

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

**NIEVES ROMERO (DECEASED); MARGARET KING,
Guardian Ad Litem for NIEVES A. ROMERO, *Applicant***

vs.

**PAUL STORY;
UNINSURED EMPLOYERS BENEFITS TRUST FUND, *Defendants***

**Adjudication Number: ADJ10821128
Fresno District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Applicant seeks reconsideration of the Findings of Fact, Award, Order, and Opinion on Decision (F&O) issued on April 12, 2022, wherein the workers' compensation administrative law judge (WCJ) found that (1) applicant, also known as Alex Romero, perished in a motor vehicle accident on October 26, 2016; (2) as of that date, applicant had been engaged in mutual projects with Paul Story, doing business as Kar Tunez; and (3) there is no evidence establishing that applicant's accident occurred in the course of employment. The WCJ ordered that applicant take nothing on his claim.

Applicant contends that the evidence establishes that applicant was employed by Story on the date of his death and that his accident arose out of and in the course of employment (AOE/COE).

We received Answers from defendants.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

Applicant filed a request for leave to file a supplemental pleading with an accompanying supplemental pleading. We approve the request and accept applicant's supplemental pleading. (Cal. Code Regs., tit. 8, § 10964.)

We have considered the allegations of the Petition, the Answers, the supplemental pleading

and the contents of the Report. Based on our review of the record, and for the reasons stated below, we will deny the Petition.

FACTUAL BACKGROUND

On February 5, 2020, the matter proceeded to trial of the following relevant issues:

- (1) Employment.
- (2) Injury arising out of and in the course of employment, specifically death.
(Minutes of Hearing and Summary of Evidence, February 5, 2020, p. 2:12-14.)

The parties stipulated as follows:

[Applicant] . . . while allegedly employed on 10/26/2016 as a sound technician . . . by Paul Story[] claims to have sustained injury arising out of and in the course of employment to his entire body resulting in death.
(*Id.*, p. 2:2-5.)

The WCJ admitted an exhibit entitled Cell Phone Text Messages to/from Paul Story 3/24/15 through 10/26/16. (*Id.*, p. 3:3) The cell phone text messages reveal the following exchange between defendant Story and applicant:

12096523852 [Story] 10/24/2016 8:10:20 PM
Well i have some pepole w anting to see some stuff and each time i can pa y you 20 or better per person. . try to mak e me and y ou some cash

Me [Applicant] 10/24/2016 8:12:39 PM
I'm picking up my son up at 2:30 from school after that I'm y ours for about 2 hours then I ha ve to get back and finish this bo x on building

Me [Applicant] 10/24/2016 9:05:40 PM
Hey you want me to go or no

12096523852 [Story] 10/24/2016 9:06:23 PM
If you comming cool. .but it its out of y our way and you didn't plan to its all good

...

12096523852 [Story] 10/24/2016 9:29:14 PM
And ill take care of it thanks an yway

12096523852 [Story] 10/26/2016 5:11:39 PM

Were the [] is m y jigsaw!!!!

(Ex. 6, Cell Phone Text Messages to/from Paul Story, March 24, 2015 through October 26, 2016, pp. 165-167.)

At the February 23, 2021 trial, Anthony Miranda testified as follows:

Q. In the week prior to his death, did you purchase some things from [applicant].

A. Yeah, I think I bought two matching amplifiers from him.

Q. What were you going to do with those amps?

A. Install them in my vehicle.

Q. So then how were -- the amps were going to be installed by Alex?

A. They weren't going to be installed by him. I was going to install the amps myself. He was going to build the box.

Q. So, in fact, did he start building the box?

A. We -- me and him at my house building it in the garage.

...

Q. So you were working on that box with Alex at your house?

A. Yeah.

...

Q. So when he was doing this with you; he was building the box in the garage, was this the night before his death?

A. Yes.

...

