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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

YANG LI, Plaintiff and Appellant, v. CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS, Defendant and Respondent.	H044597 (Santa Clara County Super. Ct. No. CV286784)

Appellant Yang Li challenges the superior court's denial of her petition for a writ of mandate. Her mandate petition sought to overturn the decision of respondent California Department of Industrial Relations (the Department) upholding a stop order and penalty assessment of $9,000 against Li for failing to have workers' compensation insurance for six employees at her business. Li contends that the superior court erred in (1) applying the substantial evidence test rather than the independent judgment test, (2) refusing to issue a statement of decision, and (3) finding that the Department's stop order and penalty assessment was supported by substantial evidence and was not an abuse of discretion. We find no error and affirm the superior court's judgment.

I. Background

Li was "the sole owner" of Imperial Foot Spa, which was identified on her City of San Jose business license as "a massage parlor" "with operating hours from 10:00 a.m. to 10:00 p.m., seven days per week." Deputy Labor Commissioner Margaret Flanders and her partner conducted an inspection of Imperial Foot Spa at 11:25 a.m. on August 20, 2015. When Flanders and her partner arrived, the receptionist, Jana, "asked if we wanted a massage." After Flanders explained "the reason for our visit," Jana "put us in touch with Lisa who she said was the manager." Flanders spoke to "Lisa" by phone, and "Lisa" said she would be there in 30 minutes.

While Flanders was waiting for "Lisa" to arrive, she observed a man working at the business. This man, Wen Long Li (James), told them that he was a massage therapist and "helped the owner run the business." Flanders also saw two customers enter the business and go into the back area, where there were six massage beds. A list of prices for various massage services and "suggested . . . tips" was posted in the reception area. Flanders also saw four framed massage therapist certificates. These certificates were for Shauande Shao (Judy), Yun Quin Chen (Helen), Guiyin Chan (Amy), and Wen Long Li (James). A "log sheet" at the "reception desk" listed four names: Jana, Lisa, Helen, and Judy.

When "Lisa" arrived, she turned out to be Li. Li provided Flanders with the names of those who "worked at the business," "their job description" and the length of time each of them had worked there. Li told Flanders that James, Judy, Helen, and Amy were massage therapists. Judy and Amy had been working there for three months, while James had been there for 2.5 months and Helen for one month. Each of them was paid 50 percent of what the customer paid for a massage. Flanders's partner observed "a credit card slip" "at the reception desk" reflecting that a massage therapist named "Jenny" "had provided a massage for an appointment earlier that day" from "10:30 a.m. to 11:30 a.m."

and a payment of $21 had been received. Li insisted that Li Ming Zhang (Jenny) "does not work for her," though Li admitted that she had a contract with Jenny.

Flanders asked Li for the workers' "time cards," but Li said "there weren't any." Li told Flanders that she "paid them at the end of each workday in cash without a pay stub." Li also said that she "provides lodging" for two or three of the therapists, including James and Judy. Li told Flanders that the therapists "do not pay rent for a space," and none of them had keys to the business. The customers paid at the reception desk. Flanders asked Li for her workers' compensation insurance information, but Li said she "did not have it," "was currently in contact with her insurance agent," and "was mailing an envelope to them that day." She also told Flanders that "she thought the previous owner's insurance policy covered the business."

Since Li could not show that she had a valid workers' compensation insurance policy, Flanders issued a "Stop Order, Penalty Assessment . . . in the amount of $9,000 for having six employees working without a valid workers' compensation insurance policy." The $9,000 penalty assessment was based on $1,500 per employee. Flanders also gave Li a "Notice to Discontinue Labor Law Violations."

Li appealed the order and assessment the following day. On August 23, 2015, Flanders "paid a follow-up visit to Imperial Foot Spa" and observed the business was open at 9:23 a.m. and a woman was working folding towels in a massage room. Flanders asked to speak to Li, but the woman told Flanders that Li was not there. Flanders spoke with Li by phone, and Li said that the woman, whom she identified at "Yun Li," "was not working there but was just helping out."

