WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

AARON BROWN, *Applicant*

vs.

COUNTY OF LOS ANGELES/SHERIFF'S DEPARTMENT, permissibly self-insured, adjusted by SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants*

Adjudication Number: ADJ11278318
Santa Ana District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration filed by applicant Aaron Brown. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the August 9, 2021 Findings and Order, wherein the workers' compensation administrative law judge (WCJ) found that applicant, an inmate with the County of Los Angeles at the time of his injury, was not an employee for purposes of workers' compensation benefits.

Applicant contends that his burden of proving employment was met because his work was voluntary and for consideration. Applicant further argues that precluding an inmate from workers' compensation benefits is against public policy because it discourages inmates from joining work programs that promote the rehabilitation of inmates.

We received an answer from defendant County of Los Angeles. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the Answer and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we amend the August 9, 2021 Findings and Order to find that applicant was an employee of the County of Los Angeles at the time of his March 22, 2018 injury as an inmate worker.

FACTS

As the WCJ stated:

> Applicant became an inmate at Los Angeles County jail on approximately February 16, 2018. On March 7, 2018 a superior court order issued, sentencing applicant to 364 days in county jail less credit for 20 days served pre-sentencing. On March 8, 2018 applicant transferred to "wayside" facility. One week later, he signed an agreement to participate in the conservation work program, which provided "work time" credits of 1 ½ days for every one day of work in the program**.**
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> On March 22, 2018, applicant slipped and fell while walking to the coffee pot at the print shop where he participated in the conservation work program. He reported the injury immediately and was examined at urgent care. He returned to urgent care the next evening due to hip pain. Hours later, he was released on the early release program.
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> On April 20, 2018 applicant retained counsel and sent a claim form to the County of Los Angeles Sheriff's Department seeking Worker's Compensation benefits for his injury. Los Angeles County denied the claim due to lack of employment relationship. The matter proceeded to trial on multiple dates due to problems with video testimony. Testimony completed on May 17, 2021 and the matter was submitted for decision on June 8, 2021. A decision issued on August 9, 2021 finding that the applicant was not entitled to workers compensation benefits as there was no employment relationship. Applicant was aggrieved by this decision and filed a timely petition for reconsideration. (Report, p. 2.)

Submitted into the record is a recommendation to the Board of Supervisors to adopt an ordinance that states that county inmates may be forced to labor and that such county inmates shall not be considered an employee for the purposes of workmen's compensation insurance. (Defendant Exhibit B, County of Los Angeles Order 91.) That ordinance was adopted by the Board of Supervisors on October 6, 1970. (*Ibid.*) On October 28, 1975, a second recommendation to the Board of Supervisors clarifying that the ordinance regarding county inmate labor equally applies to men and women was adopted on November 12, 1975. (Defendant Exhibit C, County of Los Angeles Order 83.) The WCJ relied on this ordinance to find that applicant was not an employee for the purposes of workers' compensation.

> Pursuant to Penal Code Section 4017 and Government Code Section 25359, it is hereby ordered that all prisoners confined in the County Jail, industrial farm, or road camp, under judgment of conviction of a

> misdemeanor or as probationers may be compelled to perform labor under the direction of a responsible person appointed by the Sheriff on the public works or ways, public grounds, roads, streets, alleys, highways, fire breaks, fire roads, riding or hiking trails, or public buildings, or in such other places in the County as are deemed advisable for the benefit of the public; provided, that no prisoner shall be compelled to so labor who may be physically unable to do so or whose safekeeping may be endangered thereby. "Labor upon public works" as used herein shall include among other things clerical and menial labor in the County Jail, industrial farm, or in the camps maintained for the labor of such persons upon the ways in the County.
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> No prisoner engaged in labor pursuant to this order shall be considered as an employee of, or to be employed by the County or any department thereof, nor shall any such prisoner come within any of the provisions of the Workmen's Compensation Insurance and Safety Act of 1917, now codified as Division 4 and 5 of the Labor Code, or to be entitled to any benefits thereunder whether on behalf of himself or any other person except as provided by law. (Defendant Exhibit C, County of Los Angeles Order 83.)

Also submitted into the record is the Inmate Worker Agreement, which states, in relevant part, "The Conservation Work Program shall award inmates with Conservation Credits . . . Conservation Credits are 1 ½ days credit for every one-day of incarceration and are instead of Good Time/Work Time Credits as outlined in Penal Code section 4019 (1 day credit for each 1 day of incarceration). . . . If you are removed from the Conservation Work Program, whether voluntary or by other means, you will cease to earn the 1 ½ days credit effective the date of removal and will again earn Good Time/Work Time credit of one day credit for each one day of incarceration. You can voluntarily withdraw from the program at any time you no longer wish to participate." (Joint Exhibit Y, Inmate Work Agreement.)

