

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

3
4 **DEBRA WASHINGTON,**

5 *Applicant,*

6 **vs.**

7 **PACIFIC HOSPICE ANCHOR MEDICAL**
8 **GROUP/ILLINOIS MIDWEST INSURANCE**
9 **AGENCY, LLC, On Behalf Of PROCENTURY**
10 **INSURANCE COMPANY,**

11 *Defendants.*

Case No. **ADJ9894237**
(San Bernardino District Office)

OPINION AND DECISION
AFTER
RECONSIDERATION

12 We previously granted defendant's Petition for Reconsideration to further study the factual and
13 legal issues in this case. This is our Opinion and Decision After Reconsideration. Defendant sought
14 reconsideration from the Findings and Award issued by a workers' compensation administrative law
15 judge (WCJ) on November 10, 2015, wherein the WCJ found that applicant, while employed as a patient
16 companion on June 17, 2013, sustained industrial injury to her right upper extremity.

17 Defendant contended that the WCJ erred in finding that applicant was its employee, arguing that
18 there was no employment relationship at the time of the injury and there was no employment relationship
19 contemplated by the parties.

20 We have considered defendant's Petition, and we have reviewed the record in this matter.
21 Applicant filed an Answer. The WCJ has filed a Report and Recommendation of W.C. Judge on Petition
22 for Reconsideration (Report), recommending that the Petition be denied. For the reasons set forth herein,
23 we will grant reconsideration, rescind the November 10, 2015 decision finding that applicant sustained
24 industrial injury when she was employed by defendant on June 17, 2013, and substitute a finding that
25 applicant was not an employee on the date of the alleged industrial injury.

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1 **FACTS**

2 This matter proceeded to trial on October 7, 2015, on the sole issue of employment. The parties
3 stipulated that applicant, while allegedly employed on June 17, 2013, as a massage therapist by Pacific
4 Hospice Anchor Medical Group claims to have sustained industrial injury to her neck, right shoulder and
5 right forearm. (Minutes of Hearing/Summary of Evidence (MOH/SOE), 10/7/15, morning session, 2: 1-
6 4.)

7 Injury arising out of and in the course of the employment (AOE/COE) was deferred pending
8 further development of the record. Defendant raised the issue that applicant was a volunteer and not
9 entitled to coverage under the workers' compensation system. Applicant testified on her own behalf, and
10 Dr. Sunil Arora, owner of Pacific Hospice, testified for defendant.

11 Applicant testified that she trained as a massage therapist, but was unemployed and seeking work
12 upon graduation. During her job search on Craigslist, she saw defendant's listing for volunteers.
13 (MOH/SOE, 10/7/15, morning session, 3: 5-12.) The ad was not placed in the employment section. (*Id.*,
14 4: 19.) Applicant had learned of a grant program for massage therapy through the Massage Therapy
15 Foundation which could be accessed online by medical facilities, including Hospice. Applicant
16 responded to the Pacific Hospice ad. (*Id.*, 3: 13-14.)

17 On May 31, 2013, Matthew O'Brien, volunteer coordinator and chaplain for Pacific Hospice,
18 responded to applicant by email regarding her inquiry. (*Id.*, 3: 15-16.) He thanked her for the inquiry
19 "regarding volunteering at Pacific Hospice," and noted that the next steps included an interview, physical
20 exam, and tuberculosis (TB) test. (Applicant's Ex. 6; Defendant's Ex. A; MOH/SOE, afternoon session,
21 10/7/15, 2: 24.)

22 On June 5, 2013, applicant responded by email, requesting to reschedule the interview, and
23 stating that she was "still very interested in volunteering" with Pacific Hospice and had "completed the
24 initial application." (Defendant's Ex. B.)

25 Dr. Arora testified that Pacific Hospice had four or five volunteers who sit with patients and play
26 cards or read to them. (MOH/SOE, afternoon session, 10/7/15, 3: 2-3.) No hands-on care or treatment is
27 allowed by volunteers. Medicare and the State of California regulate what can be done and by whom.

