

STATE OF CALIFORNIA
WORKERS' COMPENSATION APPEALS BOARD

Case Nos. LBO 019 2970 (MF)
LBO 021 4955

CHARLOTTE FLEISCHMAN,

Applicant

vs.

CALIFORNIA MEDICAL AUDIT, a California
Corporation, and LORNA BUCOY, Principal
Shareholder, Uninsured; LONG BEACH
MEMORIAL MEDICAL
CENTER/PERMISSIBLY SELF-INSURED;
UNINSURED EMPLOYERS FUND,

Defendants.

FINDINGS, AWARD
& ORDER

MASRY & VITITOE, by Sydney J. Gordon,
Attorneys for Applicant

KEGEL, TOBIN, HAMRICK & TRUCE, by Sandra Adams,
Attorneys for Defendant (Long Beach Memorial
Medical Center c/o Associated Claims Management)

RUSSELL D. DAVIS, Attorney for Defendant (California
Medical Audit, a Corporation and Lorna Bucoy,
Principal Shareholder)

RON HORTON, Attorney for UNINSURED EMPLOYERS FUND

* * * *

Applications having been filed herein, parties having appeared and the matter having been regularly submitted, the Honorable MARY ANNE THOMPSON, Workers' Compensation Presiding Judge, now finds and awards as follows:

hospital, then Ms. Bucoy received a fee of 15% or 20% of the first year salary. This was open to negotiation if the nurse worked at the hospital for 120 days or more.

The Applicant's work was reviewed by Ms. Bucoy. If a hospital complained to Ms. Bucoy about Applicant's services, then Applicant could be removed from the assignment by Ms. Bucoy or the hospital. The hospital, however, could not terminate Applicant's relationship with Ms. Bucoy.

Applicant was required to fill out various forms at various hospitals. The hospitals did not use the same universal form, but the information to be filled out was basically the same.

Applicant worked through Ms. Bucoy for 40 hours in March of 1989, 88 hours in April of 1989 and 32 hours in May of 1989. She was first referred to Long Beach Memorial Hospital by Ms. Bucoy. Ms. Bucoy/California Medical Audit never entered into any written contract with Long Beach Memorial regarding the referral of nurses. There is no written agreement between them as to liability in the event of an injury to a utilization review nurse, such as Applicant, while performing her duties at Long Beach Memorial Hospital.

Prior to Applicant's slip and fall injury at Long Beach Memorial she had attended 2 meetings at the hospital regarding the proper method of filling out the forms. Applicant testified that these meetings lasted over 2 hours.

IS APPLICANT AN INDEPENDENT CONTRACTOR OR GENERAL/SPECIAL EMPLOYEE?

Labor Code §3357 presumes that any employee rendering service for another is an employee unless the services are rendered as an independent contractor. Labor Code §3353 defines an independent contractor as any person who renders service for a specified result, under the control of his principal as to the result of his work only and

under the control of his principal as to the result of his work only and not as to the means by which said result is accomplished. The burden of proof of establishing the independent contractor defense is specifically upon the Defendant per Labor Code §5705(a).

The California Supreme Court discussed at great length the tests to determine the independent contractor status and the underlying policy reasons for allowing the independent contractor defense in workers' compensation.

Judge St. Clair summarized Borello as follows:

In resolving the mixed question of fact and law (see Schaller v. IAC, 11 C.2d 46,3 CCC 32 (1938)), the courts have stated various tests, factors and rules in determining the independent contractor relationship. The Supreme Court in Borello, supra, acknowledged that the control test (see §3.2.3) remained a vitally important consideration but that other indicia are applicable in making the determination. The court citations include Pergucia v. IAC (Walker), 29 C.2d 857, 12 CCC 73 (1947), where at pages 74-75 the court epitomizes the rules as follows: "A material and often conclusive factor is the right of the employer to exercise complete and authoritative control of the mode and manner in which the work is performed. The existence of such right of control, and not the extent of its exercise, gives rise to the employer-employee relationship. [Citations] Strong evidentiary support of the employment relationship is 'the right of the employer to end the service whenever he sees fit to do so'. [Citation] 'An employee may quit, but an independent contractor is legally obligated to complete his contract.' [Citations] There are 'other factors to be taken into consideration', ...[Citation] '(a) whether or not 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;

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- 3) -- Applicant has no rateable permanent disability.
- 4) - There is no basis for apportionment.
- 5) - Applicant is not in need of future medical.
- 6) - See Case No. LBO 019 2970 for self-procured medical/medical-legal/liens.
- 7) - No attorney fees are awarded except 5710 in Case No. 019 2970.