The hearing on Li's appeal was held on August 26, 2015. The only witnesses who testified at the hearing were Li and Flanders. Li testified that the workers at her business were not her "employees" but her "co-collaborators." She explained that she had "written collaboration agreement[s] with those people who work there where collaborators were not employer-employee kind of relationship." Li testified that at the

time of Flanders's inspection "I only have two employ -- I only have two person over there," which included James.

Li submitted into evidence contracts between her and Helen, Judy, Jenny, and James. Each of these contracts provided that Li and the worker "belong to collaborative, not employment relationship." The contract required the worker to provide to Li a "professional massage therapist's certificate" from the state, which Li would display on the wall. Li would provide "place and utensils" and "rent, water and electricity," and take responsibility for advertisements and displays. The worker was responsible for cleaning the workplace, the massage rooms, and the beds, and putting towels in the laundry. The worker could work any hours during the time that the business was open. Each contract provided that Li and the worker would "each . . . take 50% of the earnings (revenue)." It stated: "For example, if we charge customers $20 for foot massage, . . . each [(Li and the worker)] will take $10, [and] tips will all be given to [the worker]." The contract required the worker to follow Li's price list, and the worker could not charge less or more.

Li claimed, as to Amy, "[a]ctually, she doesn't work here." Li said that Amy had stopped working for her in July after working for her for three months. She equivocated about whether she had a contract with Amy. Li testified that she did not have a contract with Jana and that Jana "doesn't work here." Jana was "my friend" who she had "ask[ed]" to "help" with customer intake while Li was away on the day of the inspection. According to Li, Jana manned the reception desk for two or three hours that day. Li claimed that the person Flanders saw during her follow-up visit was another "friend," Xiang Yu, who was "help[ing]" Li for two or three hours that day.

At the end of the hearing, the hearing officer explained to Li that the hearing officer's role was to "determine if you are using employee labor." She told Li that it was her understanding "what I'm hearing from you is basically you're calling them as independent contractors. Okay?" Li responded: "Uh-huh." The hearing officer told Li

that it had determined that "those workers, those massage therapists, are your employees." Li protested: "But they're not." "They are not there all the time." Li changed her position and claimed that she had no contract with James and that he received 100 percent of what a customer paid. Li insisted "I don't have any employees." She also told the hearing officer: "I don't go there often." The hearing officer reiterated that she found that Li was "using employee labor," and she upheld the stop order at the hearing. She told Li that the penalty assessment would be addressed in a written ruling with written findings within 24 hours.

The following day, the hearing officer issued her written findings. She found that Li had six employees working for her: Jana, Judy, Helen, Amy, James, and Jenny. The hearing officer acknowledged Li's claim that these workers were "her collaborators" and "not her employees." The written findings explicitly acknowledged that "there is no single determinative factor" and expressly applied the multi-factor test set forth in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341 (*Borello*). The hearing officer noted that Li "carries the burden of proof" that a worker is an independent contractor, and she found that Li had failed to carry that burden.

The hearing officer expressly took into consideration the contracts that Li had provided. She noted that these contracts stated that Li provided the work space and tools and paid the rent and utilities and that the massage therapists were not permitted to deviate from Li's price list. The hearing officer found: The workers "were not engaged in an occupation or business that was different from Appellant's business. The worker's duties were part of the regular business of the Appellant. Although the written contract between the Appellant and the massage therapists purports to give autonomy to the therapists as to their work schedule, the overriding factor is that the person performing the work is not engaged in occupations or businesses distinct from that of the Appellant[']s. Rather, their work is the basis for Appellant's business. Appellant is in the business of providing massages and the workers conduct the service on the

Appellant's behalf. Regarding control, although Appellant did not provide detailed supervision of the workers, the workers were trained and certified in their profession. As such, detailed supervision on how to give a massage was unnecessary. Moreover, the nature of the work, and privacy considerations, made such detailed supervision impractical, if not impossible. In addition, although the worker[']s freedom to come and go as they please might exceed that of a typical employee, it is largely illusory. If the therapist wanted to earn a livelihood, they had to work productively which meant accepting appointments from paying clients. An employee-employer relationship will be found if the principal retains pervasive control over the operation as a whole, the worker's duties are an integral part of the operation, and the nature of the work makes detailed control unnecessary."

