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WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

Case No. LAO 691687, VNO 304418

MARVIN DARDEN,

*Applicant,*

vs.

CAREER HORIZONS TEMPORARIES  
INC.; CRAWFORD AND COMPANY,

*Defendants.*

OPINION AND ORDER  
DENYING PETITION FOR  
RECONSIDERATION

Applicant, Marvin Darden, seeks reconsideration of the Findings and Order, issued November 22, 1995, in which a workers' compensation judge (WCJ) found that applicant was not an employee of defendant Career Horizons/Temporaries, Inc. on the date of his alleged specific injury on April 24, 1991, or over the period of his alleged cumulative injury, from January 1991 through April 24, 1991. Applicant contends that the WCJ erred, as applicant asserts the evidence justifies a finding of employment during the disputed period.

Following our review of the record, and for the reasons set forth below, we shall affirm the WCJ's finding and will deny the petition for reconsideration.

Applicant was employed by Temporaries Inc. until he resigned in November of 1989, while he was assigned to a project at Xerox. Applicant testified that he resigned his employment. He further testified that he "reactivated" his employment in December of 1990 or January of 1991, by making a telephone call to the office manager, Evelyn Daily, and letting them know that he was available for assignments. He was told that his file would be reactivated, and that he was one of their top employees. Nevertheless, he was never given any job assignments.

Applicant testified that he called to report his availability two to three times

1 per week for several weeks in January of 1991. The staff was very abrupt with  
2 him. This caused him to feel stress. He kept calling to seek employment through  
3 February and March. In April of 1991, he called the corporate headquarters in  
4 Houston, Texas, to find out why he was not given assignments. The president of  
5 the company, Stacy Noel, told him she would look into the situation. He was not  
6 available when she tried to call him back.

7 He received a letter dated April 24, 1991, from Temporaries, Inc., stating  
8 "[t]his letter is written to officially inform you that your services as a temporary  
9 employee have been terminated in light of your most recent telephone activities to  
10 our Los Angeles office and our headquarters in Houston, Texas."

11 A second letter, dated May 23, 1991, from Stacy Noel, indicated that at the  
12 time he sought to reactivate his employment in January of 1991, "a review of your  
13 employment records indicated ongoing concerns regarding repeated instances of  
14 excessive absences and tardiness. Based on that information, a decision was  
15 made to decline you the opportunity for rehire with Temporaries, Inc."

16 Applicant testified that the statement that Temporaries, Inc. declined to  
17 rehire him was not accurate. He further testified that it was not true that he had  
18 excessive absences and tardiness. He then testified that he did have some  
19 tardiness at Xerox, his last assignment, due to car trouble, but he was not  
20 criticized for this. He left that job when it ended.

21 After his termination in 1991, he obtained employment through another  
22 temporary agency, through which he obtained a three month job as a computer  
23 operator.

24 On cross-examination, applicant stated that he resigned from  
25 Temporaries, Inc. in November of 1989, to take a job from Harris Devlin  
26 Associates, where he worked doing word processing beginning in April of 1990.  
27 He testified that he may have sought work through Temporaries, Inc. during the

1 interim.

2 When applicant called Temporaries, Inc. again in December of 1990 or  
3 January of 1991, he was also contacting other temporary agencies for  
4 employment.

5 Defendant called Christine Teeple, a manager for Temporaries, Inc.  
6 During the period applicant worked for Temporaries, Inc., she was the branch  
7 manager. She did not have personal contact with applicant, but supervised the  
8 employees who supervised applicant.

9 She recalled speaking with the operations manager, Evelyn Daily, about  
10 applicant. She testified that it was company policy in 1990 and 1991, that when a  
11 former employee seeks to be rehired, if they haven't worked for over six months,  
12 they have to go through the rehire process. Applicant did not go through this  
13 process.

14 When applicant quit his job on November 20, 1989, his assignment at Xerox  
15 was supposed to end on November 30, 1989. The week prior to quitting, applicant  
16 worked only 2.75 hours. Prior to that time, he had a history of absences. Xerox  
17 continued to employ him because it was not possible to train someone else to  
18 complete the project.

19 Ms. Teeple testified that she became aware that applicant was making  
20 numerous calls to her staff seeking employment in April of 1991. The staff told  
21 her that applicant did not seem to understand his position. Applicant called the  
22 office several times per day. Applicant was told that he would not be rehired. The  
23 letter sent in April was to explain why he would not be rehired.

24 Ms. Teeple testified that she did not believe that Evelyn Daily, the manager  
25 who would have dealt with applicant would have waived the rehire requirement.  
26 Ms. Daily last worked for Temporaries, Inc. in April of 1992.

