WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

LEAMON PERKINS, *Applicant,* vs. DON L. KNOX; DLK CAPITAL, INC.; AMERICAN MODERN INSURANCE COMPANY, *Defendants.*	Case No. ADJ10183569 (Los Angeles District Office) **OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION**

Defendants seek reconsideration of the Findings and Orders issued on July 30, 2018 (F&O) by a workers' compensation administrative law judge (WCJ) wherein the WCJ found in pertinent part that: "1. APPLICANT . . . while employed at Long Beach, California sustained injury arising out of and in the course of said employment . . . [and] 2. At the time of injury, the Applicant was an employee of DON LUIS KNOX, an individual, and DLK CAPITAL, Inc., a corporation."

Defendants contend that: (1) the WCJ erroneously applied *Dynamex Operations West, Inc., v. Superior Court* (2018) 4 Cal.5th 903 [83 Cal.Comp.Cases 817] (*Dynamex*) to determine that applicant was an employee of defendants; and (2) under *S. G. Borello & Sons, Inc. v. Dept. of Ind. Relations* (1989) 48 Cal.3d 341[54 Cal.Comp.Cases 80] (*Borello*), the evidence establishes that applicant was an independent contractor.

We received an answer from applicant.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) on September 14, 2018. The Report recommends that the petition be denied. Alternatively, the Report recommends that the matter be returned to the trial level to develop the record based upon analysis of the factors set forth in *Borello*.

We have considered the allegations of the petition, the answer, and the contents of the Report. Based on our review of the record, and as discussed below, we will grant reconsideration, and as our

decision after reconsideration, we will rescind the F&O, substitute new Findings of Fact that defer the issue of employment and restate Findings 4 through 8, and return this 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.) As relevant here, the parties raised the issue of employment. (*Id.*)

Trial was held on March 21, 2018 and June 13, 2018. The WCJ admitted into evidence two checks from defendant DLK Capital payable to applicant, applicant's recorded statement, and defendant Knox's recorded statement. (Joint Exhibit X, Check Dated 2 SEPT 2015; Joint Exhibit Y, Check Dated 18 SEPT 2015; Defendant American Modern's Exhibit A, RECORDED STATEMENT, 9 PAGES, DATED 6 OCT 2015; Defendant American Modern's Exhibit B, RECORDED STATEMENT, 3 PAGES, DATED 22 SEPT 2015.)

Applicant testified that he had worked as a laborer for defendant Knox for approximately one year before his injury. (Minutes of Hearing and Summary of Evidence, March 21, 2018, p. 3:16-17.) On the date of injury, applicant was engaged in demolition activity at defendants' Long Beach property when he was struck in the head by cedar wood and became unconscious. (*Id.*, p. 3:12-16.) Defendant Knox was in the business of purchasing and remodeling homes. (*Id.*, p. 4: 5-6.) Applicant did not participate in the purchasing of homes for remodeling and lacked any professional licenses. (*Id.*, p. 4:6-9.) Defendant Knox supplied applicant's tools, except for a hammer, screw driver, ladder and skill saw. (*Id.*, p. 6:17-18.) Applicant was paid $120 to $125 per day, sometimes in cash or by wire transfer from defendant Knox. (*Id.*, p. 5:15-22.)

Defendant Knox testified that he owns defendant DLK Capital and is engaged in the business of buying, rehabilitating and selling properties. (Minutes of Hearing and Summary of Evidence, June 13, 2018, p. 2:6-7.) Defendant DLK Capital owned the property on which applicant was injured. (*Id.*, pp. 2:8-10, 5:12.) Defendant Knox signed the checks admitted into evidence as payment for applicant's

work, but the September 2, 2015 check was issued on behalf of a third party for work unrelated to defendants' properties. (*Id.*, pp. 3:3-9, 5:12-19.)