Applicant testified at trial as summarized by the WCJ:

> Applicant was sentenced to 365 days in the L.A. County Jail. His sentence did not require him to work while in jail. When in jail, he wasn't assigned work. He had to apply. While waiting for the assignment, he did nothing. He applied by filling out a form.
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> The applicant has special skills as a printer due to his prior job and was assigned to the print shop because of his experience. In return for working in the print shop, he was given days off of his sentence for every day worked and an extra lunch.

> Applicant slept in an area with the other workers from the print shop. He was not in the regular dorms.
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> The applicant was free to decline the position. Not everyone worked. Each inmate had to qualify to work. Applicant worked from 6:00 a.m. to 2:00 p.m. daily. If there were too many sick calls or late arrivals, he would have been subject to termination. The sergeant had the authority to terminate the inmates from the position. (Minutes of Hearing/Summary of Evidence (MOH/SOE) dated November 4, 2020, p. 2:12-22.)
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> There were no instructors present in the print shop. He was not familiar with the name Five Keys Charter School. He does not remember anyone with the names of Hood or Peterson in the print shop. The deputies gave instructions in the form of the tasks each day such as what pages were to be folded or printed. They were in uniform. If an inmate did not know what to do, other inmates showed them. If they did not want to listen to the other inmates, they would go to one of the supervising deputies. There were approximately five supervising deputies. He was not told he would get a certificate or could use his training in the open labor market. (MOH/SOE dated May 17, 2021, p. 3:6-12.)

Gregory Sivard, records manager at the Los Angeles County Sheriff's Department, testified as follows:

> He did not know anything about the applicant until he was named as a witness. After being named as a witness, he ran the applicant's file and reviewed it. He learned the applicant was participating in the print shop at Wayside.
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> The witness has personally visited that location. There are three connected shops -- the print shop, the sewing shop, and another one unrecalled. The print shop is off the loading dock and the first one that he walked through. When he walked through the door, he noticed that there was equipment with inmates working at them and that there can be one-on-one instruction with an instructor in civilian clothing teaching the inmates.
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> . . .
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> The intent of the shops like the print shop is to help train the inmates and give them a certificate so they could work on the outside.
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> . . .
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> The witness testified that, when he said there can be one-on-one instruction, he meant that, when he came into the print shop, he did see a person in civilian clothing sitting next to an inmate and instructing them.

> He was only there for a moment in October 2019. He cannot say that there are always civilian instructors present, and he cannot say that there were any instructors present when the applicant was in the print shop in 2018. (MOH/SOE dated May 17, 2021, p. 4:2-25.)

DISCUSSION

Labor Code[1] section 3351 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, and includes: . . . (e) a person incarcerated in a state penal or correctional institution while engaged in assigned work . . . ." (§ 3351, subdiv. (e).) Section 3351 does not include county inmates in its definition of employee. (§ 3351.) Section 3352 excludes certain persons from the definition of employee but does not exclude county inmates. (§ 3352.)

Section 3357 provides that "Any person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee." (§ 3357.) This presumption is a rebuttable presumption. (*Gale v. Industrial Acci. Com.* (1930) 211 Cal. 137; *Duenas v. Workers' Comp. Appeals Bd.* (2010) 75 Cal.Comp.Cases 829, 835-836 [2010 Cal. Wrk. Comp. LEXIS 154].) The issue here is whether defendant rebutted this presumption with Order 91 and Order 83.

Penal Code section 4017 provides that county inmates working in the suppression of fire are considered employees of the county. (Pen. Code, § 4017.) It does not speak as to the employee status of county inmates who do not work in fire suppression. The employee status of county inmates are thus left to the courts to decide. In making this determination, courts have looked at whether the work that the inmate performed was "voluntary" or "compulsory" as an incident to incarceration and whether there was consideration for the work performed. (*Rowland v. County of Sonoma* (1990) 220 Cal.App.3d 331, 333-334; *Pruitt v. Workers' Comp. Appeals Bd.* (1968) 261 Cal.App.2d 546 [33 Cal.Comp.Cases 225]; *State Comp. Ins. Fund v. Workmen's Comp. Appeals Bd.* (*Childs*) (1970) 8 Cal.App.3d 978 [35 Cal.Comp.Cases 295]; *Parsons v. Workers' Comp. Appeals Bd.* (1981) 126 Cal.App.3d 629 [46 Cal.Comp.Cases 1304]; *Morales v. Workers' Comp. Appeals Bd.* (1986) 186 Cal.App.3d 283 [51 Cal.Comp.Cases 473]; *County of Kings v. Workers' Comp. Appeals Bd.* (*Garza*) (1986) 51 Cal.Comp.Cases 424 [1986 Cal.Wrk. Comp.

