**WORKERS' COMPENSATION APPEALS BOARD**

**STATE OF CALIFORNIA**

**GERMAN RENTERIA PINA, *Applicant***

**vs.**

**MIGUEL DIAZ dba BROTHER LANDSCAPE, uninsured; DA VINCI SCHOOLS, permissibly self-insured administered by ATHENS ADMINISTRATORS, *Defendants***

**Adjudication Number: ADJ13900666**
**Van Nuys District Office**

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

Defendant Uninsured Employers Benefits Trust Fund (UEBTF) seeks reconsideration of the April 22, 2025, Findings of Fact and Order (F&O) wherein the workers' compensation administrative law judge (WCJ) found that applicant was employed by uninsured defendant Miguel Diaz dba Brother Landscape (Diaz) at the time of the injury and that applicant was not an employee of Da Vinci Schools (Da Vinci) at the time of the injury.

UEBTF contends that the WCJ erred by not analyzing the burden of proof for employment and that the evidence does not support the finding that the applicant is not an employee of Da Vinci. UEBTF argues that Da Vinci was the employer of applicant either through its employment of Diaz or as an ultimate hirer of applicant because the work Diaz performed required a license per Labor Code section 2750.5.[1]

Defendant Da Vinci, permissibly self-insured, filed a response to the Petition for Reconsideration (Response) arguing that Diaz is an independent contractor and that applicant is the employee of Diaz and not the employee of Da Vinci.[2]

---

[1] All further statutory references will be to the Labor Code unless otherwise indicated.

[2] The Response attached several documents as exhibits, none of which were admitted into evidence. We have not considered these documents because our decisions "must be based on admitted evidence in the record." (*Hamilton v. Lockheed Corp.* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) Further, petitioner does

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) which clarified that the WCJ found that there was ample evidence to find that Diaz was an independent contractor, and therefore applicant was not the employee of Da Vinci. He also found that the work Diaz was performing for Da Vinci did not require a license pursuant to Business and Professions Code section 7026.1 (a)(4). The WCJ recommended that we deny the Petition.

We have considered the allegations of the Petition for Reconsideration and the Response and the contents of the Report. Based on our review of the record, we will grant the Petition for Reconsideration, rescind the F&O, and return the matter for further proceedings consistent with this decision. When the WCJ issues a new decision, any aggrieved person may timely seek reconsideration.

## FACTS

Applicant filed an application for adjudication on November 23, 2020 alleging a specific injury to his fingers, hand, arm, and nervous system/psyche occurring on November 13, 2020. Initially the County of Los Angeles was listed as the employer. Miguel Diaz dba Brother Landscaping and Da Vinci Schools were eventually joined as the appropriate alleged employers. The County was dismissed. At the time of injury, Diaz was uninsured. (Minutes of Hearing/Summary of Evidence (MOH/SOE), 05/06/2024, 2:18-19.)

On April 30, 2024, the matter proceeded to trial. The issues were as follows:

> Employment with applicant, Miguel Diaz dba Brother Landscape, and the Uninsured Employers Benefits Trust Fund alleging that Da Vinci Schools was the ultimate hirer as the work applicant performed required a license pursuant to California Code of Regulations, Title 16, Section 832.27.
>
> Applicant also contends Miguel Diaz dba Brother Landscape and Da Vinci Schools have joint and several liability on a general special employment theory with Defendant Da Vinci Schools contending that applicant was an employee of independent contractor Miguel Diaz dba Brother Landscape.

(MOH/SOE, 04/30/2024, 3:2-7.)

On April 30, 2024, Applicant testified in relevant part as follows:

On the date of injury, he was working at one of the campuses for Da Vinci. (MOH/SOE, 04/30/2024 , 4:14.) He was working for Diaz on the date of injury. (MOH/SOE, 04/30/2024, 4:13-

---

not allege that the documents were new evidence which it could not, with reasonable diligence, have discovered and produced at the time the WCJ issued the Award. (Lab. Code, § 5903(d).)