In his Report, the WCJ stated:

> While the undersigned used the Dynamex test, one could argue the Borello factors for either side. With respect to factor (a) . . . it is difficult to say whether applicant had an independent handy man business or simply worked for KNOX/DLK.
> With respect to factor (b) the Applicant was definitely a general laborer and not a specialist but no one explained with evidence whether such work is usually supervised or not. . .
> The skill level in factor (c) is an argument for a finding of employment as applicant's services required no special skill.
> Factor (d) also militates in favor of Applicant as defendant provided most of the tools . . . and all of the work sites.
> Factor (e) also militates in favor of applicant as the Applicant's testimony that he worked for defendants from June or July 2014 to 11 September 2015 was more credible than the defendant's interpretation of the 02 September 2015 check. . . .
> With respect to factor (f) the defendant paid by the day, not by the job, which, again, favors the Applicant's argument . . .
> Factor (g) asks whether the work is part of the regular business of the principal. Here the defendant is in the regular business of flipping houses which necessarily includes demolition work. Factor (h) focuses on the intent of the parties. Here, the principal claims that he intended to create an independent contractor relationship. When asked what he believed the difference was he said if there is a W-2 that is employment, otherwise it is an independent contractor relationship. This is not persuasive evidence under factor (h.) . . .
> If Borello applies, the undersigned could either weigh the existing evidence using the above factors or develop the record on factors (a)(b) and (e.)
> . . . If Dynamex applies, the undersigned would find for the Applicant.
> (Report, pp. 4-6.)

By the F&O, the WCJ found that: (1) applicant, while employed at Long Beach, California, sustained injury arising out of and in the course of employment on September 11, 2015; (2) applicant was an employee of defendants at the time of injury; (3) applicant was not a household employee for purposes of Labor Code sections 3352(h) and 3354;[1] (4) applicant filed his claim fifty-six days after the date of injury; (5) there is no evidence that defendants served applicant with a claim form as required by section 5401(a), thus tolling the statute of limitations; (6) there is no evidence of prejudice to the defendant

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

shown per section 5403; (7) applicant timely filed his claim pursuant to sections 5400 through 5403; and (8) this is an interim award, and jurisdiction over the liens is reserved and the issue deferred. (F&O, pp. 1-2.) The WCJ ordered that: (1) the parties adjust or pay benefits to applicant; and (2) the parties and lien claimants not file a Declaration of Readiness regarding the liens until after a final decision in this matter. (F&O, p. 2.)

DISCUSSION

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.) 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.

Here, defendants argue that *Borello*, and not the more recent *Dynamex*, provides the applicable standard for determining applicant's employment or independent contractor status with respect to the requirement of an employer to provide workers' compensation insurance. The question presented in *Borello* was whether a cucumber grower, who had hired migratory workers to harvest its crop on the basis that the workers managed their own labor and shared in the profits of the harvested crop, was required to obtain workers' compensation coverage. The Court found that, although the grower purported to relinquish supervision of the harvest work, it retained overall control of the production and sale of the crop and, therefore, the migratory workers were employees entitled to workers' compensation coverage as a matter of law.

In deciding the case, the Court made clear that the hirer's degree of control over the details of the work is not the only factor to be considered in deciding whether a hiree is an employee or an independent

contractor. (*Borello, supra*, at p. 350.) Unlike the common law principles used to distinguish between employees and independent contractors, the policies behind the Workers' Compensation Act are not concerned with "an employer's liability for injuries caused by his employee." (*Borello, supra*, at p. 352.) Instead, they concern "which injuries to the employee should be insured against by the employer." (*Id.*) Accordingly, in addition to the "control" test, the question of employment status must be decided with deference to the "purposes of the protective legislation." (*Id.* at p. 353.) In this context, the Court observed that the control test cannot be applied rigidly and in isolation, and "secondary" indicia of an employment relationship should be considered:

> "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 or not 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. 351.)

The Court further stated that these factors "may often overlap those pertinent under the common law," that "[e]ach service arrangement must be evaluated on its facts, and the dispositive circumstances may vary from case to case," and "all are logically pertinent to the inherently difficult determination whether a provider of service is an employee or an excluded independent contractor for purposes of workers' compensation law." (*Borello, supra*, at pp. 354-355.)