Based on these findings, the hearing officer found that the five massage therapists, James, Judy, Jenny, Helen, and Amy, "are employees of Appellant." The hearing officer made a separate finding as to Jana: "With regard to Jana, the Industrial Welfare Commission Orders provide a definition for the term 'employ' which means to engage, suffer, or permit to work. Jana performed labor for the Appellant as she was engaged, suffered, and permitted to work by performing receptionist duties. Accordingly, Jana is an employee of the Appellant at the time of Deputy Flanders' inspection." The hearing officer affirmed the stop order and penalty assessment of $9,000.

In October 2015, Li filed a mandate petition challenging the hearing officer's decision. Her petition raised three issues. First, she claimed that there was "No Substantial Evidence" that the massage therapists were her employees rather than independent contractors. Li argued that the hearing officer had "unduly emphasized" a single factor, which "ignored the court's teaching [in *Borello*] that no single factor is determinative." She maintained that the hearing officer had "failed to consider other factors weighing in favor of a finding of independent contractorship . . . ." Li insisted

that the massage therapists fell within the definition of independent contractors in Labor Code section 3353.

Second, she claimed that Amy and Helen "were no longer working" at her business at the time of Flanders's inspection or at the time of the hearing officer's order. Finally, she asserted that her testimony that Jana was not her employee, but only a "friend . . . who looked after the business" while Li was away, was undisputed, so the hearing officer was bound to credit it.

In May 2016, Li filed a memorandum of points and authorities in support of her writ petition. In this brief, Li disclaimed any argument that the massage therapists were independent contractors and instead argued that the massage therapists and Li "intended to carry on business as partners" and "[t]herefore there was no employer-employee relationship . . . ." She claimed that the hearing officer had erroneously "confus[ed] partners with independent contractors," had "unduly focus[ed]" on a single factor, and had erroneously imposed penalties for "past 'employees.'" Li asserted that the contracts between her and the massage therapists established that they "engaged in business as partner[s]" and that they "[s]har[ed] profits . . . ." She claimed that Flanders bore the burden of proof and had failed to "refute" the "presumption of partnership." (Italics omitted.) Li conceded that the hearing officer's findings "purported to apply the multifactor test," but she insisted that this was untrue based on the hearing officer's oral comments at the hearing. Li argued, based solely on her own testimony at the hearing, that Helen and Amy were former workers, not current employees, and that Jana was a friend, rather than an employee.

The Department responded that the substantial evidence test applied and that substantial evidence supported the hearing officer's findings. In reply, Li claimed that "the facts are not in dispute," that the superior court exercised de novo review over the hearing officer's "legal conclusions," that the Department bore the burden at the hearing

before the hearing officer, and that the law and the evidence did not support the hearing officer's findings.

At the hearing before the superior court, Li argued that there were "two issues." "The first one is whether or not the agency's factual findings are supported by the evidence. [¶] The second one is whether or not the agency's [decision] is supported by the fact finding." She argued that the court should review "the agency's legal conclusion [under the] de novo standard." The Department argued that substantial evidence supported the hearing officer's decision. Li responded that the hearing officer had failed to require the Department to rebut the "presumption of a partnership."

The court noted that Li had requested a statement of decision. Li argued that a statement of decision was required because "this proceeding is kind of like a trial" and the hearing officer had not decided the partnership issue. She also argued that a statement of decision was required whether the court exercised substantial evidence review or independent judgment review because there were "questions of law and fact." The Department argued that a statement of decision was not necessary if the court was reviewing the hearing officer's decision for substantial evidence.

The superior court "proceeded under the substantial evidence standard of review." It found: "[T]here was jurisdiction, there was a fair trial and there was not any prejudicial abuse of discretion. Substantial evidence supports the findings of the Labor Commissioner. As such, the issue is one of law and findings are not required." It issued a written order but did not issue a statement of decision. The court subsequently entered judgment for the Department, and Li timely filed a notice of appeal.

