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Edmond Ziraki, Petitioner v. Workers' Compensation Appeals Board, Starline Motors, Inc., Raymond Gharibi, Respondents

Civil No. B241580

Court of Appeal, Second Appellate District, Division Seven

2012 Cal. Wrk. Comp. LEXIS 118

September 5, 2012 Writ of Review Denied

PRIOR HISTORY: [*1]

W.C.A.B. Nos. ADJ6972138, ADJ6972153--WCJ Rodney M. Johnston (POM); WCAB Panel: Commissioners Brass, Lowe, Sweeney (dissenting) [*see Ziraki v. Starline Motors, Inc., 2012 Cal. Wrk. Comp. P.D. LEXIS 218 (Appeals Board panel decision)*]

DISPOSITION: Petition for writ of review denied

CALIFORNIA COMPENSATION CASES HEADNOTES

Employment Relationships--Employee/Independent Contractor Status--WCAB, in split panel decision, affirmed WCJ's finding that applicant/auto body repairer was independent contractor, not employee of defendant, at time of injuries to his back, neck, left lower extremity, head, chest, and in form of sleep disorder, and at time of cumulative trauma injury to his respiratory system, pursuant to factors in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal. 3d 341, 256 Cal. Rptr. 543, 769 P.2d 399, 54 Cal. Comp. Cases 80*, when applicant or his employee controlled performance of auto body repair work, applicant had substantial investment in his own tools, payment was by project, not by hour, applicant was free to open and close business on his own schedule, applicant purchased paint, applicant had his own employee, auto body repairman requires special skill, applicant signed verified civil pleading that he was independent contractor, and applicant received IRS Form 1099 rather than W-2 form.

[See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 3.04-3.07, 3.130, 3.131.]

CALIFORNIA COMPENSATION CASES SUMMARY

Applicant alleged that he suffered injuries to his back, neck, left lower extremity, head, chest, psyche, and in the form of a sleep disorder on 4/23/2009, and to his respiratory system during the period 6/01/2004 through 04/23/2009, while working as an auto body repairer for Defendants Starline Motors, Inc. and Raymond Gharibi.

Applicant's claims proceeded to a trial on the issue of whether, on the dates of his injuries, Applicant was working as an independent contractor or as Defendants' employee. According to the WCJ's Report and Recommendation, the following facts were established regarding Applicant's employment relationship with Defendants:

Defendants Starline Motors and its substantial shareholder Raymond Gharibi are in the business of selling used cars.

The applicant had worked in the auto repair industry since he was a teenager. The applicant operated an auto body repair shop as a sole proprietor at a different location than that of defendant Starline Motors. This shop did not have a fictitious name permit or an auto body shop license. As a sole proprietor, the applicant per-

formed work for the defendants and third parties. In late 2004 the roof of the applicant's body shop collapsed forcing the applicant to move his business. The applicant and the defendant Mr. Gharibi were friends. They made an arrangement for the applicant to continue his business from the defendant's car dealership location. The two did not discuss the pay, the charge to rent a space, or whether the applicant was an employee or an independent contractor. There was no detailed discussion because their relationship was to continue. There was no agreement as to the ending date of the services.

The applicant would perform the work of auto body repairer. The applicant's employee Mr. Arredondo would do the bondo [filler] and primer paint. The applicant controlled the repair of the vehicles. Mr. Gharibi would make suggestions regarding the painting and which cars to repair first.

At the time of the specific incident 04/23/2009, the applicant had his own business producing iron work (gates, doors, and shelving) at the same place as the auto body shop location. This separate business was not part of Starline Motors business of selling used cars. For the last six to eight months, most of the applicant's work was the iron work. He had his own business card for this business (Exhibit C). The telephone number is the applicant's number. The name Edo Ziraki that is on the business card is the name that the applicant is called.

The applicant testified that the defendant paid the applicant \$ 20.00 per hour plus a piece rate. On cross-examination, the applicant testified that he was paid based on the project. Exhibits M and N are examples charging based on the vehicle and not on an hourly rate. He charged Starline Motors based on the project.