By contrast, the issue presented in *Dynamex* was whether, in a wage and hour class action in which the plaintiffs alleged they had been misclassified as independent contractors when they should have been classified as employees, certification of the plaintiffs' class was to be based on the Industrial Welfare Commission (IWC) wage order definitions of 'employ' and 'employer' as construed in *Martinez v. Combs* (2010) 49 Cal.4th 35 [75 Cal.Comp.Cases 430], or instead, upon application of the factors in *Borello*. (*Dynamex, supra*, at pp. 941-942.) The Court held that a worker may be classified as an independent contractor only if the hirer can demonstrate that the worker: (a) is free from the control and

direction of the hirer in connection with the performance of the work, both under the contract for the performance of the work and in fact; (b) performs work that is outside the usual course of the hiring entity's business; and (c) is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed. (*Id.*, at pp. 955–956.)

Significantly, the *Dynamex* Court stated that this "ABC" standard was to be applied only in one specific context: i.e., determination of the question of "whether workers should be classified as employees or independent contractors for purposes of California wage orders, which impose obligations relating to the minimum wages, maximum hours, and a limited number of very basic working conditions." (*Id,.* at pp. 955, 913-914.) The Court also stated that it was not deciding the applicable standard for determining whether a worker is properly considered an employee or an independent contractor for claims arising out of obligations not governed by wage orders. (*Id.*, at pp. 915–16, fn. 5.) Since the *Dynamex* Court did not overturn the *Borello* standard for determining an applicant's employment status with respect to the requirement of providing workers' compensation benefits, and expressly limited the application of the ABC test to the determination of employment status with regard to wage orders, we conclude that the *Borello* standard applies here. Accordingly, the WCJ erred in applying the *Dynamex* standard to determine that applicant was employed by defendants.

Turning to defendants' contention that the evidence in the record establishes that applicant was an independent contractor, we agree with the WCJ that the record requires further development regarding the evidence necessary for analysis of the *Borello* factors. In particular, as noted by the WCJ in his Report, the record appears to be incomplete as to whether and to what extent applicant was independently engaged in a handyman/laborer business, applicant was subject to supervision in the tasks he performed, and applicant or defendants can present corroborative evidence in support of their respective contentions regarding the length of time applicant performed services for defendants. We will therefore order further development of the record as to the issue of whether applicant was an employee or an independent contractor. (See, e.g., *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924] (finding that the Appeals Board has the discretionary authority to develop the

record when appropriate to provide due process or fully adjudicate the issues); see also *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261]; §§ 5701, 5906.)

Accordingly, we will grant the Petition for Reconsideration, and as our Decision After Reconsideration, we will rescind the F&O, substitute new Findings of Fact that defer the issue of employment and restate Findings 4 through 8, and return this matter to the WCJ for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED, that the Petition for Reconsideration of the Findings and Orders issued on July 30, 2018 be, and hereby is, **GRANTED.**

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Orders issued on July 30, 2018 are **RESCINDED,** and the following is **SUBSTITUTED** in their place:

FINDINGS OF FACT

1. Leamon Perkins, born 1 April 1979, while allegedly employed on September 11, 2015 as a laborer/handyman at Long Beach, California, claims to have sustained injury arising out of and in the course of employment to his head, neck, both upper extremities and both arms.

2. The issue of employment is deferred.

3. Applicant filed his claim fifty six days after the injury occurred.

4. There is no evidence that Defendants ever served Applicant with a claim form as required by Labor Code section 5401(a) thus tolling the statute of limitations under section 5400.

5. There is no evidence of prejudice to the defendant shown per Labor Code section 5403.

6. Applicant timely filed his claim under Labor Code sections 5400 – 5403.

7. The liens were bifurcated at trial. Jurisdiction over the liens is reserved and the issue deferred.

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IT IS FURTHER ORDERED THAT this matter is hereby **RETURNED** to the trial level for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

CHAIR
KATHERINE ZALEWSKI

I CONCUR,

JOSÉ H. RAZO

CONCURRING, BUT NOT SIGNING
DEIDRA E. LOWE

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCT 23 2018

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

FENSTEN & GELBER
LEAMON PERKINS
LAW OFFICES OF MARVIN L. MATHIS

SRO/oo