ORDER

IT IS ORDERED that Applicant take nothing in Case No. LBO 021 4955.

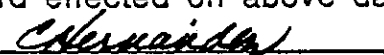
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To the extent that any benefits have been awarded, this Award is joint and several as against both employers.

* * * *

Uninsured Employers Fund has been joined to insure due process. This Award is against the willfully uninsured employer. The Uninsured Employers Fund's liability is derivative from that of the employer, but only should the employer not pay within ten (10) days after the employer is notified of the award, then the Applicant should look to the Uninsured Employers Fund, with a written demand for payment of the award (exclusive of penalties, interest and Medi-Cal liens). The Uninsured Employers Fund would then exercise its right to recoupment from the willfully uninsured employer.


MARY ANNE THOMPSON, Presiding
Workers' Compensation Judge

Dated: DEC 15 1994
at Norwalk, California
Service by mail on parties
as shown on Official Address
Record effected on above date.
By: 

WORKERS' COMPENSATION APPEALS BOARD

Case No. LBO 019 2970 (MF)

Case No. LBO 021 4955

CHARLOTTE FLEISCHMAN

vs.

CALIFORNIA MEDICAL AUDIT, a
Corporation, and LORNA BUCOY,
Principal Shareholder, Uninsured;
LONG BEACH MEMORIAL MEDICAL
CENTER/Permissibly Self-Insured;
UNINSURED EMPLOYERS FUND,

WORKERS' COMPENSATION JUDGE:

MARY ANNE THOMPSON

OPINION ON DECISION

(LBO 019 2970 - Master
File (5-5-89 Injury))

EMPLOYMENT:

In 1989 Applicant met with Lorna Bucoy, owner of California Medical Audit. They met over lunch to discuss the basic requirements for the position of "Utilization Review Nurse". Applicant had several years of experience in this area and Ms. Bucoy's business was referring such nurses to various hospitals in southern California. The position of "Utilization Review Nurse" is highly specialized. Basically, the job involves no direct patient care but requires review of patient charts to assure proper care and conformity with various city, county, state, and federal regulations as well as to assure that all private insurance procedures are followed.

Applicant agreed to "work" for Ms. Bucoy. Work was day to day, as it was available. Applicant and Ms. Bucoy never entered into a written contract. Ms. Bucoy explained to Applicant that Applicant was considered an independent contractor. She explained that Applicant would not be entitled to any benefits. Applicant was paid \$21.00 per hour plus mileage by California Medical Audit for work performed at the assigned hospitals. Ms. Bucoy charged each hospital \$30.00 to \$32.00 per hour for the hours worked by Applicant. Applicant was free to work for other agencies or hospitals on her own.

If a utilization review nurse from Ms. Bucoy's agency was hired by a

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hospital, then Ms. Bucoy received a fee of 15% or 20% of the first year salary. This was open to negotiation if the nurse worked at the hospital for 120 days or more.

The Applicant's work was reviewed by Ms. Bucoy. If a hospital complained to Ms. Bucoy about Applicant's services, then Applicant could be removed from the assignment by Ms. Bucoy or the hospital. The hospital, however, could not terminate Applicant's relationship with Ms. Bucoy.

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Prior to Applicant's slip and fall injury at Long Beach Memorial she had attended 2 meetings at the hospital regarding the proper method of filling out the forms. Applicant testified that these meetings lasted over 2 hours.

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(c) the skill required in the particular occupation; (d) whether the principal or the workman supplies the instrumentality, 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 part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee. (Restatement of Agency, §220)'."

In addition to the Restatement indicia abstracted from the Pergucia case above, the Supreme Court in Borello also adopted tests developed by the federal courts in defining employment for purposes of federal social legislation: "Besides the 'right to control the work', the factors include (1) the alleged employee's opportunity for profit or loss depending on his managerial skill; (2) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (3) whether the service rendered requires a special skill; (4) the degree of permanence the working relationship; and (5) whether the service rendered is an integral part of the alleged employer's business (Real v, Driscoll Strawberry Associates, Inc. (9th Cir. 1979, 603 F.2d 748, 754 (1979)(Fair Labor Standards Act.)" (54 CCC 89-Court's brackets.)