The applicant would open the body shop. Defendant would not open the shop. The applicant contended that he was not free to come and go as he pleased. He had his memory refreshed by his deposition. The applicant set his own time. He was not required to clock in or to clock out. He could come any time he wanted and

leave any time he wanted. The applicant was free to open and close the body shop at any time. The applicant could show up and leave whenever he wanted to. The defense witness Frank McNeal the sales manager for Starline Motors credibly testified that his duties included managing the employees to make sure they showed up for work and did their jobs. Mr. Gharibi told Mr. McNeal that the applicant was a subcontractor and not to worry about him.

The applicant had his own tools and equipment at his prior shop. He brought his tools and equipment when he moved to the Starline Motors location. He purchased new tools including the \$2,700 to \$3,700 frame straightening machine while working at defendant's location. He purchased grinders, cutters, and sanders while at defendant's location.

The applicant had his own account and purchased the paint from a third party. The applicant testified that the defendant purchased the parts. Mr. McNeal credibly denied that Starline Motors purchased the parts. The applicant testified that he would buy some parts at Glenoaks Auto Parts.

The witness Ismael Arredondo testified that the applicant was his boss. When he wanted a day off, he would go to the applicant. When he would not come in to work, he would call the applicant. He was never paid by Starline Motors. The applicant testified that Mr. Ismael Arredondo was paid by Starline Motors. Mr. McNeal credibly testified that he did not supervise Ismael, set his hours, or hand him his paycheck.

Defense Exhibit S is the civil complaint dated 02/18/2010. Defense Exhibit T is the Answer to the Civil Complaint dated 09/22/2010. The Answer denied 13 of the 14 allegations. On page 2, paragraph 7 of the complaint includes that Defendant [applicant] began working for Plaintiff [defendant] as an independent contractor doing automotive repair work at Plaintiff's place of business. The only admission is on page 2, paragraph 1, of the Answer that Defendant [applicant] admits the allegations in paragraph 7 of

the Complaint. The applicant signed page 7, the verification page.

The applicant purchased a car from Starline Motors. The credit application signed by the applicant on 12/23/2008 does not list Starline Motors as his employer (Exhibit K).

The defendant gave the applicant a 1099 tax form (non-employee compensation) and not a W-2 tax form (employee compensation) for his services.

The WCJ issued a Joint F&O, in which he found that, based upon an analysis of the factors in *S.G. Borello & Sons, Inc. v. Department of Industrial Relationships* (1989) 48 Cal. 3d 341, 769 P.2d 399, 256 Cal. Rptr. 543, 54 Cal. Comp. Cases 80, the evidence established that Applicant was an independent contractor, not an employee on the dates of his injuries.

Applicant filed a Petition for Reconsideration contesting the WCJ's finding that he was an independent contractor, contending in relevant portion that under the factors set forth in *Borello* substantial evidence established his status as an employee repairing used automobiles sold by Defendants.

The WCJ recommended that reconsideration be denied. The WCJ explained in relevant respects that, under *Borello*, Defendant successfully rebutted the presumption of employment in *Labor Code* § 3357 and established that Applicant was an independent contractor on the dates of his injuries. The WCJ found that the most significant factors indicating that Applicant was an independent contractor rather than an employee included the facts that: (1) Applicant or his employee, Mr. Arredondo, controlled the performance of the auto body repair work; (2) although Mr. Gharibi made suggestions regarding performance of the work or which car to repair first, he did not control the manner of performance of the work; (3) Applicant had a substantial investment in his tools; (4) payment was by the project and not by the hour; (5) Applicant was free to open and close the business on his own hours; (6) Applicant had his own tools and purchased the paint and parts; (7) Applicant had his own employee; (8) an auto body repairman such as Applicant requires a special skill; (9) Applicant signed a verified civil pleading that he was an independent contractor; and (10) Applicant received an IRS Form 1099 rather than a W-2 form.

The WCAB, in a split panel decision, denied reconsideration and affirmed the WCJ's finding that Applicant

was an independent contractor on the date of his injuries. The WCAB adopted and incorporated the WCJ's report.