II. Discussion

Li contends that the superior court erred in (1) utilizing substantial evidence review rather than independent judgment review, (2) refusing to issue a statement of

decision, and (3) failing to find that the Department had abused its discretion in upholding the stop order and penalty assessment.

A. Standard of Judicial Review

Administrative decisions are reviewed under the substantial evidence standard if the underlying decision did not involve "any fundamental vested right." (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 143-144.) Under the substantial evidence standard, the court "review[s] the entire administrative record to determine whether the findings are supported by substantial evidence and whether the agency committed any errors of law." (*Id.* at p. 144.) If the administrative decision involves a fundamental vested right, "the trial court not only examines the administrative record for errors of law but also exercises its independent judgment upon the evidence disclosed in a limited trial de novo." (*Id.* at p. 143.)

A stop order and penalty assessment does not involve any fundamental vested rights, so it is reviewed under the substantial evidence standard. (*JKH Enterprises, Inc. v. Department of Industrial Relations* (2006) 142 Cal.App.4th 1046, 1059-1062 [stop order and penalty assessment for failing to procure workers' compensation insurance is reviewed for substantial evidence; no fundamental vested right] (*JKH*).) Li's reliance on *Goat Hill Tavern v. City of Costa Mesa* (1992) 6 Cal.App.4th 1519 (*Goat Hill*) is misplaced. In *Goat Hill*, the City denied a tavern's application for renewal of its conditional use permit, which was required for the tavern to continue to operate, with the intent to force the tavern to shut down. (*Goat Hill*, at pp. 1524-1525.) As this court noted in *JKH*, a stop order and penalty assessment based on a business's failure to procure workers' compensation insurance, unlike the denial of renewal of an existing land use permit, does not involve real property interests and simply is intended to enforce compliance with labor laws, not to shut down the business. (*JKH*, at p. 1061.) Under these circumstances, no fundamental vested rights are involved, so independent judgment

is unwarranted. (*JKH*, at pp. 1061-1062.) Accordingly, the superior court properly reviewed the hearing officer's decision under the substantial evidence standard.

B. Statement of Decision Not Required

Li claims that the superior court erred in refusing to issue a statement of decision upon her request.

"[U]pon the trial of a question of fact by the court, written findings of fact and conclusions of law shall not be required. The court shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial upon the request of any party appearing at the trial. . . . The request for a statement of decision shall specify those controverted issues as to which the party is requesting a statement of decision. . . . [¶] The statement of decision shall be in writing, unless the parties appearing at trial agree otherwise; however, when the trial is concluded within one calendar day or in less than 8 hours over more than one day, the statement of decision may be made orally on the record in the presence of the parties." (Code of Civ. Proc., § 632.)

"A trial judge is not required to make findings of fact when it is not acting de novo under the independent judgment standard; where the substantial evidence rule applies, the trial judge does not independently weigh evidence and make his own findings but merely determines a question of law—i.e., whether the evidence is legally sufficient. [Citations.] So long as the [hearing officer] made adequate findings, there is no need for development of a further record by the reviewing court." (*Stanton v. State Personnel Bd.* (1980) 105 Cal.App.3d 729, 736.) Here, the hearing officer made extensive written findings, and the superior court exercised only substantial evidence review. As no "question of fact" was tried by the superior court, no statement of decision was required under Code of Civil Procedure section 632.

Li resists this straightforward analysis and argues that a statement of decision is required even where the substantial evidence standard of review applies because, in her view, Code of Civil Procedure section 632 does not specify when a statement of decision is required but only when a *written* statement of decision is required. She claims that an *oral* statement of decision is *always* required when there is a court trial, regardless of whether it is a trial of a question of fact or instead limited to the resolution of a question of law. She attempts to argue that the statutory language requires an oral or written statement of decision after any court trial.

