WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

RUPANDE SHRIMANKAR, *Applicant*

vs.

CABCO YELLOW, INC., dba CALIFORNIA YELLOW CAB, ET AL., *Defendants*

Adjudication Number: ADJ7608312
Anaheim District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration. Having completed our review, we now issue our Decision After Reconsideration.

Applicant seeks reconsideration of the November 3, 2022 Findings of Fact, wherein the workers' compensation administrative law judge (WCJ) found that applicant was an independent contractor and not an employee of defendant.

Applicant contends that the facts support the application of the presumption of employment of Labor Code section 3357, and that defendant has not overcome that presumption.

We have received an Answer from defendant. 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 will rescind the Findings of Fact and substitute a new Finding of Fact that on the date of injury applicant was an employee of defendant.

FACTS

Applicant claimed injury to her left clavicle, right wrist, back, neck, and left shoulder, while allegedly employed as a taxicab driver by defendant Cabco Yellow, Inc., on November 20, 2010.

Defendant denies employment, and asserts applicant was, at all relevant times, an independent contractor.

On January 22, 2020, the parties proceeded to trial on the sole issue of employment. The WCJ heard testimony from witness Timothy Conlon, president and general manager of Cabco Yellow, and continued the hearing for additional testimony. (Minutes of Hearing and Summary of Evidence, dated January 22, 2020, at p. 1:21.)

The WCJ heard additional testimony from Mr. Conlon and from applicant over multiple subsequent trial dates. The parties submitted the matter for decision on August 17, 2022.

On November 3, 2022, the WCJ issued her Findings of Fact, determining that applicant was "an independent contractor, and not an employee, of CABCO YELLOW, INC." (Finding of Fact, dated November 3, 2022, at p. 1.) The WCJ's Opinion on Decision noted that drivers for Cabco Yellow were free to accept or decline any fare, and while Cabco required drivers to perform "transactions with a Wells Fargo debit card, [Cabco] did not require them to have a Wells Fargo account." (*Id.* at p. 2.) The WCJ concluded that "the nature of the work and the overall arrangement between the parties … does not rise to the statutory level of employee/employer." (*Id.* at p. 3.)

Applicant's Petition avers that pursuant to Labor Code section 3357, she was a presumptive employee of Cabco Yellow, and that defendant did not overcome the presumption of employment. (Petition, at p. 2:16.) Applicant contends Cabco Yellow exercised control over multiple facets of her employment, and that prior caselaw involving the same defendant supports a finding of employment. (*Id.* at p. 6:13.)

Defendant's Answer asserts that it exercised no direct control over applicant's business operation, and that applicant was free to choose if and when to drive. (Answer, at p. 4:11.) Defendant contends that its leasing of vehicle and dispatch equipment was not reflective of control in a meaningful sense, and that the insurance policy required by Cabco Yellow equally benefited both the driver and Cabco Yellow. (*Id.* at p. 4:23.) Defendant also notes applicant's testimony that she understood her relationship with Cabco Yellow to be that of an independent contractor, and that "the intention of the parties is a significant factor." (*Id.* at p. 5:11.)

DISCUSSION

Applicant contends she was a presumptive employee of Cabco Yellow at the time of her injury, not an independent contractor.

Section 3357 provides that "[a]ny person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee." (Lab. Code, § 3357.)

Section 5705 provides, in relevant part:

> The burden of proof rests upon the party or lien claimant holding the affirmative of the issue. The following are affirmative defenses, and the burden of proof rests upon the employer to establish them:
>
> (a) That an injured person claiming to be an employee was an independent contractor or otherwise excluded from the protection of this division where there is proof that the injured person was at the time of his or her injury actually performing service for the alleged employer."
>
> (Lab. Code, § 5705.)

Thus, the applicant has the initial burden of proof to establish that she was rendering service for another at the time of her injury, at which point the presumption of employment attaches. The burden then shifts to the defendant to overcome that presumption by asserting the affirmative defense that applicant was an independent contractor. (Lab. Code, § 5705(a); *Germann v. Workers' Comp. Appeals. Bd.* (1981) 123 Cal.App.3d 776 [46 Cal.Comp.Cases 1062]; *California Compensation Ins. Co. v. Industrial Accident. Com.* (1948) 86 Cal.App.2d 861; 195 P. 2d 880.)

In *Yellow Cab Coop v. Workers' Comp. Appeals Bd.* (*Edwinson*) (1991) 226 Cal.App.3d 1288 [56 Cal.Comp.Cases 34] (*Edwinson*), the Court of Appeal observed that Section 3357 is best understood "as creating a presumption that a service provider is presumed to be an employee unless the principal affirmatively proves otherwise." (*Id.* at p. 1294.)

