

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

LEAMON PERKINS, *Applicant*

vs.

**DON L. KNOX, an INDIVIDUAL; DLK CAPITAL, INC.; AMERICAN MODERN
INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ10183569
Los Angeles District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

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

Defendants seek reconsideration of the Further Findings and Orders (F&O) issued on July 12, 2022, wherein the workers' compensation administrative law judge (WCJ) found that (1) on September 11, 2015, applicant sustained injury arising out of and in the course of employment (AOE/COE) with DLK Capital, Inc., a corporation, or Don Luis Knox, an individual; and (2) applicant was an employee of Don Luis Knox and DLK Capital, Inc. at the time of injury.

The WCJ ordered that (1) the parties adjust benefits and file a Declaration of Readiness upon reaching an impasse after engaging in a good faith attempt to adjust benefits; and (2) the parties and lien claimants not file a Declaration of Readiness on the medical/legal liens until after attempting to settle them.

Defendants contend that the WCJ erroneously failed to comply with the January 28, 2022 Opinion and Decision After Reconsideration of the Appeals Board requiring development of the record as to the application of the *S. G. Borello & Sons, Inc. v. Dept. of Ind. Relations* (1989) 48 Cal.3d 341 [54 Cal.Comp.Cases 80] (*Borello*) criteria for a determination of whether applicant was an employee or independent contractor of defendants.

We received an Answer from applicant.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied; or, in the alternative, that the matter be returned to the trial level for further development of the evidentiary record.

We have considered the allegations of the Petition, the Answer, and the contents of the Report. Based on our review of the record, and for the reasons stated below, as our Decision After Reconsideration, we will rescind the F&O and return the matter to the trial level for further proceedings consistent with this decision.

FACTUAL BACKGROUND

Applicant claims to have sustained injury to his head, neck, both upper extremities and both arms on September 11, 2015 while employed as a laborer/handyman by defendants. (Minutes of Hearing and Summary of Evidence, March 21, 2018, p. 2.)

In our January 28, 2022 Opinion and Decision After Reconsideration, we stated:

[T]he record demonstrates that applicant proved that he sustained injury while performing demolition work for defendants and thereby established his prima facie case that he is entitled to employment status. (Report, p. 2.) As a consequence, defendants carry the burden of proving that applicant was an independent contractor at the time of injury.

Here, as we previously opined, *Borello* provides the applicable standard for determining whether applicant was an employee or independent contractor. (Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration, October 23, 2018, pp. 4:17-5:4.)

...
In short, *Borello* requires evaluation of whether or not the alleged employer retained control over the alleged employee's work and application of "secondary" factors (a) through (h). (See, e.g., *Garcia v. C&C Food Enters.*, 2020 Cal. Wrk. Comp. P.D. LEXIS 129 (finding joint employment upon application of *Borello*'s right-to-control test and secondary factors); *Villa v. In-Home Compassionate Care*, 2020 Cal. Wrk. Comp. P.D. LEXIS 120 (finding that defendant did not prove that applicant was an independent contractor upon application of *Borello*'s right-to-control test and secondary factors.)

In this case, the record fails to show how, if at all, the WCJ evaluated whether or not defendants retained control over applicant's work and how he "re-weighed" all the secondary factors . . .

...
We therefore conclude that the WCJ should develop the record on the issue of whether applicant was employed by defendants at the time of injury. Accordingly, we will rescind the F&O and return the matter for further proceedings consistent with this decision.

(Opinion and Decision After Reconsideration, January 28, 2022, pp. 6-9.)

In the Report, the WCJ states:

This case again returns on remand from the Appeals Board to develop the record on the issue of employment using the Borello factors. See Borello vs. DIR (1989) 48 Cal.3d 341; 54 CCC 80. However, both sides declined to submit further testimonial or documentary evidence despite the remand order of the Appeals Board and strong encouragement from the undersigned at both the status conference of 14 April 2022 and the trial of 25 May 2022.