The court observed that there are many points of individual similarity between the federal guidelines and those of "our own traditional restatement tests." but that "all are logically pertinent to the inherently difficult determination whether a provider of service is an employee or an excluded independent contractor for purposes of workers' compensation law.' (Ibid.)

With respect to both California Audit and Long Beach Community Hospital, it is clear that Applicant was not volunteering her services. Rather she provided a highly specialized and highly educated service to the hospital for which she was paid by California Audit.

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In a general and special employment relationship the employee of one is in effect loaned to another with the right of control over the employee inherent in both. Kowalski vs. Shell Oil Co. (1979) 44 CCC 134; County of L.A. vs. WCAB (Conroy) (1981) 46 CCC 1322. In order to find special employment, actual acts of supervision, direction and control must be established and not merely implied control. See Barajas vs. USA Petroleum (1986) 184 C.A. 3rd/974.

In the instant case, I find that Applicant was an employee and not an independent contractor, and that she was employed by both California Audit and Long Beach Memorial Hospital as general and special employee.

With respect to Long Beach Memorial Hospital, Applicant clearly rendered services to the hospital. She was essentially selling the hospital her skilled services on an hourly rate. The fact that she is a skilled worker does not mean that she could not be controlled or employed as an employee. She brought nothing to the hospital except herself. She has no business cards, equipment or materials, no office staff. She is being paid for her time and not by the job. I believe that the hospital had the right to control the method in which she performed the work and did so. Applicant testified that she had 2 lengthy meetings concerning the proper method to fill out various forms. Clearly, the hospital supervised her day-to-day activities in order to determine that the work was properly done. The hospital clearly monitored her time so that it would be properly charged for her services. She was brought in to perform a job function which is part of the usual business of the hospital (after all, the hospital also employs utilization review nurses on a full-time basis).

With respect to California Medical Audit and Ms. Bucoy, Ms. Bucoy sent Applicant to various hospitals in southern California, monitored her work when there were complaints by hospital clients, had the power to terminate Applicant at will, and paid Applicant for the work that Applicant performed at each client hospital. Please see County of Los Angeles vs. WCAB (Conroy) (1981) 46 CCC 1332, where the Court of

Appeal found these types of activities to constitute sufficient control to create the employment relationship. I have reviewed Archen vs. Kiddoo (1988) 200 C.A.3d 532. This case differs from Archen because Ms. Bucoy is a nurse and did have the knowledge to determine Applicant's ability to do her job. Ms. Bucoy also monitored Applicant's work when hospital clients complained of Applicant's work product. Further, Applicant did not actually provide actual patient care.

OCCUPATION:

Applicant is a Group 35 nurse.

INJURY AOE/COE:

Applicant claims to have sustained an injury to her back, right lower extremity and psyche.

In light of Applicant's testimony and pursuant to the medical reports of First Western Medical Group, and the records from Long Beach Memorial, and Dr. Sheridan, Applicant injured her low back and right ankle.

With respect to her psyche, no industrial injury is found in light of the medical report of Dr. Wardell. It should also be noted that no doctor has any real knowledge as to Applicant's vast and tragic psychiatric history. I have spent over 10 hours reading the subpoenaed records from her treating psychiatrists and psychologists. Without summarizing these documents at length, it is quite clear that Applicant has led a very hard life and that she is an abuser of Demoral. Dr. Dorsey's history has clearly been sanitized and is not at all accurate. It cannot be relied upon as substantial evidence. Therefore, no psychiatric injury is found.

EARNINGS:

I simply do not have enough information to determine Applicant's earnings for temporary disability and permanent disability. Therefore,

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at this time I presume minimum earnings, with jurisdiction left open to adequately determine the issue upon further evidence. Therefore, temporary disability is payable at \$112.00 per week and permanent disability payable at \$112.00.

TEMPORARY DISABILITY:

Applicant was temporarily totally disabled for the period 5-5-89 through 8-31-89, per the 8-31-89 report of Dr. Reynolds.

PERMANENT DISABILITY:

In light of the medical reports of Dr. Sheridan, Applicant has no rateable permanent disability.

APPORTIONMENT:

There being no permanent disability, there is no apportionment.

FUTURE MEDICAL:

None pursuant to Dr. Sheridan.