The essential question is whether *the statute* required a statement of decision in this case. The statute states that a "written" statement of decision is not required even where there is a court trial of a question of fact unless there is a request. And it provides a further exception to this rule, permitting an "oral" statement of decision where the court trial of the question of fact was brief. Here, there was no trial of a question of fact. The statute contains no requirement of a statement of decision, oral or written, where there has not been a court trial of a "question of fact." This makes perfect sense of course. Since the superior court was reviewing the hearing officer's decision for substantial evidence, and we do the same, there would be no value in having the superior court explain its decision. (*Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 762 ["when the scope of review in the trial court is whether the administrative decision is supported by substantial evidence, the scope of review on appeal is the same."].) It was the hearing officer who made the factual findings in this case, and she made written findings, which were before the superior court and are before this court to aid in our review of her decision. "The primary purpose of a statement of decision is to facilitate appellate review." (*People v. Landlords Professional Services, Inc.* (1986) 178 Cal.App.3d 68, 70.) Since we review the hearing officer's decision, not the superior court's decision, a statement of decision from the superior court would be purposeless in this case.

Li does not identify any statutory requirement of a statement of decision that applies where there has not been a court trial of a question of fact, so we reject her claim that the superior court erred in failing to issue a written or oral statement of decision.

C. Substantial Evidence Review

Judicial review of an administrative decision under the substantial evidence standard extends only "to the questions whether the [agency] has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (Code Civ. Proc., § 1094.5, subd. (b).) The court "review[s] the entire administrative record to determine whether the findings are supported by substantial evidence and whether the agency committed any errors of law." (*Bixby v. Pierno*, *supra*, 4 Cal.3d at p. 144.)

Li contends that the Department lacked "jurisdiction" because it failed to rebut the "presumption" of partnership and "failed to prove the employee status of the massage workers."

Li's claim that there is a "presumption of partnership" is based on Corporations Code section 16202, subdivision (c)(3): "A person who receives a share of the profits of a business is presumed to be a partner in the business, unless the profits were received for any of the following reasons: [¶] (A) In payment of a debt by installments or otherwise. [¶] (B) In payment for services as an independent contractor or of wages or other compensation to an employee. [¶] (C) In payment of rent." (Corp. Code, § 16202, subd. (c)(3).) She ignores another portion of that statute which provides that "[t]he sharing of gross returns does not by itself establish a partnership . . . ." (Corp. Code, § 16202, subd. (c)(2).) She also ignores the statute's definition of partnership: "the

association of two or more persons to carry on as coowners a business for profit forms a partnership." (Corp. Code, § 16202, subd. (a).)

No evidence was presented at the hearing before the hearing officer that Li and any of the massage therapists were "coowners" of "a business" or that they had agreed to "share . . . profits." It was undisputed that Li was the sole owner of Imperial Foot Spa, and the contracts simply provided that Li and the massage therapists would share "gross returns," not that they would share "profits." Hence, there was no basis for a presumption of partnership. Accordingly, we reject Li's claim that the hearing officer erred in "fail[ing] to consider whether a partnership existed."

Li claims that Labor Code section 3351, which defines "employee," supports her argument that the massage therapists were not her employees. "'Employee' means 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, and includes: . . . [¶] . . . [¶] . . . All working members of a partnership or limited liability company receiving wages irrespective of profits from the partnership or limited liability company." (Lab. Code, § 3351.) As we have already noted, there was no evidence that the massage therapists were her partners because the undisputed evidence showed that they shared revenue, not profits.

Li claims that the hearing officer mistakenly "confused" her claim that the massage workers were her "collaborators" with a claim that they were independent contractors. Yet, other than her unsupported claim of partnership, Li does not identify how her relationship with the massage therapists differed from an employer-employee relationship. "The label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced. [Citations.] The Act must be liberally construed to extend benefits to persons injured in their employment. (§ 3202.) One seeking to avoid liability has the burden of proving that persons whose services he has retained are independent contractors rather than employees." (*Borello*, *supra*, 48 Cal.3d at p. 349.)

Thus, it was Li who bore the burden of proving that the workers were not her employees, and the fact that she attached the "label" of "collaborators" was not dispositive.