...
[T]he evidence of employment proved challenging for the fact-finder. Applicant testified that he had worked for defendants for a little more than a year prior to the injury, since June or July 2014. He testified that he was paid weekly at a daily rate that began at \$80.00 and eventually reached \$ 120.00 to \$125.00 per day. Defendants sometimes paid him by check but applicant only presented two checks at the first trial: one dated 02 September 2015 and the other dated 18 September 2015. He explained that defendants sometimes paid by check or wired money directly into the applicant's account. He testified that he worked consistently from June or July 2014 through the date of injury in September 2015. Thus, applicant testified about working consistently with the defendants but the documentary evidence was scant. He testified that he banked with Chase Bank but no documentary evidence was presented at trial. On remand, further banking records were admitted showing that the applicant did some work for others and received income for it. . . .

On reconsideration, the Appeals Board in its most recent Decision found that the Applicant had sustained its burden of proof that he provided services for hire but that defendant had the burden of proof to show that applicant was an independent contractor. The Appeals Board remanded for further evidence on this issue.

...
After remand, the parties were given the opportunity to develop the record. At a status conference, the undersigned urged both sides to present new evidence. They have not done so. At the trial, the undersigned again urged the parties to present new evidence. They have not done so.

The Appeals Board in its remand order ordered development of the record . . . Specifically, the Appeals Board noted that based on their review of the record, applicant had sustained the burden of proving that the applicant provided services for hire . . .

...
[T]he Appeals Board has . . . shifted the burden of proof to defendant. Since they have not provided any new evidence despite an order to develop the record from the Appeals Board and encouragement from the undersigned to both sides to present more evidence, defendant is left with the results of the shift in the burden of proof as delineated in the last Decision and Order of the Appeals Board.
(Report, pp. 1-4.)

DISCUSSION

In our January 28, 2022 decision, we opined that applicant established that he provided services for defendants, thereby shifting the burden to defendants to prove that applicant provided the services as an independent contractor. (Opinion and Decision After Reconsideration, January 28, 2022, p. 6.) We further opined that the record failed to show how the WCJ evaluated the primary *Borello* factor, i.e., whether or not defendants retained control over applicant's work, and

how he evaluated the secondary *Borello* factors. (*Id.*, pp. 8-9.) On that basis—and without making any factual determinations—we returned the matter to the trial level to develop the record on the issue of whether applicant was an employee or independent contractor.

After the matter was returned to the trial level, the WCJ twice encouraged the parties to provide further evidence and they declined the opportunity. (Report, pp. 1, 3-4.) Because the parties presented no additional evidence, the WCJ was left in the position of having to evaluate the application of the *Borello* factors to the available evidence and produce a summary of the reasons or grounds for his decision. (Opinion and Decision After Reconsideration, January 28, 2022, p. 9; Labor Code § 5313.)

However, although the record is clear that the WCJ relied on the “the shift in the burden of proof as delineated in the last Decision” to determine the F&O, it remains unclear as to how, if at all, he applied the available evidence under the applicable burden of proof to the *Borello* factors in his determination. (Report, p. 4.)

Labor Code section 5313 requires the WCJ to state the “reasons or grounds upon which the [court’s] determination was made.” (See also *Blackledge v. Bank of America* (2010) 75 Cal.Comp.Cases 613, 621–22 [2010 Cal. Wrk. Comp. LEXIS 74].) 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), citing *Evans v. Workmen’s Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].) A decision “must be based on admitted evidence in the record” (*Hamilton*, at p. 478), and must be supported by substantial evidence. (Lab. Code, §§ 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. Workers’ Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) As required by section 5313 and explained in *Hamilton*, “the WCJ is charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision.” (*Hamilton, supra*, at p. 475.)

Given the absence of a record as to how the WCJ applied the available evidence to the *Borello* factors, we conclude that the matter should be returned to the trial level to develop the record thereon. (Labor Code §§ 5701, 5906; *Tyler v. Workers’ Comp. Appeals Bd.* (1997) 56

Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924] ("principle of allowing full development of the evidentiary record to enable a complete adjudication of the issues is consistent with due process in connection with workers' compensation claims (citations)"); see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].) Should the WCJ conclude that the evidence available in the record is insufficient to decide applicant's employment status under *Borello*, he may order the parties to further develop the record.

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

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Further Findings and Orders issued on July 12, 2022 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/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JANUARY 29, 2026

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

**LEAMON PERKINS
FENSTEN AND GELBER
LAW OFFICES OF MARVIN L. MATHIS
OFFICE OF THE DIRECTOR – LEGAL UNIT**

SRO/kl

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