Q. And the police report indicates the time of death was 9:00 a.m.?

A. Yeah.

(Transcript of Proceedings, February 23, 2021, pp. 7:16-9:3.)

Q. You don't know whether the trips to your house or working on cars from his mom's was just an extension of working for Paul; is that correct?

A. No, everything he's done was through him. He didn't work for Paul like that. He would buy equipment from Paul. He would turn around and sell it.

(*Id.*, p. 25:6-12.)

At the July 13, 2021 trial, Paul Story testified as follows:

Q. So at 5:11 p. m. that's when you noticed that the jigsaw was missing?

A. Yeah that's – it might have been a little before that. That's around the time I went to go build something in the wood room, and the saw was missing. I never loaned him that saw. He's the only one that I assume took it. That's why I was, "where the saw at?"

...

MR. GLEASON: Q. All right so your call asking for your saw back occurred at 5:11 p.m.; is that right?

A. Yes.

Q. . . . Did you ever ask Alex -- did you ever ask him to bring that box there and to get that saw back; that you needed it for some specific reason? Did you direct him to come with it and the box to your shop before he died?

A. No.

(Transcript of Proceedings, July 13, 2021 pp. 34:10-35:10.)

In the opinion on decision, the WCJ states:

Applicant, Nieves Romero (hereafter, "Alex Romero"), sustained fatal injuries as a result of a motor vehicle accident in which he was involved on October 26, 2016. It is alleged that, at the time, Alex Romero driving on an errand intended to benefit the alleged employer, Paul Story . . . dba Kar Tunez (hereafter, "Paul Story").

...

In October 2016, "Kar Tunez" was not a licensed business. Paul Story worked out of his home garage in Modesto, although he engaged in auto stereo installation as a "side business" since he was 13 years old. (Minutes of Hearing, 02/05/2020, at pg. 4:21-25). Paul Story also rented space at a warehouse on Bitritto Way in Modesto and stored tools there. He testified that Alex Romero stored tools there as well. (Minutes of Hearing, 02/05/2020, at pgs. 5:22-23; 7:19-21.)

Paul Story testified that, prior to October, 2016, he had no employees (Minutes of Hearing, 02/05/2020, at pg. 5: 1-3) but that he "partnered up" on projects with Romero. Paul Story marketed Kar Tunez on social media. (Minutes of Hearing, 02/05/2020, at pg. 11-13.)

When business improved, he had people helping out -- which included Romero, Story's wife, Patty, and several other individuals. (Minutes of Hearing, 02/05/2020, at pg. 5:18-19.)

...

Paul Story testified that . . . when he did a job with Alex Romero, they would split the proceeds. When they worked together, it was because they wanted to "do something good for ourselves." (Minutes of Hearing, 02/05/2020, at pg. 5:22-24.)

After Alex Romero was killed in the car accident, Paul Story recovered some tools from the trunk of the car, including a jigsaw and a staple gun. (Minutes of Hearing, 02/05/2020, at pg. 6:1-4.) Alex Romero had his own tools, but he also borrowed tools from Paul Story, which included the jigsaw and staple gun found in the trunk. (Minutes of Hearing, 02/05/2020, at pg. 8:2-4.)

To him, through it all, Alex Romero was "like family" and lived with Paul Story and his family off-and-on for "a few years." Alex Romero would pay rent in cash, or contribute to household bills and groceries. (Minutes of Hearing, 02/05/2020, at pg. 6:5-8.)

There were instances where he would assign projects to Alex Romero, who was free to accept the project, and could renegotiate or re-estimate the job. Alex Romero would be paid proportionate to the job performed. Where Alex Romero was assigned jobs outright, or were his own side-jobs, Alex Romero would keep all of the profits from the job. (Minutes of Hearing, 02/05/2020, at pg. 6: 19-24, 7:12-13.)