1 Massage therapy is not within their authorized licensed activity. (*Id.*, 3: 3-6.)

2 Applicant came in for an interview with Mr. O'Brien and Dr. Sunol. Applicant explained her idea
3 to try to set up a massage program for Pacific Hospice by utilizing a grant. (MOH/SOE, 10/7/15,
4 morning session, 3: 18-24.) Dr. Sunol testified he told applicant that Pacific Hospice did not have a
5 position for a massage therapist, that massage was not one of the services they were allowed to provide to
6 patients, and they did not have anyone who could apply for a grant. (MOH/SOE, afternoon session,
7 10/7/15, 3: 15-20.)

8 Dr. Sunol did not tell applicant she would be employed. She was advised she would have to
9 submit to a physical and have a TB test as part of the volunteer application process. (*Id.*, 3: 22-25.) The
10 TB test is a universal requirement for all employees or volunteers sharing the same air space with
11 patients. (*Id.*, 3: 24-25, 4: 1.) Applicant was informed that she could go to a facility named Primary Care
12 for free, or get the exam and test on her own from a facility of her choice. (*Id.*, 4: 2-3.)

13 On June 17, 2013, applicant came into Pacific Hospice for a TB test. She was inadvertently given
14 a TDAP vaccine and alleges an adverse reaction. Applicant never completed the rest of the process to
15 become a volunteer. (MOH/SOE, 10/7/15, morning session, 4: 14-15.) She began working as a massage
16 therapist for American Apparel shortly after the TDAP injection. (*Id.*, 5: 4-5.)

17 On November 10, 2015, the WCJ issued the disputed decision, finding that applicant sustained
18 industrial injury to her right upper extremity while working for defendant as a patient companion on
19 June 17, 2013.

20 DISCUSSION

21 Labor Code¹ section 3351 defines "employee" as "every person in the service of an employer
22 under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether
23 lawfully or unlawfully employed" Section 3357 provides that, "[a]ny person rendering service for
24 another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be
25 an employee."

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27 ¹ Unless otherwise stated, all further statutory references are to the Labor Code.

1 Volunteers are generally excluded from coverage of workers' compensation. (*Edwards v.*
2 *Hollywood Canteen* (1946) 11 Cal.Comp.Cases 105.) A volunteer is one who performs services not
3 called for by a contract hire, without contemplation of remuneration or consideration. (See, *Department*
4 *of Natural Resources v. IAC (Machado)* (1929) 208 Cal. 14, 16.) Where there is no evidence of mutual
5 consent to form an employment relationship and no consideration, the Workers' Compensation Appeals
6 Board (WCAB) has found there is no employment relationship. (*Ginsburg v. Workers' Comp. Appeals*
7 *Bd.* (1998) 63 Cal.Comp.Cases 1285.) However, if there is sufficient connection with the employment,
8 externally ascertainable intent to form an employment contract, and consideration for the employment
9 contract, courts have extended workers' compensation coverage to "volunteers."

10 In *Laeng v. Workers' Comp. Appeals Bd.* (1972) 6 Cal.3d 771 [37 Cal.Comp.Cases 185] (*Laeng*),
11 workers' compensation coverage was extended to a city job applicant who was injured as part of an
12 agility tryout for employment. The Court reasoned that the pre-employment agility tryout mimicked the
13 special risks of the employment, provided a benefit to the city, and placed the applicant under the control
14 and direction of the city. In *Laeng*, the Court noted an injury is covered when it flows directly from
15 employment activities or conditions, and the proper test is whether the claimant has "achieved sufficient
16 connection with the employment to bring him within the orbit of the risks of that employment." (*Laeng*,
17 *supra*, at p. 783.)

18 In *Barragan v. Workers' Comp. Appeals Bd.* (1987) 195 Cal.App.3d 637 [52 Cal.Comp.Cases
19 467] (*Barragan*), the court found that a college student extern in a medical assistant program was an
20 employee as a matter of law when she was required to provide services to a hospital in order to obtain her
21 degree. In *Barragan*, the court found clear evidence of consideration underlying the employment
22 contract: the hospital and the student intended an arrangement in which the student performed services
23 for the hospital, and the hospital provided training and instruction to enable her to earn her diploma.
24 Since the student's participation in an externship training program was mandatory, her services were not
25 voluntary.