[1] All subsequent references are to the Labor Code unless otherwise indicated.

LEXIS 3361] (writ denied); *Salazar v. Workers' Comp. Appeals Bd.* (1980) 45 Cal.Comp.Cases 16 [1980 Cal. Wrk. Comp. LEXIS 3119] (writ denied).) If an inmate was performing compulsory work as an incident to penal servitude, he is not an employee and has no rights to workers' compensation benefits. (*Parsons* at p. 638.) In deciding whether an inmate was performing compulsory or voluntary work, trial courts may ask the following questions (the *Rowland* factors):

(1) Did the county require the worker to work as a condition of incarceration?

(2) Did the inmate worker volunteer for the assignment? and

(3) What consideration were received, if any; for example, monetary compensation, work-time credits, freedom from incarceration, etc. (*Rowland,* 220 Cal.App.3d at pp. 333-334.)

In *Pruitt, supra,* 261 Cal.App.2d at p. 551, there was a county ordinance that allowed the county to require its prisoners to work as a consequence of incarceration. The applicant in *Pruitt* was a county inmate who was injured while working for the city at a sewage plant. (*Id.* at p. 548.) There was an agreement between the county and the city where county prisoners could be picked up by the city for work in the City Park or at the sewage plant. (*Ibid.*) Notwithstanding the county ordinance, the *Pruitt* court held that the county inmate was an employee. (*Id.* at pp. 552-553.) In reaching its holding, the *Pruitt* court analyzed the inmate's relationship with the city and not the county. (*Id.* at pp. 552-553.)

In *Parsons, supra,* 126 Cal.App.3d at p. 639, the court found that the county inmate there was not an employee. The inmate in *Parsons* was sentenced to probation with the condition that he serve 45 days at an industrial camp. (*Ibid.*) The *Parsons* court held that it cannot be said that the *Parsons* inmate bargained for or consented to work. (*Ibid*.) "His choice was between regular sentencing or probation with the included condition that he serve 45 days at the road camp. In short, petitioner accepted an act of judicial leniency." (*Ibid.*) The *Parsons* court noted that the county ordinance in that case compelling county inmates to work further negates any consensual employment relationship that would make the work performed voluntary. (*Ibid.*)

In *Morales, supra,* 186 Cal.App.3d at p. 289, the court held that a county inmate was an employee when the county offered him a work release program sometime after the inmate began serving his sentence but before he completed his sentence. The *Morales* court distinguished the facts in that case from the facts in *Parsons* by emphasizing that in *Morales*, the inmate was offered a work release program after he began serving his sentence. (*Ibid.*) "Unlike the situation in *Parsons*, applicant in the present case was serving a regular jail sentence when he was offered the

opportunity to perform voluntary community work. In exchange for his agreeing to work, he was recompensed by being allowed to reside anywhere within the county and was no longer confined to jail." (*Ibid.*)

In *Childs, supra,* 8 Cal.App.3d at pp. 981-983, the court held that a county inmate's work was voluntary based on the absence of a county ordinance requiring him to work as an incident of incarceration and based on the relationship between the inmate and the county. An "inmate was at liberty to either accept the work or refuse it and was thus a volunteer; that having accepted the work in return for compensation he was entitled to the benefits enjoyed by employees under the Workmen's Compensation Act, which act should be liberally construed to carry out its beneficent purposes. [citation omitted]." (*Id.* at p. 980.) The inmate in *Childs* provided unrefuted testimony that his work was voluntary. (*Id.* at p. 981.)

The courts in *Garza, supra,* 51 Cal.Comp.Cases 424 and *Salazar, supra,* 45 Cal.Comp.Cases 16 scrutinized the language of the relevant county ordinance and noted the permissive language of the ordinance. In *Garza,* the court held that the county ordinance that provided that county inmates "may" be required to work did not require a finding that a county inmate's work was compulsory. (*Garza* at p. 425.) In other words, the court in *Garza* held that a county inmate could be working voluntarily even though there was an ordinance in place allowing the county to require work as an incidental consequence of incarceration.

In contrast, in *Salazar*, the court held that even though the county ordinance provided that county inmates "may" be required to work, a county inmate's work is compulsory "because the ordinance gave the sheriff the decision-making power regarding work by county prisoners." (*Salazar* at p. 17.)