14). As of the date of injury, applicant worked for Diaz for approximately two or three months and had been to Da Vinci roughly six times. (MOH/SOE, 04/30/2024, 4:15-17.) His co-worker advised him of what work to do at the school which entailed mowing the lawn and picking up trash. (MOH/SOE, 04/30/2024, 4:18-20.) He was paid $600 per week, but was paid by the day at $130 per day. (MOH/SOE, 04/30/2024, 6:1-6.) He regarded Diaz as his boss though he took instruction from his co-worker. Diaz made Applicant's schedule and provided the lawnmower. (MOH/SOE, 04/30/2024, 6:1-7.)

On November 26, 2024, the parties returned to trial. Most of the evidence regarding Diaz's business is from the testimony of Diaz himself. Diaz testified in relevant part as follows:

He had been in the landscaping business as Brother Landscaping for 35 to 36 years (MOH/SOE, 11/26/2024, 2:23.) He had a contract with the prior school and it was his understanding that Da Vinci assumed that contract. The terms of the prior contract were not discussed apart from a discussion that he was to maintain the property. (MOH/SOE, 11/26/2024, 5:7-8.) Diaz did not have a written contract with Da Vinci until the end of his time working at Da Vinci. (MOH/SOE, 11/26/2024, 3:20-21.) Diaz's services were used by Da Vinci for 11 years. (MOH/SOE, 11/26/2024, 5:7-8.) Da Vinci fired him which eliminated 80% of his business. (MOH/SOE, 11/26/2024, 6:17.) For a short period of time after he was terminated, he continued to do landscaping business, but not under the Brother Landscaping name. (MOH/SOE, 11/26/2024, 6:18-19.) He was paid monthly by Da Vinci when Diaz submitted invoices. (MOH/SOE, 11/26/2024, 6:16-20.) He repaired a chicken coop at Da Vinci's instruction. (MOH/SOE, 5:18-19.) He installed pavers at Da Vinci's request, cutting grass, leveling ground, putting in gravel, and sand. (MOH/SOE, 6:7-8).

On December 12, 2024, the parties returned to trial. Diaz completed his testimony. He testified that he worked one time per month during the school day, would regularly work in the morning, though if children were at the school he would work in the afternoon. (MOH/SOE, 12/12/2024, 3:7-9).[3]

The facilities director for Da Vinci, John Fernandez also testified in pertinent part as follows:

[3] Of note, Applicant testified that he left his home at 7 am and went to his workplace to pick up the work truck and drive to Da Vinci. (MOH/SOE, 04/30/2024, 4:11-14.) The injury is alleged to have occurred November 13, 2020, a Friday.

Diaz was previously used by the school that owned the property prior to Da Vinci taking over. When Da Vinci took over, they "inherited" Diaz. (MOH/SOE, 12/12/2024, 6:10-11.) He had never seen a written contract between Diaz and the predecessor school. (MOH/SOE, 12/12/2024, 5:10-12.) He would give instructions to Diaz over the phone and would sometimes inspect the work. (MOH/SOE, 12/12/2024, 4:24-25.) He never saw the bills. (MOH/SOE, 12/12/2024, 4:21.) Da Vinci has three campuses, and he was in charge of two. (MOH/SOE, 12/12/2024, 5:1-2.) He admitted that it was possible that other staff members of Da Vinci could have given instructions to Diaz. (MOH/SOE, 12/12/2024, 4:25-5:1-2.) When there was additional work to be completed beyond mowing the lawns, Diaz would have to ask for permission from Da Vinci. (MOH/SOE, 12/12/2024, 6: 11-13.) Diaz worked on Friday evenings or Saturdays when children and staff were not present. (MOH/SOE, 12/24/2024, 3:21-22.)

Da Vinci used separate companies who had appropriate licenses to perform tree trimming over 15 ft. high. (MOH/SOE, 12/12/2024, 4:10-12.) Diaz was not authorized by Da Vinci to trim trees, but did trim bushes that were three to four feet tall. (MOH/SOE, 12/24/2024, 4: 11-12.) Da Vinci disputed that Diaz repaired the chicken coop or put in pavers. (MOH/SOE, 6:19, 5:24-25.) When extra work was performed by Diaz, the invoices included extra charges for the additional work. (MOH/SOE, 12/12/2024, 6:12-13.)

