BEFORE THE INSURANCE COMMISSIONER

OF THE STATE OF CALIFORNIA

COPY

In the Matter of the Appeal of **KWA SAFETY & HAZMAT CONSULTANTS, INC.,** Appellant, From a Decision of **STATE COMPENSATION INSURANCE FUND,** Respondent.	FILED MAY 02 2002 ADMINISTRATIVE HEARING BUREAU **FILE NO. AHB-WCA-01-22**

ORDER ADOPTING PROPOSED DECISION AND DESIGNATING DECISION AS PRECEDENTIAL

The attached proposed decision of Administrative Law Judge Lisa A. Williams is adopted as the Insurance Commissioner's decision in the above-entitled matter. This order shall be effective June 3, 2002. Judicial review of this decision may be had pursuant to California Code of Regulations, title 10, section 2509.76. Any party seeking judicial review of this decision shall lodge copies of the request for judicial review and the final judicial order on the request for judicial review with the Administrative Hearing Bureau of the California Department of Insurance.

Additionally, pursuant to Government Code section 11425.60, I hereby designate this decision as precedential.

Dated: APRIL 25, 2002

Harry W. Low
Insurance Commissioner

By: _____
STEVEN J. GREEN
Chief Counsel

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PROPOSED DECISION

Introduction

The dispute underlying this appeal arises over the classifications assigned by appellant's worker's compensation insurance carrier, State Compensation Insurance Fund (SCIF or respondent), to KWA SAFETY & HAZMAT CONSULTANTS, INC.'S (KWA or appellant), sub-consultant workers on appellant's workers' compensation insurance policy Numbers 469-2256-99 and 469-2256-00, for the policy years 1999 and 2000[1].

[1] Unless otherwise indicated, all references are to appellant's 1999 and 2000 workers' compensation insurance policies and rates.

KWA timely appeals under Insurance Code section 11737 (c)[2] and the California Code of Regulations, title 10, section 2509.46,[3] from SCIF's determination that Appellant's sub-consultants were KWA'S employees rather than independent contractors. Appellant also appeals SCIF's determination that as employees, Appellant's sub-consultants are properly assigned to classification codes 8868, 8748 and 8720, under Insurance Code section 11753.1, subdivision (b)[4] and the California Workers' Compensation Uniform Statistical Reporting Plan[5] (Rating Plan or Plan).

For the reasons that follow, SCIF'S decision to designate appellant's workers as employees and assign Classification Codes 8868, 8748 and 8720 to them, is overturned because the workers that KWA used as sub-consultants were not employees, but were independent contractors who were excluded from coverage under the Workers' Compensation Act (California Labor Code sections 3200, et seq.).

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[2] Section 11737, subdivision (c) provides in pertinent part: "Every insurer or rating organization shall provide within this state reasonable means whereby any person aggrieved by the application of its filings may be heard on written request to review the manner in which the rating system has been applied in connection with the insurance offered or afforded . . . . Any party affected by the action of the insurer or rating organization on the request may, within 30 days after written notice of the action, appeal to the commissioner. . . . ."

[3] The California Code of Regulations, title 10, section 2509.46 clarifies the time frame for the appeal rights of any person aggrieved by a workers' compensation insurer's decision.

[4] Section 11753.1, subdivision (b) authorizes any person to appeal the decision to the Insurance Commissioner when aggrieved by a workers' compensation insurer's decision adopting a change in the classification assignment of an employer that results in an increased premium. Since this decision finds that KWA'S sub-consultant workers are independent contractors, the classification issues raised under Insurance Code Section 11753.1 (b) are moot and are not addressed here.

[5] The provisions of the Plan, including the Standard Classification System in Part 3, are part of the Insurance Commissioner's regulations, at title 10, California Code of Regulations, section 2318.6. The 1999 version of the Plan applies to the issues presented in this appeal because the policies at issue incepted during that year.

Issue Statement

Are Appellant's sub-consultant workers employees for whom workers' compensation insurance coverage is required by law, or are they independent contractors who are excluded from coverage under the Workers' Compensation Act?

Procedural History

KWA initiated these proceedings on July 18, 2001, by filing a written appeal with the California Insurance Commissioner of SCIF'S determination that appellant's sub-consultants were employees who should be assigned to classification codes 8868, 8748 and 8720 (Hearing Transcript (HT), HT, 20:14-20). Administrative Law Judge Lisa A. Williams conducted an evidentiary hearing on January 8, 2002.

Pamela Murcell, President and owner of KWA Safety & Hazmat Consultants, Inc. (HT, 13:13-14), appeared at the hearing as the representative for appellant KWA and testified on Appellant's behalf. Barbara Gallios, Senior Staff Counsel, appeared as counsel for respondent SCIF.