Here, applicant asserts that she was an employee of Cabco Yellow. Pursuant to section 3357, we must first determine whether applicant was "rendering services for another" at the time of her injuries on November 20, 2010, and the burden rests with applicant. (Lab. Code, § 5705.) If applicant satisfies that burden and we find in the affirmative, then the statutory presumption of employment of section 3357 attaches and applicant is presumed to be an employee of Cabco Yellow.

The analysis of the Court of Appeal in *Edwinson, supra,* 226 Cal.App.3d 1288 is germane. Therein, applicant was injured while allegedly in the employ of defendant Yellow Cab Cooperative. Yellow Cab, for its part, asserted the affirmative defense that applicant was an

independent contractor, and in support thereof, noted that its core business enterprise was the leasing of vehicles. Yellow Cab further asserted that as an independent contractor, applicant provided no services to Yellow Cab within the meaning of section 3357. The Court of Appeal rejected this argument, however, noting:

> Contrary to Yellow's portrayal here, the essence of its enterprise was not merely leasing vehicles. It did not simply collect rent, but cultivated the passenger market by soliciting riders, processing requests for service through a dispatching system, distinctively painting and marking the cabs, and concerning itself with various matters unrelated to the lessor-lessee relationship. Applicant testified that he and other drivers were instructed in "service" and "courtesy," i.e., "being properly presented in our dress, keeping the cabs clean, going on calls that we were sent on and being courteous and helpful to the public." Written radio regulations provided, among other things, "Never just sit there waiting and/or blasting your horn unless you have been told to do so by the dispatcher. [para.] In case of disputes with other drivers about who should get the call, never argue about it in front of customers."
>
> We follow courts elsewhere in holding that Yellow's enterprise consists of operating a fleet of cabs for public carriage. (See *Central Management v. Industrial Com'n* (1989) 162 Ariz. 187 [781 P.2d 1374, 1377-1378]; *Globe Cab Co. v. Industrial Commission* (1981) 86 Ill.2d 354 [55 Ill.Dec. 928, 427 [*1294] N.E.2d 48, 52]; *Hannigan v. Goldfarb* (1958) 53 N.J.Super. 190 [147 A.2d 56, 62].) The drivers, as active instruments of that enterprise, provide an indispensable "service" to Yellow; the enterprise could no more survive without them than it could without working cabs. Thus the factual predicate was laid for application of sections 3357 and 5705, subdivision (a).
>
> (*Edwinson, supra*, 226 Cal.App.3d at p. 1293.)

Similarly, we are persuaded that in the present matter Cabco Yellow's enterprise extended beyond leasing vehicles and equipment to its drivers. Cabco's president and general manager testified that in addition to being a taxi leasing company, Cabco Yellow was also a "dispatch company." (Minutes of Hearing and Summary of Evidence, dated January 22, 2020, at p. 5:10.) As was the case with *Edwinson*, Cabco "cultivated the passenger market by soliciting riders, processing requests for service through a dispatching system, distinctively painting and marking the cabs, and concerning itself with various matters unrelated to the lessor-lessee relationship." (*Edwinson, supra*, at p. 1293.) Cabco leased both vehicles and equipment necessary to the business of public carriage, and in furtherance of that business dispatched taxi calls for service to its drivers. (*Id.* at p. 5:16.) Pursuant to County regulation, Cabco required its drivers to use vehicles with

Cabco's distinctive markers and/or color schemes. (Minutes of Hearing and Summary of Evidence, dated March 29, 2022, at p. 4:14). Cabco entered into various joint ventures at area destinations to promote its business enterprise. (*Id.* at p. 6:10.) This included a joint venture with the County of Orange at the John Wayne Airport. (Minutes of Hearing and Summary of Evidence, dated January 22, 2020, at p. 9:21.) Cabco instructed its drivers in etiquette, noting its drivers had "daily face to face contact with the customers of California Yellow Cab," and that "the way our customers perceive you is the way they perceive California Yellow Cab." (Ex. 22, Yellow Cab Driver's Training Guides, dated October 7, 2019, at p. 5; see also Minutes of Hearing and Summary of Evidence, dated January 22, 2020, at p. 7:16.) Cabco's training manual notes that "our Taxi service is the best in Orange County because we know first and foremost that our customers have a *choice* in companies to call." (*Id.* at p. 6.) Drivers are instructed to "always project an image that you are a courteous professional driver that everyone in our company can be proud of." (*Id.* at p. 5.) The training manual concludes, "we are relying on you to be the best driver on the road – don't let us down." (*Ibid*.)

The evidence thus supports a determination that Cabco's business was not limited to the leasing of vehicles and dispatch equipment. Rather, Cabco operated a fleet of cabs for public carriage, and its drivers as active instruments of that enterprise provided an indispensable "service" to Cabco. Just as in *Edwinson*, "the enterprise could no more survive without [its drivers] than it could without working cabs." (Edwinson, *supra*, at p. 1293.) Pursuant to sections 3357 and 5705(a), we therefore conclude that applicant rendered a service to Cabco, and that the presumption of employment attaches, accordingly.

