WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

JOLEE ROGELSTAD, ***Applicant***

vs.

BRIAN SILVER, ***Defendants***

Adjudication Number: ADJ14132796
Santa Rosa District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in order to study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Defendant seeks reconsideration of the Findings, Award, and Order (F&A) originally issued on January 13, 2023, and amended on January 24, 2023, by the workers' compensation administrative law judge (WCJ). The WCJ found in pertinent part that applicant "sustained injury arising out of and occurring in the course of employment. Body parts are deferred with WCAB jurisdiction reserved"; applicant was an employee of defendant Brian Silver on June 21, 2020; defendant failed to prove that the applicant was an independent contractor; "applicant was injured while living on the employer's premises and engaging in a reasonable and anticipated use of the premises"; and "applicant's injury was in the course of employment and the injury is compensable."

Defendant contends that applicant's testimony is contradicted by the evidence; that the employment relationship was not established as of the date of injury; and alternatively if the relationship were established, that the employment agreement is rescinded due to alleged falsehoods regarding her prior experience. He further contends that the bunkhouse rule does not apply as the offer of residence was a benefit to the applicant, but that the defendant did not receive a benefit by the applicant living on the premises, and that defendant did not have control or possession of the trailer in which the applicant was living when the injury occurred.

We received an Answer from applicant. Applicant contends in relevant part that the evidence does support the findings of fact and that particular weight should be given to the WCJ's assessment of credibility. Applicant also requests a dismissal of defendant's Petition for Reconsideration as it is not verified.

The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending denial of the Petition but also recommending dismissal of the Petition as it was untimely and unverified.

We have considered the allegations of the Petition for Reconsideration and the Answer and the contents of the Report. As our Decision After Reconsideration, we will rescind the F&O and substitute a new F&O that defers the issue of injury arising out of and in the course of employment and the issue of judicial notice of the applicant's prior case from the State of Washington. We will make no other substantive changes to the decision.

FACTS

As set forth in the WCJ's Report:

On April 11, 2020, the applicant posted a Craigslist ad seeking living quarters in exchange for work. (App. Exh. 13/DefExh. E.) The ad's title was "Let me be a BLESSING helping/working exchange for living quarters". (*Id.*) Within the ad, the applicant stated,

> " .. .I was the owner/manager working also in housekeeping, maintaining the home, outbuildings, barns, fencing and farm. I did all the accounting, guest services, bookings, public relations, marketing, advertising, and trail rides." (*Id.*)

In his emailed response five days later, the defendant wrote,

> " ... This would be a 'live-in' personal assistant arrangement that could provide you with an apartment or home, possibly board and a salary or hourly income, the amount of which would depend on the tasks that you can choose to assume... You would have your own place to live outside of our home, probably on a separate living unit over our garage, with a space for your car. This has not yet been built so in the interim, I would buy an RV trailer for you to live in, parked on our property with our supply of electricity, water, sewage disposal, cable tv, and internet."
> (App. Exh. 2.)

The applicant and defendant met at the defendant's office the next day, on April 17, 2020. (MOH/SOE, 6/14/22, p. 7, lines 20-23.) They spoke about job duties and the defendant taught the

applicant the Peachtree Accounting System. (MOH/SOE, 6/14/22, p. 7, lines 23-25; App. Exh. 5/ Def. Exh.I.) Applicant's understanding was that she was hired at the first interview. (MOH/SOE, 6/14/22, p. 9, lines 16-17.)