The parties submitted written briefs prior to and following the hearing. Respondent's pre-hearing brief was not filed because it was untimely. The pre-filed documents included Joint Exhibits 1 through 10, Bate Stamp Numbers 1 through 69. All of the Joint Exhibits were admitted as evidence at the hearing except Bates Stamp Numbers 44 and 45 of Joint Exhibit 8 (Respondent's pre-hearing brief). Appellant also presented Exhibits 11 through 14, which were admitted as evidence at the hearing.

Other than the exhibits offered by Respondent in the parties' joint exhibits, Respondent did not submit any other evidence or testimony, but instead based its case on the evidence and testimony offered by Appellant at the hearing (HT, 68:15-25, 69:1).

Pursuant to the Administrative Law Judge's February 1, 2002 post-hearing Order, additional Exhibits 100 through 168, Bates Stamp Numbers 1 through 189, were submitted by Appellant on February 26, 2002, and were admitted as evidence on March 8, 2002, without objection by Respondent. The testimony presented at the hearing and the admitted Exhibits comprise the record evidence in this matter. The record remained open until April 12, 2002, when the case was submitted and the record closed.

Parties' Contentions

KWA contends that it is a consulting firm that follows standard consulting practices and that its sub-consultant workers are independent contractors who are excluded from coverage under the Workers' Compensation Act. SCIF contends that Appellant's workers are employees who are required to be covered by Appellant's workers' compensation insurance[6] and that as employees, it correctly assigned Appellant's workers to Classification Codes 8868, 8748 and 8720, under Part 3 of the California Workers' Compensation Uniform Statistical Reporting Plan.

FINDINGS OF FACT

How KWA Worked

Appellant is a consulting firm offering a variety of regulatory compliance services including occupational safety and health programs and hazardous materials management (HT, 12:6-25). Murcell purchased KWA in June 1996 (HT, 11:21-25, 12:1-4).

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[6] Appellant does not dispute that it also had employees who were clerical administrative employees that were

During the relevant policy years,[7] Appellant assisted its client companies by inspecting and auditing them to determine their compliance with regulatory requirements, environmental impact requirements and hazardous materials management (HT, 12:6-25). Appellant also trained companies in areas that include occupational health and safety, emergency response and hazardous materials management (HT, 19:14-25, 20:1-10).

The inspections, audits and training were performed by KWA at the client's facilities (HT, 25:8-25, 26-30). Appellant's clients included transportation companies, public agencies, manufacturing facilities and environmental firms (HT, 29:16-25, 30:1-25). Appellant obtained new clients through marketing efforts such as telephone calls, advertisements, flyers, facsimiles and mailings, and had some clients who had previously engaged Appellant's services for several years (HT, 43:9-24).

Appellant used workers (referred to by Appellant as associates or sub-consultants) to perform some of the inspections, audits and training sessions (Exh. 3; HT, 21:12-25, pp. 22-36). Contracting with independents is customary in the consulting business (Exh. 7, Bates 35-40; HT, 12:12-23, 14:18-19, 14:20-25, 15:1).

Appellant contacted sub-consultants through professional associations, referrals from appellant's former owner, and the workers' own advertisements of their services (Exh. 150, Bates Nos. 65-67; Exh. 162 Bates No. 113; HT, 21:13-20, 31:2-19). Most of the workers KWA used were highly skilled and educated. They included engineers, certified drivers, industrial hygienists, geologists and trainers (Exhs. 140-166; HT, 21-25, 31:20-25, 32:1-23).

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properly classified by SCIF as Classification Code 8810 (HT, 20:1-13, 28:2-5).

[7] The relevant policy years at issue in this appeal are 1999 and 2000 (Exh. 3; HT, 21:12-25 and pp. 22-36).

Depending on the sub-consultant's experience and expertise, Appellant required the worker's input on a potential job in advance in order to determine a time estimate for the project (HT, 45:4-25, 46:1-8, 52:21-25, 53:1-9). Based on the sub-consultant's input, KWA would set up the scope of services and estimated costs for a particular client's project (HT, 45:4-25, 46:1-8, 52:21-25, 53:1-9). However, if the project was a well-defined service such as a training assignment, KWA usually charged the client a lump sum and paid the sub-consultant a lump sum, without the necessity of the worker's input in advance.

Appellant would enter into a contract with a client for a particular project and then contact a potential sub-consultant worker to discuss whether that person would accept the project, and determine the estimated cost and time for the project (Exh. 3; HT, 21:21-25, pp. 22-27, 34:22-25, 35:1-11, 65:14-25). Depending on the particular assignment, after a client's project was completed, the client received a copy of the training materials, a certificate of completion of training including attendance records, an audit report, or an air sample and lab report (HT, 32:24-25, 33, 34:1-18). The reports were provided to the clients under KWA's name, even if the initial report was prepared by a KWA sub-consultant (HT, 34:19-21).