It is unclear from his testimony whether applicant was assigned to other locations and there was no specific testimony about the number of days or hours he worked for Diaz apart from the rate.

None of the invoices for Da Vinci or other clients of Diaz's were entered into evidence, nor was there testimony about the amount Diaz charged or was paid. The circumstances around Diaz's termination are not in the record. The alleged contract between Diaz and Da Vinci is not in evidence. There was no evidence provided or testimony elicited as to the type of business enterprise, whether Diaz had a business license, was registered in California, filed taxes for Brother Landscaping, or had a bank account set up for Brother Landscaping.

There was conflicting testimony provided from Diaz and Da Vinci about the schedule Diaz kept. Neither testified as to whether this schedule was applicable to all three campuses. The parties agreed that Diaz used his own tools. There was no discussion about who was in charge of the third campus or whether Diaz reported to that person, but Diaz did work at all three campuses.

On April 22, 2025, WCJ issued a F&O finding that applicant was an employee of Diaz and was not an employee of Da Vinci at the time of injury.

**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 June 2, 2025 and 60 days from the date of transmission is August 1, 2025. This decision is issued by or on August 1, 2025, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on June 2, 2025 and the case was transmitted to the Appeals Board on June 2, 2025. 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 June 2, 2025.

**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 4 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; *S. G. Borello & Sons, Inc. v. Department of Industrial 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.) Further, 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. (*Cristler v. Express Messenger Sys., Inc.* (*Cristler*) (2009) 171 Cal.App.4th 72, 84 [74 Cal.Comp.Cases 167]; *Narayan v. EGL, Inc*. (*Narayan)* (2010) 616 F.3d 895, 900 [75 Cal.Comp.Cases 724].) Consequently, unless the hirer can demonstrate that the worker meets specific criteria to be considered an independent contractor, all workers are presumed to be employees.

In this matter, there appears to be no dispute that applicant is the employee of Diaz. Diaz hired, paid, and controlled applicant's schedule. Applicant used the tools provided by Diaz and was driven to the school in a truck supplied by Diaz. (MOH/SOE, 04/30/2024, 6:1-6). Applicant was clearly hired by and in the service of Diaz.

**III**

We will discuss whether there is joint employment between Da Vinci and Diaz.

The courts have consistently held that an owner or general contractor is not liable under workers' compensation for injury to the employee of an independent contractor hired by the general contractor. (*State Comp. Ins. F. v. Ind. Acc. Com.* (1941) 46 Cal.App.2d 526, 528-530 [116

Cal.Rptr. 173] (*Grashel*); *Western Ind. Co. v. Industrial Acc. Com.,* (1916) 172 Cal. 766 [158 P. 1033] (*Turner*); *Sturdivant v. Pillsbury*, 172 Cal. 581 [158 P. 222] (*Silva*); *Carstens v. Pillsbury*, 172 Cal. 572 [158 P. 218]; *S. A. Gerrard Co. v. Industrial Acc. Com*. (1941) 17 Cal. 2d 411 [110 P.2d 377] (*Valdez*).) Likewise, it has been held that where a person hired by a primary employer is an employee rather than an independent contractor, the primary employer may be liable for workers' compensation injuries to person hired by the employee on the theory that they are also the primary employer's employees. (*Blew v. Horner* (1986) 187 Cal.App.3d 1380 [51 Cal.Comp.Cases 615]; *Valdez*, *supra*, 17 Cal. 2d 411; *Brietigam v. Industrial Acc. Comm.* (1951) 37 Cal. 2d 849).) Thus, the relevant inquiry here is as to the employment relationship between Da Vinci and Diaz.

As noted above, once the employment relationship is established, the burden shifts to the hiring entity to prove that the employee is an independent contractor. Here, Diaz was rendering a service to Da Vinci under an oral contract. As such, we agree with petitioner that the burden shifts to Da Vinci to prove that Diaz is an independent contractor.