> The first two weeks, Monday through Friday, the applicant met the defendant at noon at his office. She was doing data entry, then they would go to lunch and then do more data entry. The applicant saw the defendant at least five times during this time period. (MOI-VSOE 6/14/22; p. 8, lines 11-15.)
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> Subsequently, the defendant sent the applicant website links to available trailers. (App. Exh. 1.) On April 25, 2020, the applicant emailed the defendant the trailer she selected. (Def. Exh. 0.) An RV was purchased in Fairfield on May 24 and delivered to the defendant's property on May 27, 2020 as the applicant's new fulltime residence. (MOH/SOE, 6/14/22, p. 9, line 1; line 6.) Mr. Silver gave Ms. Rogelstad $900.00 as a "loan" on May 31, 2020. (Def. Exh. K.)
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> During her first night in the trailer on June 21, 2020, the applicant tripped on a stair on her way to the bathroom and was knocked unconscious. (MOH/SOE, 6/14/22, p. 10, lines 24-28.) She woke up to her dog barking around 3:30 p.m. the next day. (MOH/SOE, 6/14/22, p. 10, lines 41-42.) She was transported via ambulance to Queen of the Valley Hospital where she was admitted for 10-11 days. (MOH/SOE, 6/14/22, p. 11, lines 1-4.) The applicant has undergone left knee, hip and left elbow surgeries. (MOH/SOE, 6/14/22, p. 11, lines 5-6.)
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> From the time of the applicant's interview to her injury, the defendant did not have workers' compensation insurance. (MOH/SOE, 7/7/22, p. 19, lines 27-29.) The day after the applicant moved in, the defendant attempted to get insurance from Allstate but the defendant had to rewrite the application due to an adjustor error and the insurance. came in mid-July, a month after the applicant got injured. (MOH/SOE, 7/7/22, p. 18, lines 36-41.) This matter proceeded to trial on the following issues: whether an employment relationship existed at the time of injury or whether the applicant was an independent contractor; and whether the injury arose out of and in the course of employment. All other issues were deferred with jurisdiction reserved.
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> The applicant, Ryan Tippins, Baba Eden, Wayne Miller and the defendant, Brian Silver provided trial testimony. The substance of their testimony is set forth below.

Jolee Rogelstad, Applicant

The applicant performed bookkeeping for her own business. She was never certified in bookkeeping and never formally worked as a bookkeeper. The applicant never worked as an independent contractor for anyone else. (MOH/SOE, 6/14/22, p. 6, lines 11- 14.)

The applicant felt that she was being trained in the Peachtree system the first couple

of weeks. (MOH/SOE, 6/14/22, p. 8, lines 18-19.) The applicant was doing bookkeeping duties from 4/24/20-6/14/20. (MOH/SOE, 6/14/22, p. 14, lines 39-40.) The applicant was living on the property from 5/27/20-6/21/20. (MOH/SOE, 6/14/22, p. 14 lines 38-39.)

Brian Silver, Defendant

The defendant is a lawyer and knows the need to have workers' compensation whenever he's had employees. (MOH/SOE, 7/7/22, p. 14, lines 7-9.) According to the defendant, the applicant was asked and stated she wanted to be an independent contractor at the initial meeting because it's less bookkeeping and there wouldn't be any deductions. (MOH/SOE, 7/7/22, p. 15, lines 30-32.) He had nothing to memorialize her as an independent contractor. (MOH/SOE, 7/7/22, p. 20, lines 43-44.)

At the interview the defendant showed the applicant double-entry bookkeeping and paid attention to her comments. (MOH/SOE, 7/7/22, p. 16, lines 34-36.) After the interview, the defendant felt the applicant was a good candidate but it was too soon. (MOH/SOE, 7/7/22, p. 16, lines 45-47.) For the defendant, the first step was the interview, the second step was for the applicant to live in the trailer. If she couldn't live in the trailer, everything would be called off (MOH/SOE, 7/7/22, p. 21, lines 22-25.)

The day after the interview, the defendant drove the applicant around town and gave her office keys to "dabble" on the computer. (MOH/SOE, 7/7/22, p. 17, lines 12-15.) The applicant was supposed to go into the office the next day after the interview because the defendant needed someone to do the filing with his son, Noah, which the applicant did for one or two days. (MOH/SOE, 7/7/22, p. 19, lines 1-4.)