Commissioner Sweeney dissented, stating in pertinent part:

I dissent. I would grant applicant's petition for reconsideration and find applicant is an employee of Starline Motors, uninsured, and Raymond Gharibi, its substantial shareholder, based upon factors showing applicant was under the control of Starline Motors and the evident subterfuge and manipulation engaged in by Mr. Gharibi to conceal applicant's employment status.

The principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired. *Labor Code section 3353* defines an independent contractor as "any person who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work and not as to the means by which such result is accomplished."

Though an important test of an employment relationship, the "right to control" is not to be applied rigidly as the sole consideration, but rather is to be considered in combination with a number of "secondary" factors with an eye towards the purposes of the workers' compensation act. (*S.G. Borello & Sons, Inc. v. Dept. of Ind. Rel.* (1989) 48 Cal.3d 341 [256 Cal. Rptr. 543, 769 P.2d 399, 54 Cal.Comp.Cases 80, 88].) These secondary factors include whether either party, the employer or the worker, has the right to terminate relationship at will without incurring liability, or whether the termination is limited by a requirement of unsatisfactory performance or for good cause. The former is indicative of an employment relationship, while the latter supports a finding of independent contractor status. (*1 Hanna, Cal. Law of Emp. Inj.* (2nd Ed. Rev.) § 3.07[2].)

The determination of employee or independent contractor status is one of fact if dependent upon the resolution of disputed evidence or inferences. (*Germann v.*

Workers' Comp. Appeals Bd. (1981) 123 Cal.App.3d 776, 783 [176 Cal. Rptr. 868] [46 Cal.Comp.Cases 1062].) The label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced. (*Kowalski v. Shell Oil Co. (1979) 23 Cal.3d 168, 176 [151 Cal. Rptr. 671, 588 P.2d 811] [44 Cal.Comp.Cases 134]*). The party seeking to avoid liability has the burden of proving that a person performing services is an independent contractor and not an employee. Once it is established that the injured person was performing services for the alleged employer at the time of the injury, the burden shifts to the employer to establish the affirmative defense, by a preponderance of the evidence, that the injured person was excluded from coverage by virtue of his independent contractor status. (*Labor Code sections 3357, 2750.5*) Section 3357 creates a presumption that a person rendering service for another is an employee. Section 2750.5 creates a rebuttable presumption that one who performs services for which a license is required is an employee rather than an independent contractor. Defendant here has not rebutted that presumption.

It is apparent that applicant's auto body work at Starline Motors was under the control of Mr. Gharibi, and was performed for the benefit of Starline Motors, as Mr. Gharibi bought cars for resale that required repair by applicant. It was Mr. Gharibi who established the parameters of the employment relationship. Applicant had no business license or insurance, and did not hold himself out as a separate business entity from Mr. Gharibi. It should be noted that Mr. Gharibi did not testify in these proceedings and thus could not contradict much of applicant's testimony. Mr. Gharibi did not hold applicant out as an independent contractor and though he issued payment for applicant's services through Form 1099, he also paid his manager using Form 1099 for several years as well. This conduct is indicative of his intent to manipulate his employment relationships for his own purposes.

Therefore, I would reverse the WCJ's determination and find applicant an employee for purposes of pursuing workers'

compensation benefits. To that end, on remand I would also direct the WCJ to further develop the record with regard to applicant's claim of injury to his psyche, and consider the medical evidence listed at the Mandatory Settlement Conference.

Applicant filed a Petition for Writ of Review, contending in relevant part that the WCAB erred in finding that he was an independent contractor, rather than an employee, on the dates of his injuries.

Defendants filed an Answer, contending in substance that the WCAB's determination that Applicant was an independent contractor should be upheld, because it was supported by an analysis of the factors set forth in *Borello*.

WRIT DENIED September 5, 2012.

COUNSEL: For petitioner--Law Offices of Scott B. Solis, by Scott B. Solis

For respondents Starline Motors, Inc. and Gharibi--Yarian & Patatanyan, by Levik Yarian, and Law Offices of Artin Yadegarian, by Artin Yadegarian.