27 ///

1 Discussion

2 In order to obtain compensation benefits for an injury, an employment  
3 relationship must be established. (Labor Code section 3600.) An 'employee' is  
4 defined as "every person in the service of an employer under any appointment or  
5 contract of hire or apprenticeship, express or implied, oral or written . . ." (Labor  
6 Code section 3351). Labor Code section 3357 provides a presumption of  
7 employment where a person renders a service to another, other than as an  
8 independent contractor.

9 Applicant asserts that an employment relationship existed during the  
10 period applicant had "reactivated" his file in January of 1991 through the date of  
11 the termination letter of April 24, 1991, as he considered himself to be an employee  
12 and the termination letter establishes that defendant also considered him to be an  
13 employee.

14 Applicant argues, in view of the decision in *Laeng v. Workers' Comp.*  
15 *Appeals Bd.* (1972) 6 Cal.3d 771 [37 Cal. Comp. Cases 185], that there need not be  
16 consideration to create an employment relationship.

17 In *Laeng*, the court held an injury to a *prospective* employee was  
18 compensable when he was injured in the course of a physical agility test, as part  
19 of a 'try-out' for a job as a refuse worker. The issue addressed by the court was at  
20 what point does the protective purposes of the workers' compensation scheme  
21 require that an employment relationship exist between an employer and a  
22 prospective employee prior to the actual formation of an employment contract.  
23 The court held that the presence of special risks of employment created by the  
24 employer *for which the employer receives some benefit* would justify the  
25 imposition of liability despite the absence of a formal contract. The court was not  
26 constrained by the "technical contractual or common law conceptions of  
27 employment" in determining the issue, though it recognized that such

1 | conceptions are factors to be considered. (*Laeng*, 37 Cal. Comp. Cases at 188-189.)

2 |       This case does not support applicant's contention that there was an  
3 | employment relationship during the time period in which applicant alleges that  
4 | he sustained injury. Despite the language in the termination letter of April 24,  
5 | 1991, which appears to indicate that the defendant believed it was terminating an  
6 | existing employment relationship, no such relationship between applicant and  
7 | Temporaries, Inc. after his resignation in November of 1989. Rather than  
8 | evidencing the existence of an employment relationship, defendant's letter of  
9 | April 24, 1991, was an effort to bring an end to applicant's attempts to create an  
10 | employment relationship.

11 |       Applicant argues further that there was consideration, in the form of  
12 | applicant's "performance" of his repeated telephone calls informing defendant of  
13 | his availability for work. Defendant received the benefit of having the knowledge  
14 | of applicant's availability.

15 |       After November of 1989, applicant was never rehired by Temporaries, Inc.  
16 | An employment relationship requires at a minimum that the employee provide  
17 | some benefit or service to the employer, that there be some consideration offered  
18 | in exchange for that benefit, and that the employer have the ability to exert control  
19 | over its employee. None of these conditions exist.

20 |       In *Laeng*, the employer received the benefit of being able to try-out  
21 | prospective employees prior to taking the risk of hiring them for a strenuous job.  
22 | No such benefit accrued to defendant here. Applicant's status as a prospective  
23 | employee provided no benefit to defendant. Applicant provided no service to  
24 | defendant, but merely awaited an assignment, making repeated unsolicited  
25 | telephone calls to defendant. Just as defendant received no consideration for  
26 | applicant's readiness to work, applicant received no benefit from defendant. The  
27 | nature of their prior relationship was such that all applicant could expect to

1 receive was wages. Applicant received no wages from defendant after November  
2 of 1989. Furthermore, defendant did not have control over applicant's actions,  
3 and applicant was free to seek employment anywhere he chose.

4 Accordingly, we shall affirm the Findings and Order and deny applicant's  
5 petition for reconsideration.

6 For the foregoing reasons,

7 **IT IS ORDERED** that the Petition for Reconsideration, filed December 12,  
8 1995, is **DENIED**.

9 WORKERS' COMPENSATION APPEALS BOARD

10  
11 *Allen S. Gray*

12 I CONCUR,

13  
14 *Wiegand*

15 CONCURRING, BUT NOT SIGNING

16 Arlene Heath

17 DATED AND FILED IN SAN FRANCISCO, CALIFORNIA

18 FEB 8 1996

*T. Rena Hernandez*

19 SERVICE BY MAIL ON SAID DATE TO ALL PARTIES LISTED  
20 ON THE OFFICIAL ADDRESS RECORD, EXCEPT LIEN CLAIMANTS.

21 pwp