Cabco asserts that applicant was not an employee, but rather an independent contractor. As the party with the affirmative of the issue, Cabco bears the burden of proof necessary to overcome the operative presumption that applicant was an employee of Cabco. (Lab. Code, § 5705(a).)

Under the common law, "[t]he principal test of an employment relationship is whether the person to whom service is rendered has 'the right to control the manner and means of accomplishing the result desired . . .'" (*Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522 [79 Cal.Comp.Cases 760, 764] (*Ayala*), quoting *S.G. Borello & Sons, Inc. v. Department of Ind. Rel.* (1989) 48 Cal.3d 341 [54 Cal.Comp.Cases 80] (*Borello*).) Section 3353 defines an independent contractor as "any person who renders service for a specified recompense

for a specified result, under the control of his principal as to the result of his work and not as to the means by which such result is accomplished." (Lab. Code, § 3353.)

Though an important test of an employment relationship, the "right to control" is not to be applied rigidly as the sole consideration, but rather is to be considered in combination with a number of "secondary" factors with an eye towards the purposes of the workers' compensation act. (*Borello, supra*, 48 Cal.3d 341.)

While the extent of the hirer's right to control the work is the foremost consideration in assessing whether a common law employer-employee relationship exists, our precedents also recognize a range of secondary indicia drawn from the Second and Third Restatements of Agency that may in a given case evince an employment relationship. Courts may consider "(a) whether the one performing services is engaged in a distinct occupation or business; (b) the land 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." (*Ayala, supra*, at p. 532.) We also observe that, "[e]ach service arrangement must be evaluated on its facts, and the dispositive circumstances may vary from case to case." (*Borello, supra*, at p. 354.)

Here, defendant asserts "Cabco's business model consists of leasing equipment for the use of its customers for the purpose of facilitating their ability to generate income by acting as independent taxi drivers." (Answer, at p. 2:21.) Defendant contends that it had no control over applicant's independent enterprise. Defendant points out that on the date of the injury, applicant received a phone call from a client on her personal cellular phone, rather than receiving a dispatch from Cabco. Applicant was on her way to pick up that passenger when she was injured in a motor vehicle collision. (*Id.* at p. 1:27.) Defendant also notes applicant's testimony that she understood herself to be an independent contractor of defendant. (*Id.* at p. 2:14.)

However, the record suggests that Cabco's enterprise extended beyond the mere leasing of equipment to a fleet of independent contractor drivers. As we have noted above, Cabco engaged in a business of public carriage, and exerted control over its drivers to further its commercial

enterprise. Cabco's mandatory training for all new drivers included a training manual in which Cabco asserts on the first page that it "expects" a "professional approach to driving," and instructs its drivers to "[s]tart each driving shift with a 'safety first' focus for yourself and your passengers." (Ex. 22, Yellow Cab Driver's Training Guides, dated October 7, 2019, at p. 3.) The manual describes Cabco as, "the fastest growing transportation company in Orange County and the largest street cab company servicing Orange County." (*Id.* at p. 4.) Cabco describes it goal to be the "best company in Orange County," a goal not limited to the "number of vehicles in the fleet," but the "best in services … promptness … well kept vehicles … and the best in informed, *uniformed*, and courteous professional drivers." (*Ibid*., italics added.)

Cabco's training manual makes clear its expectations that its drivers represent Cabco, and that Cabco in turn has expectations of its drivers with respect to their comportment, attire, courtesy and safety. As we noted above, Cabco's own training manual states that "the way *our* customers perceive you is the way they perceive California Yellow Cab." (*Id.* at p. 5, italics added.)

In addition to considerations as to the demeanor and presentation of its drivers, the training manual provides specific instructions to the drivers regarding daily operations. The manual notes that "every time our customer is happy with our service, we attract more customers." (*Id.* at p. 6.) Thus, if a driver is unable to pick up a customer in the standard time frame of 10 to 20 minutes, they must let the dispatcher know their true arrival time so that it may be communicated to the customer. (*Ibid*.) Drivers are instructed to avoid tailgating, to make lane changes with plenty of room, and to avoid driving while drowsy. (*Id.* at p. 8.) Drivers are instructed on how to avoid rear end collisions, on safety while backing up the vehicle, and to open the doors for their passengers. (*Id.* at p. 10.) Appended to the training manual are the locations and specific taxicab performance expectations with respect to venues that Cabco serviced.