For this date of injury, under section 3351(i), section 2775 controls the analysis for determining whether an employee is an independent contractor.[4] 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.

[4] While there are exceptions to applicability of section 2775, the current record does not support the application of any exception.

In *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903 [83 Cal. Comp. Cases 817], the court provided the ABC test, which was then codified in section 2775. It is important to recognize that a hiring entity must satisfy all three factors in order to meet its burden to show that a worker was an independent contractor.

It is well established that decisions by the Appeals Board must be supported by substantial evidence. (§§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) "The term 'substantial evidence' means evidence which, if true, has probative force on the issues. It is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion…It must be reasonable in nature, credible, and of solid value." (*Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd.* (*Bolton*) (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566].) We do not agree that there is substantial evidence to find that Da Vinci met its burden of proving that Diaz is an independent contractor.

Part A of section 2775 requires that the presumed employee is free from control and direction of the hiring entity. In *Dynamex,* the court remarks, "depending on the nature of the work and overall arrangement between the parties, a business need not control the precise manner of or details of the work in order to be found to have maintained the necessary control that an employer ordinarily possesses over its employees." (*Dynamex, supra*, at 958) The right to control has been demonstrated by evidence that the worker must obey instructions and is subject to consequences, including discipline or termination, for failure to do so. (*Toyota Motor Sales v. Superior Court* (1990) 220 Cal.App.3d 864, p. 875; *G. Borello & Sons, Inc. v. Dept. of Ind. Relations* (1989) 48 Cal.3d 341 [54 Cal.Comp.Cases 80] (*Borello*) at 350.) Moreover, "the unlimited right to discharge at will and without cause has been stressed by a number of cases as a strong factor demonstrating employment." (*Toyota, supra*, at 875.) So long as the employer has the authority to exercise complete control "whether or not that right is exercised with respect to all details, an employer-employee relationship exists." (*Id*., p. 874.) Hence, when considering the right to control, the focus is on the necessary control, and an employment relationship for purposes of workers' compensation may be found even when the company "is more concerned with the results of the work rather than the means of its accomplishment." (*JKH Enterprises v. Dept. of Ind. Relat.* (2006) 142 Cal.App.4th 1046, 1064-1065 [71 Cal.Comp.Cases 1257]; see also *Borello*, *supra*, at pp. 355-360; *Air Couriers, Intl. v. Emp. Dev. Dept.* (2007) 150 Cal.App.4th 923, 937.)

Diaz worked for Da Vinci for 11 years, apparently working at least once a week during that time. At some point, he was terminated but the record includes no discussion of the circumstances, and the reasons surrounding his termination could show whether Da Vinci had a right to control. Both parties testified that Diaz would receive instruction from Da Vinci as to the tasks Diaz was authorized to perform and Diaz was limited to doing work that was authorized. There was no testimony about how long Diaz was at each school each day and the testimony as to the schedule was confusing at best. The work was not specialized per se, so the fact that Da Vinci did not supervise each time Diaz was working is not dispositive. Although there is some testimony about contracts, there are no contracts in evidence. In this case, the record is not adequately developed to make a determination as to whether Diaz was free of the control of Da Vinci.

Part B requires the hiring entity to establish that the worker performs work that is outside the usual course of its business. This factor is likely met as Diaz was a gardener, and Da Vinci is a school. However, it is worth mentioning that there was no testimony regarding the type of business Da Vinci was running. The only testimony regarding Da Vinci running a school was from Diaz himself who was not only found not credible, but also not proffered as a representative of the school. Again, the record is incomplete.