Here, we are cognizant of the disparate impact in determining employee status between persons incarcerated in state prison and person incarcerated in county jail. State inmates are statutorily included in the definition of "employee" while county inmates are subjected to a compulsory test to determine their employee status. We are also cognizant of the difference between county inmates who work in fire suppression and county inmates who do not, the former being statutorily included in the definition of employee, while the latter being subjected to the aforementioned compulsory test. Lastly, we are aware that in more recent laws, employer control is a major factor in determining employment status (the more employer control, the more likely

employment status is found[2]), whereas here, the opposite effect results when applying the compulsory test, in that the more control the county exercises, the more likely the inmate's work is found to be compulsory without the protections of an employment relationship. Given these considerations, we conclude that the case law with respect to county inmates is antiquated and deserving of a fresh look by the Legislature or courts. That said, we understand that we are bound by existing case law and are constrained in applying the compulsory test explained above.

In applying the compulsory test above using the *Rowland* factors, we conclude that applicant's work here was voluntary. Defendant bears the burden to rebut the employment presumption found in section 3357. Defendant contends that the exclusionary language of the county ordinance in Orders 91 and 83 compels a finding that applicant was not an employee of the county. However, the language in a local ordinance with respect to assigning work to inmates is not determinative, although it may be considered in determining whether the inmate's work is compulsory or voluntary. Both the *Pruitt, supra,* 261 Cal.App.2d 546 and *Parsons, supra,* 126 Cal.App.3d 629 courts focused their analysis on the relationship between the inmates and the county despite there being a local ordinance on the matter.

Orders 91 and 83 state that a county inmate "may" be compelled to perform labor and that "[n]o prisoner engaged in labor pursuant to this order shall be considered as an employee of, or to be employed by the County . . . ." (Defendant Exhibit C, County of Los Angeles Order 83.) There is no evidence in the record of such compulsion. There is no evidence in the record that applicant was sentenced to work. Instead, the record shows that applicant was sentenced to 365 days of jail time. (Defendant Exhibit D, Superior Court Commitment.) While in jail, he was not assigned to work but applied to work by filling out a form. He testified that not all inmates worked and that an inmate had to qualify to work. He also testified that he was free to decline to work. (MOH/SOE dated November 4, 2020, p. 2:12-22.) The Inmate Work Agreement that he signed states that an inmate "can voluntarily withdraw from the program at any time [the inmate] no longer wish[es] to participate." (Joint Exhibit Y, Inmate Work Agreement.) In exchange for his work, applicant received extra time credit, 1 ½ days credit for every one-day of incarceration instead of the Good Time/Work Time Credits of 1 day credit for each one-day of incarceration that non-working inmates received. (Joint Exhibit Y, Inmate Work Agreement.) He also was allowed to sleep in a

[2] See *Dynamex Operations W. v. Superior Court* (2018) 4 Cal.5th 903 and *S. G. Borello & Sons, Inc. v. Dept. of Ind. Relations* (1989) 48 Cal.3d 341 [54 Cal.Comp.Cases 80].

special area with other workers and sometimes received extra lunch. (MOH/SOE dated November 2, 2020, p. 2:18-19; MOH/SOE dated May 17, 2021, pp. 2:24-3:3.) From this record, we determine that applicant's work was voluntary.

We are also not convinced that applicant was participating in a vocational program. Although Mr. Sivard, defendant's witness, testified that he saw a civilian instructing inmates, he admitted on cross-examination that he does not know whether there is always instruction or what the circumstances were during applicant's time in the print shop; his testimony was in regards to the one day he visited the print shop. (MOH/SOE dated May 17, 2022, p. 4:21-25.) Furthermore, he testified that although the intention was to give certificates to the inmates to show the skill they learned while in prison, he is not aware that the program actually followed through the plan of issuing certificates. (MOH/SOE dated May 17, 2022, p. 5:1-3.) Then, of course, there is the consideration of extra time credit that applicant received as a result of his work in the print shop, which belies the contention that this was a vocational program. We note that applicant's early release did not affect the fact that he received extra time credit in consideration of his work or the fact that the reason applicant applied to work at the print shop was to reduce his time. (MOH/SOE dated May 17, 2022, p. 2: 20.)

In summary, we conclude that the evidence points to applicant's work at the print shop as voluntary and not compulsory. Accordingly, we conclude that applicant is an employee of the county and entitled to workers' compensation benefits.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the August 9, 2021 Findings and Order is **AFFIRMED EXCEPT** that it is **AMENDED** as follows:

Findings of Fact

. . .

3. Aaron Brown is an employee of the County of Los Angeles at the time of his March 22, 2018 injury as an inmate worker.

Order

There is no order at this time.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

DECEMBER 19, 2022

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

AARON BROWN
LAW OFFICE OF JESSE MELENDREZ
LOS ANGELES COUNTY, COUNTY COUNSEL

LSM/*pc*

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