Ryan Tippins

Mr. Tippins testified at trial that he met the applicant on or about July 15, 2020 at Queen Valley Hospital. (MOH/SOE, 6/14/22, p. 16, line 10; line 18.) Mr. Tippins fed the applicant's horses for her after her injury and built a bridge for her after her injury. (MOH/SOE, 6/14/22, p. 16, lines 14-16.)

Mr. Tippins further testified that the applicant was going to be a bookkeeper after healing but he had no knowledge about what happened before the applicant's injury. (MOH/SOE, 6/14/22, p. 18, lines 19-21.)

According to Mr. Tippins, he had questions about the applicant's integrity and he felt the defendant would not get a fair trial if he didn't testify. (MOH/SOE, 6/14/22, p. 17, lines 19; 25-26.) He was concerned the applicant wouldn't tell the truth at trial. (MOH/SOE, 6/14/22, p. 17, lines 26-27.)

Baba Eden

Mr. Eden, the applicant's son, also offered testimony at trial. Mr. Eden testified that the applicant was not looking to be an independent contractor and she wanted to live with horses or a family and willing to work a trade to keep horses on someone's property. (MOH/SOE, 7/7/22, p. 6, 11-14.) Mr. Eden went with the applicant to her interview and waited in the car for 4 hours. According to Mr. Eden, the applicant was training to do bookkeeping and going to defendant's office and working with defendant's son. (MOH/SOE, 7/7/22, p. 7, lines 33-35.) The applicant collected defendant's mail and cleaned the bathroom at the office. (MOH/SOE, 7/7/22, p. 7, lines 34-36.)

Mr. Eden testified that the applicant started working with the defendant the day after the interview for about two weeks. (MOH/SOE, 7/7/22, p. 8, lines 21-22.) It was obvious to Mr. Eden that the applicant was hired for bookkeeping because the defendant was paying her for bookkeeping and bought her a trailer. The trailer was bought two or three weeks after the interview. (MOH/SOE, 7/7/22, lines 27-30.)

According to Mr. Eden, one of the benefits or perks of working for the defendant was that the applicant was able to have her horses there. After the interview, the applicant mentioned that she was going to start doing books and see how it would evolve from there. (MOH/SOE, 7/7/22, p. 11, lines 4-7.)

Wayne Miller

Mr. Miller owns adjoining land behind the defendant, Mr. Silver. He met the applicant when the defendant brought her to his house. (MOH/SOE, 7/7/22, p. 11, lines 22- 23.) It was Mr. Miller's understanding that the applicant was going to live on the property and work at the office. (MOH/SOE, 7/7/22, p. 11, lines 26-29.) The applicant came by and told Mr. Miller that she was going to sue Brian. Mr. Miller asked if she had started working for him and the applicant replied "no". (MOH/SOE, 7/7/22, p. 12, lines 19-21.)

This matter was submitted after three days of trial. A Findings and Award issued on January 13, 2023 finding that 1) At the time of injury, the employer was uninsured; 2) Applicant was an employee of defendant, Brian Silver, when injured on June 21, 2020; 3) Defendant has failed to meet the burden of proof to show that applicant was an independent contractor when injured on June 21, 2020; 4) The applicant was injured while living on the employer's premises and engaging in a reasonable and anticipated use of the premises; and 5) The applicant's injury was in the course of employment and the injury is compensable.

An Amended Findings and Award issued January 24, 2023 solely to remove the Uninsured Employer Benefits Trust Fund from the Caption and Award. It is from this Amended Findings and Award that the petitioner seeks reconsideration.

DISCUSSION

In reviewing the timeliness of the petition, we conclude that the petition was timely. WCAB Rule 10510(a) (Cal. Code Regs., tit. 8, § 10510 (a)) provides "When any document is served by mail, fax, e-mail or any method other than personal service, the period of time for exercising or performing any right or duty to act or respond shall be extended by… **(2)** Ten calendar days from the date of service, if the place of address and the place of mailing of the party, attorney or other agent of record being served is outside of California but within the United States." According to the official address record, applicant resides in the state of Washington. Thus, the parties had 30 days to timely file a petition for reconsideration. The Amended F&A was served on January 24, 2023. Defendant filed his Petition on February 21, 2023, 28 days later. Therefore, the Petition is timely.