26 We note that undergoing a TB test was not a requirement created by defendant. Healthcare
27 facilities are required to have employees submit to a physical examination and a TB test prior to the start

1 of employment. (Cal. Code Regs., tit. 22, § 72535.) Dr. Arora testified that a TB test is a state
2 requirement for any and all employees and volunteers that come into contact with patients. (MOH/SOE,
3 10/7/15, afternoon session, 3:25-4:1.) In the instant matter, the state mandated TB testing for the purpose
4 of protecting patients, and defendant merely communicated this state requirement to applicant.

5 Here, we are not persuaded that defendant should be held to be an employer merely for informing
6 applicant that she had to comply with this state mandate. That is especially so when, as here, applicant
7 had discretion to decide when, where and how to fulfill the mandate. (MOH/SOE, 10/7/15, afternoon
8 session, 4:1-3.) No other job-related activities were involved. The relationship between the volunteer
9 activity and completing a state-mandated task is simply too attenuated to bring applicant within the
10 workers' compensation system.

11 Unlike the claimant in *Laeng*, the applicant here has not established "sufficient connection with
12 the employment to bring [her] within the orbit of the risks of that employment." (*Laeng, supra*, at p.
13 783.) Moreover, in contrast with the circumstances in *Barragan*, where there was clear evidence of
14 exchange of services, i.e., consideration, underlying an employment contract, here the evidence does not
15 demonstrate an externally ascertainable intent to form an employment contract. (*Ginsburg, supra*, 63
16 Cal.Comp.Cases 1285.)

17 Accordingly, for all of the reasons discussed herein, we will rescind the November 10, 2015
18 Findings and Award and substitute a new decision reflecting that applicant was not an employee of
19 defendant on June 17, 2013.

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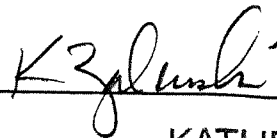
1 For the foregoing reasons,

2 **IT IS ORDERED**, as the Decision After Reconsideration of the Workers' Compensation
3 Appeals Board, that the November 10, 2015 Findings and Award is **RESCINDED** and the following
4 **SUBSTITUTED** therefor:

5 **FINDING OF FACT**

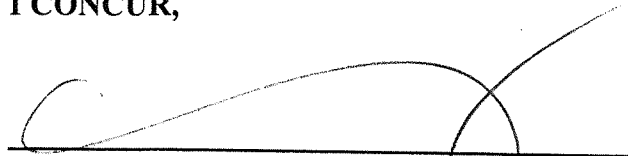
- 6 1. Applicant was not an employee of defendant on June 17, 2013, and is not entitled
7 to workers' compensation benefits.

8 **WORKERS' COMPENSATION APPEALS BOARD**

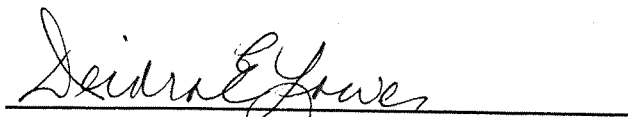
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12 **KATHERINE ZALEWSKI**

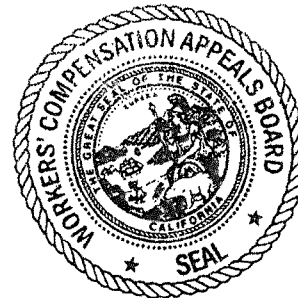
13 **I CONCUR,**

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16 **MARGUERITE SWEENEY**

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19 **DEIDRA E. LOWE**



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21 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

22 **FEB 16 2017**

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

25 **DEBRA WASHINGTON**
26 **MANN AND MANN**
27 **BRADFORD & BARTHEL**

MG:abs

WASHINGTON, Debra