At the time he died, Alex Romero was working on a speaker box for a friend, Anthony Miranda. (Minutes of Hearing, 02/05/2020, at pg. 7:19-21.) Story had no idea where Romero was going at the time of the accident and could not recall if they spoke before the accident. (Minutes of Hearing, 02/05/2020, at pg. 8:5-6.)

Anthony Miranda testified that in the weeks prior to Alex Romero's death, they had agreed that Alex Romero would fabricate speaker boxes to fit a vehicle that Miranda was purchasing. Romero never was able to complete the project as he died in the October 26, 2016 automobile accident. (Minutes of Hearing, 02/23/2021, at pg. 2:4-10.)

He testified that he would direct customers or clients to Alex Romero, who operated a mobile automotive stereo installation business out of the trunk of his car. To Miranda's knowledge, Paul Story never shared in the proceeds of these projects. (Minutes of Hearing, 02/23/2021, at pg. 2:14-16.)

Miranda purchased the matching amplifiers that Alex Romero was going to install in the stereo boxes being fabricated for the car. He and Alex Romero worked on the project in Miranda's garage. He stated that, one week prior to Alex Romero's car accident, he told Miranda he would take the box and finish it at Paul Story's garage. (Minutes of Hearing, 02/23/2021, at pg. 2: 18-24.)

Over the years, Miranda purchased equipment and services from Alex Romero, but also purchased equipment and services from Story. He knew that Alex Romero lived with Paul Story, but never got into his personal business. (Minutes of Hearing, 02/23/2021, at pg. 3:6-9.)

At no time did Alex Romero ever tell him that he worked for Paul Story. As far as he knew, Alex Romero and Paul Story were simply friends who helped each other out when it was needed. (Minutes of Hearing, 02/23/2021, at pg. 4:10-18.)

After the car accident, the speaker box project was completed by Harpreet Singh, the father of Alex Romero's nephew. (Minutes of Hearing, 02/23/2021, at pgs. 5:16-6:18.)

Singh knew that Alex Romero worked off and on for Paul Story from about five years. Singh also testified that Alex Romero worked "out of the trunk of his car." (Minutes of Hearing, 02/23/2021, at pg. 7:7-10.) Alex Romero, himself, lacked the tools necessary to be self-employed, and often went to Paul Story's shop to use the latter's tools. Alex Romero sold stereo equipment out of the trunk of his car, handled projects on his own, and these had nothing to do with Paul Story. (Minutes of Hearing, 02/23/2021, at pgs. 7:7-10; 7:23-25.)

Alex Romero's mother, Margaret King testified he returned to work for Paul Story and Kar Tunez shortly before he died. (Minutes of Hearing, 02/23/2021, at pg. 9:3-5.) When Alex Romero worked for Paul Story, he was paid in cash; in fact, she once witnessed a cash exchange. Alex Romero and Paul Story had a falling-out in August or September, just before her son died in the car accident. (Minutes of Hearing, 02/23/2021, at pg. 9:10-23.)

On the day he died, Alex Romero was en route to the Kar Tunez shop. Afterward, Paul Story met her in the police impound yard and opened the trunk of her son's car, where he recovered a jigsaw and staple gun. Ms. King was given personal items including her grandson's school work and several duffle bags of clothing. (Minutes of Hearing, 02./23/2021, at pgs. 9:25-10:7.)

Later, she went to Paul Story's Bitritto Way warehouse where he gave her some fundraising money for her use to defray the funeral costs. There, she found Alex Romero's tool box. When he died, Alex Romero lived with Ms. King. (Minutes of Hearing, 02/23/2021, at pg. 10:14-21.)

Unequivocally, she stated that Alex Romero was never self-employed. In fact, he refused to start up his own business -- even though she encouraged it (Minutes of Hearing, 02/23/2021, at pg. 11:8-9) and even though she knew that Paul Story was having trouble paying Alex Romero for the work he performed. (Minutes of Hearing, 02/23/2021, pg. 10:18.)