Last, part C requires the hiring entity to prove that the worker is customarily engaged in an independently established trade, occupation, or business as the work performed for the hiring entity. In *Dynamex*, the court notes that an independent contractor is ordinarily understood to refer to an individual that has independently made the decision to go into business for themself. The court points out, "such an individual generally takes the usual steps to establish and promote his or her independent business-for example, through incorporation, licensure, advertisements, routine offerings to provide the services of the independent business to the public or to a number of potential customers." (*Dynamex, supra*, at 962.) They go on to state, "the fact that a company has not prohibited or prevented a worker from engaging in such a business is not sufficient to establish that the worker has independently made the decision to go into business for himself." (*Id.*)

Here, the evidence regarding Diaz's business is limited only to the testimony of Diaz himself. While he did testify that he had approximately 50 other customers as of November 2020, there is no information about how that business was procured. Further, it is concerning that once Da Vinci terminated him, he stopped doing business as Brother Landscape and eventually stopped working all together shortly thereafter. There is no information about licensure, advertisement, pricing, tax filings, incorporation, etc. From the information in the record, we cannot decipher whether Diaz was actually in an independently established business as opposed to side work in addition to working for Da Vinci.

Ultimately, the record is incomplete and a determination as to independent contractor status cannot be made. Further, we remind Da Vinci that it is their burden to meet the ABC test. Da Vinci has not provided substantial evidence to meet their burden.

**IV**

Next, we turn to the alternative theory raised by petitioner regarding the applicability of section 2750.5.

Workers' compensation insurance coverage is required for all those who employ one or more employees. (Bus. & Prof. Code, § 7125.2; *Wright v. Issak* (2007) 149 Cal.App.4th 1116 [72 Cal.Comp.Cases 438].) With respect to contractors on construction projects, section 2750.5 applies to workers' compensation, and section 3351, subdivision (d) is read together with section 2750.5. (*Cedillo v. Workers' Comp. Appeals Bd.* (2003) 106 Cal.App.4th 227 [68 Cal.Comp.Cases 140]; *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (*Meier*) (1985) 40 Cal.3d 5 [50 Cal.Comp.Cases 562].) Section 2750.5 provides that when a worker is "performing services for which a license is required" or is "performing such services for a person who is required to obtain such a license" that worker is presumed to be an employee rather than an independent contractor. In order to successfully prove independent contractor status, a person must satisfy certain factors set forth within section 2750.5, and, additionally, must "hold a valid contractors' license as a condition of having independent contractor status." (Lab. Code, § 2705.5, italics added; *Cedillo*, *supra,* 106 Cal.App.4th 227; *Blew v. Horner, supra*, 187 Cal.App.3d 1380.)

Once the person hired by an owner or general contractor is shown to be an employee rather than an independent contractor, "the general contractor may be liable under workers' compensation for injuries to persons hired by the employee, on the theory that such persons are also the general contractor's employees." (*Blew v. Horner, supra*, 187 Cal.App.3d 1380, 1387; *Rinaldi v. Workers' Comp. Appeals Bd.* (1987) 196 Cal.App.3d 571 [52 Cal.Comp.Cases 366].) "For workers' compensation purposes, under section 2750.5, the hirer of a contractor for a job requiring a license is the statutory employer of the unlicensed contractor. In addition, the hirer is the statutory employer of those workers employed by the unlicensed contractor. . . Accordingly, the presumption that the person who employs the unlicensed contractor is the employer is conclusive." (*Cedillo v. Workers' Comp. Appeals Bd., supra,* 106 Cal.App.4th 227, 233; see *Rinaldi v. Workers' Comp. Appeals Bd., supra*, 196 Cal.App.3d 571; *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Meier), supra,* 40 Cal.3d 5) Thus, when status as an independent

contractor is lost for lack of a license, the unlicensed contractor becomes both the employee and the employer, and when the unlicensed contractor lacks workers' compensation insurance coverage, the "ultimate hirer" who does have workers' compensation insurance coverage becomes liable. (*Cedillo v. Workers' Comp. Appeals Bd., supra,* 106 Cal.App.4th 227; *Hernandez v. Chavez Roofing, Inc*. (1991) 235 Cal.App.3d 1092 [56 Cal.Comp.Cases 650]; *Rinaldi v. Workers' Comp. Appeals Bd., supra*.)