Cabco provided its drivers with a $1 million liability insurance policy as required by the Orange County Taxi Administration Program, a requirement that "benefits both the driver and the Cab Company equally." (Minutes of Hearing and Summary of Evidence, dated January 22, 2020, at p. 5:22; Answer, at p. 4:23.) Cabco further required that its drivers be "clean, polite and tidy," requirements that concededly benefited both the driver and Cabco. (Minutes of Hearing and Summary of Evidence, dated March 29, 2022, at p. 5:6.) We also note that Cabco retained the right to terminate a transportation lease agreement, not only for non-payment of the monthly lease obligations, but also if it discovered evidence of unsafe driving resulting in an accident. (Minutes

of Hearing and Summary of Evidence, dated January 22, 2020, at p. 10:2.) Cabco further received updates from the Department of Motor Vehicles pursuant to a "Release of Driver Record Information." (Ex. 15, DMV Employer Pull Notice Program, dated August 23, 2010, at p. 3.) The record thus supports applicant's contention that Cabco exercised control over multiple facets of its drivers' appearance and performance, and participation in various regulatory requirements necessary to the operation of its business. Based on the foregoing considerations, we are persuaded that defendant's multi-faceted control over daily activities of its drivers overcomes the assertion of an independent contractor relationship. (*Borello*, *supra*, 48 Cal.3d at 351.) We therefore conclude that defendant has not rebutted the presumption of employment of section 3357.

Defendant contends that the injury occurred while applicant was driving to pick up a passenger she obtained through her own marketing efforts. (Answer, at p. 1:27.) Defendant notes that on the date of injury, "applicant received a call from a customer who called the applicant on her personal phone requesting that the applicant pick up the customer for a fare," and that "[t]he customer had obtained the applicant's personal phone number after being provided with the personal phone number by the applicant." (*Ibid*.) Certainly these facts when viewed in isolation would be factors supporting defendant's assertion that applicant was acting in furtherance of her own business enterprise at the time. However, we also observe that the applicant came into contact with the passenger the night before while driving a Cabco branded vehicle and wrote her personal phone number on the back of a Cabco business card. (Minutes of Hearing and Summary of Evidence, dated January 22, 2020, at p. 2:20.) Applicant testified that she did not have personal business cards and would pass out the Cabco business cards to "certain people, for example, if they needed a ride the next day." (*Ibid*.) The business cards had the Cabco logo and contact information, and applicant "conducted all business, personal and otherwise, under CYC [Cabco]." (Minutes of Hearing and Summary of Evidence, dated July 6, 2022, at p. 3:22.)

Defendant also contends that "[a]t the time the applicant entered into the initial business arrangement with CABCO, the applicant signed a statement that she understood that she was not entering into an employment relationship with CABCO and that she was leasing the vehicle with the understanding that she was intending to be a self-employed sub-contractor and not an employee." (Answer, at p. 2:14.) In addition, defendant observes that applicant possessed a degree in business, further supporting the assertion that she properly understood the nature of her business relationship with Cabco. However, the Supreme Court in *Borello* observed that, "[t]he label placed

by the parties on their relationship is not dispositive, and subterfuges are not countenanced." (*Borello, supra*, 48 Cal.3d at p. 349.) "Even in the common law setting, a formal agreement characterizing the relationship as independent contractorship 'will be ignored if the parties, by their actual conduct, act like "employer-employee."' [Citations.] Indeed, the attempt to conceal employment by formal documents purporting to create other relationships [has] led the courts to disregard such terms whenever the acts and declarations of the parties are inconsistent therewith." (*Edwinson, supra,* 226 Cal.App.3d at p. 1297.) Here, and irrespective of the terms employed by the parties, the evidentiary record persuades us that the conduct of the parties was that of "employer-employee" rather than that of lessor-lessee/independent contractor. (*Borello, supra*, 48 Cal.3d at p. 349.)

In summary, we are persuaded that Cabco was engaged in the business of public carriage, and that applicant has sustained her burden of proving that she was performing a service for Cabco at the time of her injury in her capacity as a driver on behalf of Cabco's enterprise. We therefore conclude that pursuant to section 3357, applicant is presumed to have been an employee of Cabco. We are further persuaded that Cabco has not met its burden of proving that applicant was an independent contractor because of the control it exercised over applicant's driving activities that were accomplished in furtherance of Cabco's business goals. We will therefore rescind the Findings of Fact and substitute new Findings that applicant was an employee of Cabco Yellow, Inc., doing business as California Yellow Cab.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the November 3, 2022 Finding of Fact is **RESCINDED**, and the following **SUBSTITUTED** therefor:

FINDING OF FACT

1. Applicant Rupande Shrimankar claims to have sustained injury on November 20, 2010 to her left clavicle, right wrist, back, neck and left shoulder.
2. On the date of injury applicant was employed by Cabco Yellow, Inc., dba California Yellow Cab.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 23, 2024

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

RUPANDE SHRIMANKAR
ULLASINI JOY DHOLAKIA
GOLDMAN MAGDALIN& KRIKES

SAR/abs

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