Alex Romero's older brother, Steven testified that his brother was working for Paul Story at the time he died and was not doing any work outside the work he had with Paul Story and Kar Tunez. (Minutes of Hearing, 07/13/2021, at pg. 2-13-16.) Steven contradicted Margaret King's earlier testimony that Alex Romero had never tried to start up his own business when he stated - also unequivocally - that Alex Romero tried to start up his own business in August 2016. Their mother told Alex

Romero to "go his own way" but his brother loved working for Paul Story. (Minutes of Hearing, 07/13/2021, at pg. 2:20-22.)

On the day he died, Steven saw his brother at their mother's house. Alex Romero was placing items into the trunk of his car, including the jigsaw and a speaker box. (Minutes of Hearing, 07/13/2021, at pg. 2:24-25.) Steven testified that Alex Romero was instructed by Paul Story to bring the speaker box to the shop so they could work on it. (Minutes of Hearing, 07/13/2021, at pg. 3:1-4.)

Steven testified that he heard Alex Romero and Paul Story talk about pay for work performed, and the use of the jigsaw. Frequently, he drove Alex Romero to the Kar Tunez shop and was personally at the shop himself "virtually every other day." He recognized the jigsaw that he saw at the shop.

Only nine days prior to his death, Alex Romero purchased a new vehicle, the same vehicle in which he died. (Minutes of Hearing, 07/13/2021, at pgs. 3:15-18; 4:10-11.) Steven understood that Miranda would be paying Paul Story directly for the speaker project. (Minutes of Hearing, 07/13/2021, at pg. 5:1-4.)

...
Anthony Miranda's -- an individual with no familial relationship with the Romero family, and at whose direction the speaker project was commenced -- contradicts the testimony of Margaret King and Steven Romero that there was an employment relationship between Alex Romero and Paul Story.

It is the undersigned's finding that the testimony of Anthony Miranda simply carries the greater weight. Mr. Miranda stated, unequivocally, that he commissioned Alex Romero, alone. Mr. Miranda stated, unequivocally, that he was going to pay Alex Romero, alone.

Finally, even if Alex Romero had been working for Paul Story on the day he died, there is no convincing evidence establishing a work purpose for Alex Romero to be on the open road that day.
(Opinion on Decision, pp. 3-10.)

In the Report, the WCJ states:

The undersigned presided over multiple Trial days with hours of testimony, including evidence presented under oath by persons related to the matter, including Margaret King, mother to the Decedent and Paul Ector Story, III, the alleged employer.

...
Mr. Story testified that Decedent lived in Defendant's home - on-and-off - helping out with chores and contributing to the household budget.

...
Additionally, testimony was given by Anthony Miranda, the individual who commissioned Romero to build a speaker box for an automobile he was buying.

Mr. Miranda testified that he alone had agreed with Romero for the fabrication project and even worked with Romero himself on the job . . . Miranda testified that he had a financial arrangement with Romero alone and would have paid Decedent had the project been completed.

Testimony was given by individuals (Margaret King and Decedent's brother, Steven) that Paul Story paid Nieves Romero in cash, but no bank receipts were produced to corroborate that testimony. Decedent's mother testified that Romero was on his way to Paul Story's shop to work on the Miranda speaker box project. However, no testimony was produced that indicated that Paul Story directed the project nor that he had summoned Romero to the shop that day.

...

Much testimony was presented about tools provided to, or loaned to, Romero. In fact, a jig saw was recovered from the trunk of Romero's car after the accident, as well as the speaker box, and other belongings. Story testified that Romero did not have permission to use the saw.

...

Since the allegations underpinning this case rely almost exclusively on witness testimony, witness credibility becomes the lynchpin in the case. Quite frankly, it was the testimony of the man who commissioned the speaker box, Anthony Miranda that proved crucial.

Miranda testified that he was working . . . late in the evening of October 25th and early morning of October 26, 2016. The speaker box project, based on the testimony of Miranda and Story, clearly was intended to benefit of Decedent alone.