Labor Code section 5902 requires that all petitions for reconsideration "shall be verified upon oath in the manner required for verified pleadings in courts of record…" (see also Cal. Code Regs., tit. 8, § 10510(d).) A lack of verification does not deprive the Appeals Board of jurisdiction to consider and act upon a petition. (*Pacific Tel. & Tel. Co. v. WCAB* (*Nichols*) (1983) 48 Cal.Comp.Cases 530 (writ den.).) In *Lucena v. Diablo Auto Body* (2000) 65 Cal.Comp.Cases 1425 (Significant Panel Decision), it was held that where a petition for reconsideration is not verified as required by Labor Code section 5902, the petition may be dismissed if the petitioner has been given notice of the defect (either by the WCJ's report or by the respondent's answer) unless, within a reasonable time, the petitioner either (1) cures the defect by filing a verification; or (2) files an explanation that establishes a compelling reason for the lack of verification and the record establishes that the respondents are not prejudiced by the lack of verification.

Here, the Petition for Reconsideration is not verified and notice of this defect was specifically given. Moreover, a reasonable period of time has elapsed, but petitioner has neither cured the defect by filing a verification nor offered an explanation of why a verification cannot be filed. While the petitioner is a trained attorney and should have made himself aware of Labor Code section 5902 for proper filing of a petition for reconsideration, we will consider and act on the petition despite a properly verified pleading.

Turning to the merits of the petition, petitioner asserts that the applicant is not an employee because she had not done any work or provided any services or benefit to defendant. (Petition, p.

8, line 8.)

First, we observe that we have given the WCJ's credibility determination great weight because the WCJ had the opportunity to observe the demeanor of the witnesses. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500, 504-505].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determinations (*Id*.)

As stated in the WCJ's Opinion on Decision:

> 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." (Labor 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. (Labor 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.* (2009) 171 Cal. App. 4th 72, 84.)
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> The controlling authority on this issue is S.G. *Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal. 3d 441 (*Borello*). The California Supreme Court in *Borello* held that the most important factor in determining whether an employment relationship exists is the employer's right to control over the work details. The court also held,
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> > Additional factors have been derived principally from the Restatement Second of Agency. These include (a) whether the one performing services is engaged in a distinct occupation or business; (b) 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; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee. (*Id.* at p. 85.)
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> Looking at the record as a whole and applying the *Borello* factors, it is determined that the applicant was an employee of the defendant's at the time of her injury. First and foremost, the defendant controlled the work details, specifically when and where (his office) to report to work and the instrument (Peachtree Accounting System) to complete her tasks. As part of her job duties, she was to look for and select a trailer subject to the defendant's final approval. (Def. Exh. U.) The applicant

> was going to be paid an hourly rate and be provided a trailer to live in. (MOH/SOE 7/7/22, p. 18, lines 11-14.)
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> An employee may be compensated for services provided by means of any property of value, or even by a return of services pursuant to agreement, and need not be in the form of monetary wages. (*Barragan v. WCAB* (1987) 52 CCC 467, 474.) In *Barragan v. WCAB* the Court of Appeal held that training and instruction received by a student participating in an externship program at a hospital was sufficient consideration to support an employment contract. (*Barragan v. WCAB* (1987) 52 CCC 467, 474.) Similarly, in this matter, the provided job training at the defendant's office coupled with the furnishing of a trailer constitutes adequate consideration for an employee-employer relationship.

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); *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 354 [54 Cal.Comp.Cases 80].) Any person rendering service for another, other than as an independent contractor or other excluded classification, is legally presumed to be an employee. (Lab. Code, § 3357.)