Li also contends that the hearing officer's findings do not support her decision that the massage therapists were Li's employees rather than independent contractors. To support this contention, she critiques statements that the hearing officer made during the hearing, rather than the hearing officer's written findings. Her critique is irrelevant because remarks made at a hearing may not be used to impeach formal written findings. (*Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, 1451.) We review the hearing officer's findings, not her remarks at the hearing.

Li claims that the hearing officer "unduly [relied] upon one single factor" rather than properly "applying the multi-factor *Borello* test." Not so. The hearing officer's findings expressly applied the multi-factor *Borello* test and examined each of the factors identified in *Borello*.

Borello was a challenge to a stop order and penalty assessment that had been issued on the ground that the appellant cucumber grower lacked workers' compensation insurance for 50 workers who harvested the grower's cucumbers. The grower claimed that the harvesters were independent contractors because the grower had entered into "'sharefarmer'" agreements with each harvester that identified the harvesters as "'independent contractors.'" (*Borello, supra,* 48 Cal.3d at p. 345.) Under these agreements, the harvesters furnished the tools and the labor to harvest the cucumbers, and the grower furnished everything else. Each harvester was completely responsible for a designated plot of land, and the grower did not supervise the work or set the hours. The gross revenue was to be split equally between the harvester and the grower. (*Id.* at pp. 346-348.) The Department had affirmed the stop order and penalty assessment based on the grower's control of the harvesting and sale of the cucumbers. (*Id.* at p. 348.) The superior court denied the grower's mandate petition because the administrative decision was "supported by the evidence . . . ." (*Ibid.*)

On review, the California Supreme Court observed that whether a worker was an employee or an independent contractor was a question of fact, and the administrative decision "must be upheld if substantially supported." (*Borello, supra,* 48 Cal.3d at p. 349.) In other words, judicial review was deferential. The court rejected the claim that the sharefarmer agreements were conclusive of the harvesters' status. "The label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced. [Citations.] The Act must be liberally construed to extend benefits to persons injured in their employment. (§ 3202.) One seeking to avoid liability has the burden of proving that persons whose services he has retained are independent contractors rather than employees." (*Borello,* at p. 349.)

Control was not necessarily the definitive factor. Instead, many factors needed to be considered: "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. [Citations.] 'Generally, . . . the individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations.'" (*Borello, supra,* 48 Cal.3d at p. 351.)

The California Supreme Court upheld the administrative decision rejecting the grower's claim that the harvesters were independent contractors. The court noted that the grower owned and controlled the premises, set the price for the crop, dealt with the buyer, and paid the harvesters. (*Borello, supra,* 48 Cal.3d at p. 356.) "The harvesters form a

regular and integrated portion of [the grower's] business operation," which is "a strong indicator that [the grower] functions as an employer under the Act." (*Id*. at p. 357.) The existence of the "'sharefarmer'" agreements did not rebut this evidence that the grower was the employer of the harvesters. (*Id.* at pp. 345, 357.) The court held that the grower "has failed to demonstrate" that the harvesters "are independent contractors excluded from coverage under the Act." (*Id*. at p. 360.)

The California Supreme Court's decision in *Borello* strongly supports the hearing officer's decision in this case. As in *Borello*, Li owned the business, controlled the premises, set the prices for the massage services, collected payments from the customers, and paid the massage therapists. The massage therapists provided the sole service that her business offered. (*Borello*, *supra*, 48 Cal.3d at pp. 356-357.) And Li's "collaborator" contracts, like the "'sharefarmer'" agreements in *Borello*, did not rebut this strong evidence that the massage therapists were Li's employees. The fact that Li, like the grower in *Borello*, did not set the work hours or supervise the work also did not rebut the other evidence showing that the massage therapists were employees rather than independent contractors (or something else).

