burden of proof pursuant to section 2775(b). Accordingly, we discern no error in the finding that applicant was Romano's employee.

We next address Romano's argument that applicant was generally employed by Torres.

Here, we agree with the WCJ that the record fails to establish the requisite elements of a special/general employment relationship, including that Torres hired applicant on his own behalf or paid applicant's wages. (Report, pp. 7-9.)

Accordingly, we discern no merit to Romano's argument that applicant was generally employed by Torres.

Lastly, we address Romano's argument that applicant is precluded from pursuing his claim because he failed to appear at previous court proceedings.

Here, the sole issue at trial was employment; and, as such, the WCJ issued no findings on the issue of whether applicant's claim may be precluded. (Report, p. 4; F&O) Because there is no final order on the issue of whether applicant's claim may be precluded, we will not address it. (§§ 5900(a), 5902, 5903.)

Accordingly, we will deny the Petition.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Findings and Order issued on August 22, 2024 is **DENIED**.

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

NOVEMBER 18, 2024

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

YAHIR ESCOBAR PALOMARES
MANUEL TORRES FERNANDEZ
JOSEPH ROMANO
OFFICE OF THE DIRECTOR – LEGAL UNIT

SRO/*cs*

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