SELF-PROCURED MEDICAL/MEDICAL-LEGAL/LIENS:

- 1) - Defendants are ordered to reimburse EDD for all benefits paid during the period 5-5-89 through 8-31-89 at the minimum rate. The EDD lien is disallowed for all benefits paid after 9-1-89.
- 2) - Dr. Jefferson Davis: The lien is disallowed because no injury is found.
- 3) - First Western: All liens for psychiatric treatment are disallowed. The medical-legal reports of Dr. Dorsey are disallowed. Jurisdiction is reserved over the charges for

orthopaedic treatment and orthopaedic and internal medical-legal charges. Defendants are ordered to pay, adjust or litigate these charges with jurisdiction reserved.

- 4) - Associated Reproductions Services: Defendants are ordered to pay these liens in full.
- 5) - Homelink Pharmacy: Defendants are ordered to pay, adjust or litigate the orthopaedic charges, with jurisdiction reserved over any dispute. Any charges for psychiatric medication are hereby disallowed.
- 6) - Seawest Physical Therapy: Defendants are ordered to pay, adjust, or litigate with jurisdiction reserved over any disputes.
- 7) - Dr. James H. Jen Kin: The lien is disallowed in full as no industrial injury is found.

ATTORNEY FEES:

Applicant's attorney is entitled to 15% of all temporary disability over and above that paid to EDD. Applicant's attorney is awarded \$870.00 per Labor Code §5710.

* * * *

(Case No. 89 LBO 021 4955 -
Injury of 6-8-89)

EMPLOYMENT:

See discussion above.

OCCUPATION:

See discussion above.

CHARLOTTE FLEISCHMAN
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INJURY AOE/COE - PARTS OF BODY:

It is found that Applicant sustained an injury to her right major elbow, right major wrist and back in light of the medical reports in the file. No injury is found to her psyche per the above discussion.

EARNINGS:

See above.

TEMPORARY DISABILITY:

See above.

PERMANENT DISABILITY:

Applicant has no rateable permanent disability in light of the medical reports of Dr. Sheridan. Not even the doctors at First Western find any permanent disability with respect to the wrist and elbow.

APPORTIONMENT: None.

FUTURE MEDICAL: None.

SELF-PROCURED MEDICAL/MEDICAL-LEGAL/LIENS: See above.

ATTORNEY FEES:

None, except 5710 fees awarded above.

Dated: DEC 15 1994
at Norwalk, California
Service by mail on parties
as shown on Official Address
Record effected on above date.


MARY ANNE THOMPSON, Presiding
Workers' Compensation Judge

WORKERS' COMPENSATION APPEALS BOARD
Case No. LBO 019 2970 (MF)
Case No. LBO 021 4955

CHARLOTTE FLEISCHMAN

vs,

CALIFORNIA MEDICAL AUDIT, a
Corporation, and LORNA BUCOY,
Principal Shareholder, Uninsured
LONG BEACH MEMORIAL MEDICAL
CENTER/Permissibly Self-Insured
UNINSURED EMPLOYERS FUND,

WORKERS' COMPENSATION JUDGE:

MARY ANNE THOMPSON

REPORT AND RECOMMENDATION OF WORKERS' COMPENSATION
JUDGE ON PETITION FOR RECONSIDERATION

I

INTRODUCTION

Applicant has filed a timely but unverified Petition for Reconsideration to the Findings & Award. Applicant asserts that Applicant should have been awarded some permanent disability on an orthopaedic basis.

In LBO 019 2970, Applicant sustained an industrial injury to her low back and right ankle on 5-5-89. In LBO 021 4955, Applicant sustained an industrial injury to her right major elbow, right major wrist and back. After trial, it was found that Applicant, inter alia, was entitled to 3 months of temporary disability and no rateable permanent disability. The finding of no rateable permanent disability was based upon the medical reports of Dr. Sheridan dated 12-17-90 and 1-31-90.

An Answer has been filed by Long Beach Memorial Hospital. No Answer has been filed by Lorna Bucoy or California Medical Audit.

II

ISSUES & ARGUMENTS

A. - IS THERE SUBSTANTIAL EVIDENCE TO SUPPORT A FINDING OF NO
ORTHOPAEDIC PERMANENT DISABILITY AS A RESULT OF EITHER

INDUSTRIAL INJURY?

The trier of fact has the power to choose from conflicting medical reports. Jones vs. WCAB (1968) 33 CCC 221. The considered opinion of one doctor may constitute substantial evidence even though it is inconsistent with other medical reports in evidence. Place vs. WCAB (1970) 35 CCC 525.