Li challenges the hearing officer's findings that some of the *Borello* factors did not support a finding that the massage therapists were independent contractors. First, she attacks the hearing officer's finding that the lack of "detailed supervision" did not support a finding that the massage therapists were not her employees because detailed supervision of certified massage therapists was, given the nature of the work, "unnecessary" and "impractical, if not impossible." We can find no flaw in this finding. The fact that supervision of the giving of a massage by a certified massage therapist is not practical suggests that the lack of supervision does not weigh in favor of finding that the massage therapists were independent contractors. Second, she takes issue with the hearing officer's finding that the massage therapists' "freedom to come and go as they please" was "largely illusory" because they could not "earn a livelihood" unless they "accepted

appointments from paying clients." The hearing officer could reasonably conclude that this *Borello* factor did not play a significant role in determining the status of the workers, just like the California Supreme Court found this factor of little import in *Borello*. We decline Li's invitation for us to reweigh the factors as our limited judicial review under the substantial evidence test precludes us from doing so.

Li makes two additional arguments. With regard to Jana, she claims that the hearing officer erroneously relied on a definition of "employ" in an Industrial Wage Commission (IWC) order, which she argues was inapplicable to the determination of whether a person is an employee for workers' compensation purposes. Li did not claim that Jana was her partner or collaborator or an independent contractor. Instead, she claimed that Jana was a "friend" who was simply doing her a favor by serving as receptionist at the business while Li was away. She seems to be arguing that unpaid, short-term service cannot qualify as employment.

The hearing officer, relying on "Industrial Welfare Commission Orders [which] provide a definition for the term 'employ' which means to engage, suffer, or permit to work," found that Jana was Li's employee because "Jana performed labor for the Appellant as she was engaged, suffered, and permitted to work by performing receptionist duties." The crux of this finding was that Jana's "labor" for Li made her Li's employee. Although the hearing officer relied on an IWC order's definition of "employ," that reliance was immaterial. Labor Code section 3351, which Li concedes applies here, defines "'Employee'" 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 . . . ." The hearing officer's finding that Jana was "performing" "labor" "for [Li]" necessarily establishes that Jana was "in the service of" Li under an implied contract and therefore was her employee.

Li's final argument is that "the evidence shows that [Helen and Amy] were no longer working there" so the hearing officer erred in finding that they were her

employees at the time of the order and assessing the penalty based on their inclusion in the number of employees.

Labor Code section 3722 provides that the penalty assessment shall be based on "the sum of one thousand five hundred dollars ($1,500) per employee employed at the time the order is issued and served." Li argues that neither Helen nor Amy was working at her business at the time the order was "issued and served." She apparently misunderstands when the "order" was "issued and served." The evidence at the hearing before the hearing officer established that Flanders issued the order and served the order on Li at the end of the inspection after Li failed to provide proof of workers' compensation insurance.

Li's reliance on *Woodline Furniture Mfg. Co. v. Department of Industrial Relations* (1994) 23 Cal.App.4th 1653 (*Woodline*) is misplaced. In *Woodline*, the Court of Appeal rejected the employer's claim that the penalty should have been limited to the employees who were "present at the time" of the inspection rather than the number who were "'employed at the time the order [was] issued and served.'" (*Id.* at p. 1660.) Li seems to erroneously believe that this means that Labor Code section 3722 is referring to the number of employees at the time of the hearing officer's decision, rather than at the time of the inspection. As noted above, her error is in failing to understand that Flanders issued and served the stop order and penalty assessment at the end of the inspection.

Li's claim that the evidence does not support the hearing officer's finding that Helen and Amy were current employees lacks any citation to the record. In fact, the evidence before the hearing officer reflected that both Helen and Amy were working at Imperial Foot Spa at the time Flanders issued the stop order and penalty assessment. Helen's name was on the log sheet at the receptionist's desk, reflecting her current employment there, and massage therapist certificates for Helen and Amy were both currently in Li's possession and on display at Imperial Foot Spa at the time of Flanders's inspection. Furthermore, Li identified both Helen and Amy as among the massage

therapists working at Imperial Foot Spa when, during the inspection, Flanders asked Li to identify those who worked at her business. We find that substantial evidence supports the hearing officer's finding that Helen and Amy were Li's current employees at the time Flanders issued the stop order and penalty assessment.

III. Disposition

The judgment is affirmed.

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Mihara, Acting P. J.

WE CONCUR:

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Grover, J.

_____
Danner, J.

Li v. California Department of Industrial Relations
H044597