No one credibly testified that Story summoned Nieves Romero to the shop. No one credibly testified that Romero was performing a special errand for Story at the time of his death on October 26, 2016.

...

In order to prevail on a Petition for Reconsideration, Applicant, represented by Margaret King, had to make a showing of employment. No such showing was made here. . . .

(Report, pp. 1-5.)

DISCUSSION

We observe that California has a no-fault workers' compensation system. With few exceptions, all California employers are liable for the compensation provided by the system to employees injured or disabled in the course of and arising out of their employment, "irrespective of the fault of either party." (Cal. Const., art. XIV, § 4.) The protective goal of California's no-fault workers' compensation legislation is manifested "by defining 'employment' broadly in terms

of ‘service to an employer’ and by including a general presumption that any person ‘in service to another’ is a covered ‘employee.’” (§§ 3351, 5705(a); *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 354 [54 Cal.Comp.Cases 80].)

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.) 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*).) Consequently, all workers are presumed to be employees unless the hirer can demonstrate that the worker meets specific criteria to be considered an independent contractor.

Under these authorities, the applicant bears the burden of proving that he rendered service for the defendant, whereupon the burden shifts to the defendant to rebut the employment presumption with proof that applicant did not work "under any appointment or contract of hire or apprenticeship." (See § 3351; *Parsons v. Workers’ Comp. Appeals Bd.* (1981) 126 Cal.App.3d 629, 638 [46 Cal.Comp.Cases 1304]) In other words, after the applicant demonstrates that he rendered service for the defendant, the defendant must show by a preponderance of the evidence that the service was rendered in an excluded status such as that of an independent contractor. (*California Compensation Ins. Co. v. Workers’ Comp. Appeals Bd. (Hernandez)* (1998) 63 Cal.Comp.Cases 844 (writ den.); *Lara v. Workers’ Comp. Appeals Bd.* (2010) 182 Cal.4th 393, 402 [75 Cal.Comp.Cases 91].)

In this regard, applicant contends that the evidence establishes that applicant was rendering service for Story on or about the date of his death, and, therefore, gives rise to the presumption that he was Story’s employee. However, we concur with the reasoning of the WCJ that the evidence fails to show that applicant was rendering service to Story when he sustained fatal injury. (Report, p. 5.) In particular, the text communications between applicant and Story reveal that (1) Story requested that applicant assist him with a project on the evening of October 24, 2016; (2) applicant initially responded that he could work no more than two hours and then would have to finish the speaker box he was building; (3) Story then retracted his request for applicant’s services

by texting that he would “take care of it” himself; (4) Story did not attempt to text applicant again until after applicant’s death; and (5) Story’s text to applicant after applicant’s death did not reflect any request or expectation that applicant was to have assisted him in any way, but rather asked about a missing jigsaw. (Ex. 6, Cell Phone Text Messages to/from Paul Story, March 24, 2015 through October 26, 2016, pp. 165-167.) It follows that the evidence fails to establish that applicant was rendering service to Story on or about the time of his death, and, therefore, that applicant failed to establish the presumption that he was Story’s employee.

Having determined that the evidence fails to give rise to the employment presumption, we nevertheless address applicant’s contention that his injury occurred AOE/COE in that (1) he used his car to perform work for Story and sustained injury while “commut[ing]” to defendant’s workplace; (2) Story had applicant use his own vehicle to transport the speaker box he was constructing back to Story’s shop to “complete the job”; or (3) applicant’s intended use of Story’s shop for a personal side job constituted a form of applicant’s compensation or provided an incidental benefit to Story. (Petition, pp. 15:10, 16:10-16, 17:3-18:24.)