On 12-17-90 and 1-13-91 Dr. Sheridan, Orthopaedist, reported on behalf of California Medical Audit. (See California Medical Audit Exhibit A.) Dr. Sheridan's reports do not refer to Applicant's second injury, because Applicant did not report the second injury to him. Dr. Sheridan opined on 12-17-90 that Applicant had the following subjective disability based on no objective findings,

"Constant minimal occasional slight ankle pain. Occasional minimal to slight low back pain."

On 1-13-91 Dr. Sheridan reported, after having reviewed various medical reports, where for the first time he became aware of Applicant's second injury wherein Applicant broke her wrist. Dr. Sheridan noted that "I did not examine Ms. Fleishman's right wrist, as it was asymptomatic by her statements and drawing."

A finding of subjective factors of disability, where there are no objective findings, is based by the doctor upon the honest and accurate reporting of the Applicant. In the instant case, I have great difficulty in finding Applicant to be a credible historian. She has repeatedly lied and misrepresented to various employers, doctors, and this Court, her history. For example, she swears that she has a Masters Degree in Biochemistry from Columbia University, but Columbia University has no record of her. Her pre-employment records from Hawthorne Community Hospital do not refer to a Masters Degree in Biochemistry from Columbia University or any other college. Applicant denies that she is an abuser of Demoral, but the records from Dr. Berkowitz show that she withheld her drug abuse history from her private treating psychologists for years. The records also reveal that several

hospitals have banned Applicant from receiving any drugs from the emergency rooms. She was clearly less than candid with her own reporting psychiatrist the extent of her use of drugs. She reported to Dr. Dorsey in his report of 6-20-89 at page 5 that she last used drugs of any kind in 1980. The records from Dr. Berkowitz show, however, extensive problems with drugs particularly Demoral well into the mid-1980's and the records from Cedar-Sinai show that by July of 1986 that Applicant was using 40 mg. of methadone on a daily basis "consistent with her benzodiazepine dependence." Dr. Dorsey also reported that Applicant had not attempted suicide in 1984 or 1985 although the records show that she was clearly contemplating suicide in the mid-1980's.

In summary, I found Applicant to be completely lacking in credibility. To make a finding of permanent disability on subjective factors alone in this circumstance would simply be requiring this Court to condone and reward Applicant's lack of candor.

III

CONCLUSION


It is respectfully requested that the unverified Petition for Reconsideration be denied.


MARY ANNE THOMPSON, Presiding
Workers' Compensation Judge

Dated: JAN 24 1995
at Norwalk, California

Served by mail on: Masry & Vititoe
Kegel, Tobin, Hamrick & Truce
Russell D. Davis, Esq.
Ron Horton (UEF)

Effected on above date.

By: 

1 WORKERS' COMPENSATION APPEALS BOARD

2 STATE OF CALIFORNIA

3
4 CHARLOTTE FLEISCHMAN,

5 *Applicant,*

6 vs.

7 CALIFORNIA MEDICAL AUDIT, a
8 California Corporation, and LORNA
9 BUCOY, Principal Shareholder, Uninsured
10 LONG BEACH MEMORIAL MEDICAL
CENTER, Permissibly Self-Insured;UEF.

11 *Defendants,*

Case Nos. LBO 0192970
LBO 0214955

ORDER DENYING
RECONSIDERATION

12 We have considered the allegations of the Petition for
13 Reconsideration and the contents of the report of the workers'
14 compensation judge (WCJ) with respect thereto. Based on our
15 review of the record, and for the reasons stated in said report
16 which we adopt and incorporate, we will deny reconsideration.

17 We are, moreover, extending to the WCJ's finding on
18 credibility the great weight to which it is entitled (see Garza v.
19 Workers' Comp. Appeals Bd. (1970) 3 Cal. 3d 312, 35 Cal. Comp.
20 Cases 500).

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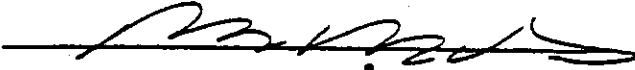
1 For the foregoing reasons,

2 IT IS ORDERED that said Petition for Reconsideration be,
3 and it hereby is, DENIED.

4 WORKERS' COMPENSATION APPEALS BOARD

5 

6 I CONCUR,

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8 

9 DATED AND FILED IN SAN FRANCISCO, CALIFORNIA

10 FEB 23 1995

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

13 vsr 