UEBTF argues that Diaz was required to have a license pursuant to California Code of Regulations, title 16, section 832.27. This section provides:

> A landscape contractor constructs, maintains, repairs, installs, or subcontracts the development of landscape systems and facilities for public and private gardens and other areas which are designed to aesthetically, architecturally, horticulturally, or functionally improve the grounds within or surrounding a structure or a tract or plot of land. In connection therewith, a landscape contractor prepares and grades plots and areas of land for the installation of any architectural, horticultural and decorative treatment or arrangement.

(Cal. Code Regs., tit. 16, § 832.27.)

In addition, Bus. and Prof. Code section 7026.1 (a)(4) provides:

(a) The term "contractor" includes all of the following:

> (4) Any person not otherwise exempt by this chapter, who performs tree removal, tree pruning, stump removal, or engages in tree or limb cabling or guying. The term contractor does not include a person performing the activities of a nurseryperson who in the normal course of routine work performs incidental pruning of trees, or guying of planted trees and their limbs. The term contractor does not include a gardener who in the normal course of routine work performs incidental pruning of trees measuring less than 15 feet in height after planting.

Diaz testified to performing work such as carpentry work in repairing a chicken coop, trimming trees over 15 feet high, paver installation, laying down sod, sprinkler installation, sprinkler repair, repairing various woodwork, tree trimming, and tree removal. Da Vinci refuted Diaz's claims, and the WCJ found Da Vinci more credible. We have given the WCJ's credibility determinations great weight because the WCJ had the opportunity to observe the demeanor of the witnesses. (*Garza*, *supra*, 3 Cal.3d 312, 318-319.)

However, noticeably missing from the record are any of the invoices Diaz submitted to Da Vinci. At the time of applicant's claimed injury, Business & Professions Code section 7048

required a license for projects where the aggregate contract price was over $500.00 for labor, materials, and all other items. Diaz and Da Vinci testified that Diaz would invoice any additional work performed. Diaz testified that on at least one occasion he purchased sod and was reimbursed for it. (MOH/SOE, 11/26/2024, 4:18-19.) If any of these additional tasks, which may be more than mere maintenance, were performed and the cost of the tasks was more than $500.00, it is plausible that a license was required. If a license was required, Diaz would be deemed an employee under section 2750.5.

**V**

Finally, we turn briefly to whether there is a "general" and "special" employment relationship.

In the seminal case of *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.]" If general and special employment exist, "the injured workman can look to both employers for [workers'] compensation benefits. [Citations.]"

The paramount consideration in determining whether a special employment relationship exists "is whether the special employer has 'the right to control and direct the activities of the alleged employee or the manner and method in which the work is performed, whether exercised or not. [Citation.]" (*Kowalski,* 23 Cal.3d at p. 175.) Although the *Kowalski* case and a number of cases following it reiterate that the issue of control is 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.)

As the original hiring entity, Diaz would be the general employer. The question is whether Da Vinci is a special employer over applicant. Here, there was no evidence presented that applicant had an understanding that he was subject to the control or direction of Da Vinci as a special employer. He testified that at the school his co-worker told him what to do. (MOH/SOE, 05/06/2024, 4:15.) Moreover, there is no evidence that Diaz relinquished any control over applicant to Da Vinci. Though Diaz was found to be less credible, he also testified that Da Vinci did not have authority to fire his workers. (MOH/SOE, 11/26/2024, 5:11.) As noted previously, Diaz provided all the tools to his workers not Da Vinci. As such we agree that there is not a "general" and "special" employment relationship in this matter.

We conclude that the record should be developed, as appropriate, on the issue of whether Diaz was an employee of Da Vinci.

Accordingly, we will grant the Petition for Reconsideration and, as our Decision for 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 of Fact, Orders, and Opinion on Decision issued on April 22, 2025 is **GRANTED.**

**IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings of Fact, Orders, and Opinion on Decision issued on April 22, 2025 is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings consistent with this decision.

**WORKERS' COMPENSATION APPEALS BOARD**

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

**I CONCUR,**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**

**/s/ PAUL F. KELLY, COMMISSIONER**

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

**August 1, 2025**

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

**GERMAN RENTERIA PINA**
**WILLIAM HENDRICKS**
**DOMINGO ELIAS BREA**
**SHELDON SINGER**

**TF/md**

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