Here we observe that where a worker sustains injury while employed, section 3600 imposes liability on the employer for workers’ compensation benefits only if the employee sustains an injury “arising out of and in the course of employment.” An employer is liable for workers’ compensation benefits, where, at the time of the injury, an employee is “performing service growing out of and incidental to his or her employment and is acting within the course of employment.” (§ 3600(a)(2).) The determination of whether an injury arises out of and in the course of employment requires a two-prong analysis. (*LaTourette v. Workers’ Comp. Appeals Bd.* (1998) 17 Cal.4th 644 [63 Cal.Comp.Cases 253].)

First, the injury must occur “in the course of employment,” which ordinarily “refers to the time, place, and circumstances under which the injury occurs.” (*LaTourette v. Workers’ Comp. Appeals Bd., supra*, 63 Cal.Comp.Cases at page 256.) An employee is acting within “the course of employment” when “he does those reasonable things which his contract with his employment expressly or impliedly permits him to do.” (*Id.*) In other words, if the employment places an applicant in a location and he or she was doing an activity reasonably attributable to employment or incidental thereto, an applicant will be in the course of employment and the injury may be industrially related. (*Western Greyhound Lines v. Ind. Acc. Com. (Brooks)* (1964) 225 Cal.App.2d 517 [29 Cal.Comp.Cases 43].)

Second, the injury must “arise out of” the employment, “that is, occur by reason of a condition or incident of employment.” (*Employers Mutual Liability Ins. Co. of Wisconsin v. I.A.C. (Gideon)* (1953) 41 Cal.2d 676 [18 Cal.Comp.Cases 286, 288].) “[T]he employment and the injury must be linked in some causal fashion,” but such connection need not be the sole cause, it is sufficient if it is a “contributory cause.” (*Maher v. Workers’ Comp. Appeals Bd.* (1983) 33 Cal.3d 729 [48 Cal.Comp.Cases 326, 329].)

Here, we concur with the reasoning of the WCJ that there is no persuasive evidence that applicant was placed in a location and doing an activity reasonably attributable to his alleged employment when he suffered his fatal accident. (Opinion on Decision, p. 10.) As we explained, the text messages between applicant and Story referring to applicant’s potential assistance to Story occurred two days before the accident and Story retracted his request for assistance by stating he would take care of it himself. Thereafter, none of the text messages between applicant and Story reflect any request or expectation that applicant would assist Story in any way.

Additionally, applicant’s text to Story responding to Story’s initial request for assistance indicates that he could provide no more than two hours of help to Story before he would have to “finish this box on building.” (Ex. 6, Cell Phone Text Messages to/from Paul Story, March 24, 2015 through October 26, 2016, pp. 165-167.) We read this text to communicate that applicant had to finish the speaker box that he—and he alone—was building for Mr. Miranda, an interpretation consistent not only with Mr. Miranda’s testimony that applicant’s work on the speaker box did not involve Story’s participation or interest, but also with the testimony of Mr. Story and Mr. Singh. (Transcript of Proceedings, February 23, 2021, pp. 7:16-9:3, 25:6-12; Opinion on Decision, pp. 4-6.)

Finally, the WCJ determined that Mr. Miranda’s testimony as to the nature of the speaker box project was credible and that Margaret King’s and Steven Romero’s testimony on that subject was not credible. We accord these determinations great weight because the WCJ had the opportunity to observe the witnesses’ testimony at trial and the record is otherwise without evidence of considerable substantiality that would warrant rejecting them. (Opinion on Decision, p. 10; Report, pp. 4-5; *Garza v. Worker’s Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500].) Accordingly, we conclude that the evidence fails to establish that applicant was placed in a location and doing an activity reasonably attributable to his alleged employment

when he sustained fatal injury, and, as such, fails to establish that applicant's injury occurred in the course of employment.

Accordingly, we will deny the Petition.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Findings of Fact, Award, Order, and Opinion on Decision issued on April 12, 2022 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JULY 5, 2022

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

**MARGARET KING
LAW OFFICES OF KENNETH R. MACKIE
LAW OFFICES OF GLEASON & CAMACHO
OFFICE OF THE DIRECTOR LEGAL**

SRO/pc

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

CS