While we disagree with defendant's contention that an employment contract was not in effect, common law rules for creation of employment contracts have been rejected in favor of liberal interpretation to extend the benefits of California's workers compensation laws (*Laeng v WCAB* (*Laeng)* (1972) 6 Cal.3d 771). As defendant argues in this case, in *Laeng* the applicant suffered a compensable injury while participating in a tryout and before an offer of work was made. To the extent that the applicant here was "trying out" for the job, she too was brought into the scope of employment. It is irrelevant unsatisfactory employee. Further, in *Barragan v. Workers' Comp. Appeals Bd.* (*Barragan*) (1987) 195 Cal.App.3d 637 [52 Cal.Comp.Cases 467], the Court of Appeal explicitly held that "there is a long line of case law establishing the rule that one need not receive actual payment of money or wages in order to be an employee for purposes of the Workers Compensation Act." (*Id*. at p. 649.) While it is unclear whether applicant was actually paid, she was in the service of the employer training for at least two months and was living

on the premises at the time of injury. Pursuant to the agreement, part of her remuneration was housing. As a result, defendant's argument fails.

The WCJ's analysis concluding that applicant was in the service of defendant pursuant to Labor Code section 3351 is supported by the legal authority and factors outlined in *Borello*. As a result, defendant is unable to overcome the presumption of employment in Labor Code section 3357.

However, when the parties proceeded to trial, although they raised the issue of injury arising out of and in the course of employment (AOE/COE), they did not stipulate to injury to any claimed body parts. In her decision, the WCJ found that applicant's injury arose out of and in the course of employment, but she did not find injury to any body part and she deferred the issue of injury to applicant's body parts. While the record refers to an injury, there is no medical evidence to support that the applicant sustained an injury to any body parts. Further, injury was not stipulated by the parties. The WCJ's determination "must be based on admitted evidence in the record." (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 477 (en banc decision); *Hernandez v. Staff Leasing* (2011) 76 Cal.Comp.Cases 343).) It is noted that there are allusions to the "injury" and that the body parts were deferred, but without a medical record we cannot address whether there is an injury and whether the alleged injury arose out of and in the course of employment. Thus, the WCJ must address the issue of injury AOE/COE in the first instance. (See *Gangwish v. Workers' Comp. Appeals Bd.* (*Gangwish*) (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584].) Therefore, we defer the issue of whether the injury arose out of and in the course of employment.

Finally, we note that the WCJ took judicial notice of applicant's prior case from the State of Washington. However, we could not locate any reference to the issue in the Minutes of Hearing, and there is nothing in the record regarding a prior case. Thus, we defer the issue of judicial notice of applicant's prior case from the State of Washington.

As our Decision After Reconsideration, we rescind the F&O and substitute a new F&O that defers the issue of injury arising out of and in the course of employment and the issue of judicial notice of applicant's prior case from the State of Washington. We make no other substantive changes to the decision.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Amended Findings, Award, and Order issued on January 24, 2023 by the workers' compensation administrative law judge is **RESCINDED** and the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Applicant Jolee Rogelstad, while employed on June 21, 2020 by defendant Brian Silver claims injury arising out of and occurring in the course of employment. The issue of injury arising out of and occurring in the course of employment is deferred.

2. At the time of the injury, defendant Brian Silver was uninsured.

3. Applicant Jolee Rogelstad was an employee of defendant Brian Silver at the time of her claimed injury on June 21, 2020.

4. Defendant has failed to meet the burden of proof to show that applicant was an independent contractor at the time of her claimed injury on June 21, 2020.

5. Applicant's claimed injury occurred while she was living on the employer's premises and engaging in a reasonable and anticipated use of the premises.

ORDERS

IT IS ORDERED that Defendant's Exhibits A, B, C, and M are admitted into the evidentiary record over applicant's objections of relevance.

IT IS FURTHER ORDERED that the issue of judicial notice of applicant's prior case from the State of Washington is deferred.

IT IS FURTHER ORDERED that all other issues are deferred.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 25, 2025

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

JOLEE ROGELSTAD
LEVITZ LEGAL GROUP
OFFICE OF THE DIRECTOR – LEGAL UNIT (OAKLAND)
BRIAN SILVER

TF/md

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