KWA's workers acquired assignments through a written offer from KWA, which the worker could accept or reject (Exh. 3; HT, 21:13-25, 22, 23:1-22, 34:15-25, 35, 36:1-21). If accepted, the worker would sign the written offer from KWA (Exh. 3; HT, 22:5-25, 23, 24). The offer was in the form of a written contract listing the terms of the assignment, including the date, time and duration of the project, location (usually at the business client's facility) and compensation (Exh. 3; HT, 21:13-25, 22, 23:1-22, 34:15-25, 35, 36:1-21). The contract also included a provision allowing either KWA or the worker to terminate the contract upon fifteen

days written notice (Exh. 3; HT, 21:13-25, 22, 23:1-22, 34:15-25, 35, 36:1-21). The workers were under no obligation to accept an offer on a project, but were free to accept or reject any particular job. KWA did not expect the workers to work any minimum amount of jobs, and some of the workers performed work for consultant firms other than and in addition to KWA (Exhs. 101-103, 118-129, 140-142, 148-154, 158-160, 162, 165-166; HT, 50:3-24).

Appellant was ultimately responsible for completing the projects for its clients based on its contract (Exh. 3; HT, 50:25, 51:1-23, 52:1-20). If a sub-consultant worker breached his or her contract with KWA, the worker would have been responsible to KWA on the worker's contract with KWA, and KWA would have been responsible to the client on its contract with the client for the project's completion (Exh. 3; HT, 50:25, 51, 52:1-20). The workers were only compensated for the time they worked (HT, 52:9-20). No sub-consultant, however, had failed to perform.

Once a project was completed, KWA paid the sub-consultants upon receipt of their reports, invoices and documentation substantiating the completion of the assignment (HT, 53:15-25, 54:1-12). Appellant paid the sub-consultants by a check generated from KWA (HT, 54:13-15).

Equipment and tools were provided by KWA, the sub-consultant, or the client (HT, pp. 26-27, 36:22-25, 37, 38:1-4). The sub-consultants assumed the costs of the operation and maintenance of their own tools, equipment and vehicles, as well as their insurance and payroll taxes (HT 37:1-25, 38:1-4, 38:12-222, 55:5-14). The workers also had to provide their own means of updating their education and qualifications by staying current on changes and new

developments in the regulations on which they provided consulting services (HT, 55:20-25, 56:1).

KWA did not provide any directives on the manner in which any of the sub-consultants' services were to be performed. KWA did not train them on how to perform their assignments, did not supervise them while they performed their assignment at KWA'S client's facilities, and did not control the means or method by which the sub-consultants performed their work, thereby leaving the control and discretion on how the project should be performed to the workers (Exhs. 106-140; HT, 38:22-25, 39, 40:1-4).

However, if the sub-consultant prepared training materials, KWA initially reviewed them to determine whether they were appropriate for the course being taught (HT, 55:5-19). On occasion, KWA also provided some of the training materials (HT, 36:22-24, 37, 38-39, 40:1-4).

While most of the sub-consultant workers KWA used did not hold special licenses, some were required, pursuant to various governmental regulations, to have special knowledge, training and certifications in order to be qualified to teach training programs to KWA'S clients and perform the work required by the clients (HT, 40:5-25, 41, 42:1-4, 55:20-25, 56:1).

KWA'S driving trainers taught driving instruction in the classroom but remained outside the trainee vehicles to observe the trainees (HT, 66:9-25, 67, 68:1-10). The trainers did not perform actual driving during the training and did not handle any hazardous materials (HT, 25, 26:1-20, 66:9-25, 67, 68:1-10).

During part of the 1999 policy year, with the exception of one extraordinary project for one client, Burlington Northern Santa Fe Railway Company (BNSF) (Exh. 3), Appellant's owner, Pamela Murcell, performed the bulk of the work on KWA'S client projects, and the sub-

consultant workers performed the work on twenty percent (HT, 46:9-25, 47-48, 49:1-17, 65:9-25). On the BNSF project, Appellant's only role was setting the project up, client contact and handling the administrative documentation. The sub-consultant workers performed 100 percent of the actual work, and KWA did not control how the actual work was performed or the results achieved (HT, 46:9-25, 47, 48, 49:1-17).

Pamela Murcell was trained in OSHA regulatory compliance, specifically occupational health compliance (with limited experience in hazardous materials management and environmental compliance), but she is not a biochemist, industrial hygienist, certified engineer, geologist or a expert in hazardous materials (HT, 7:15-18, 12:24-25, 13:1-3). She did not exercise any control or supervision over the workers skilled in these areas as they performed their work on client projects (Exh. 7, Bates 35-40). The sub-consultant workers were not an integral component of KWA'S operations, as Murcell typically performed eighty percent of the work on the client projects (HT, 46:14-25, 47-49, 50:1-26, 65:9-25). Overall, the sub-consultants performed assignments for KWA on an average of 48 to 52 days per year during the relevant policy years, or no more than 15 to 20 percent of the year (HT, 49:18-24). Some of the workers had other employment, some were retired or semi-retired, and some had their own firms and advertised their services (Exhs. 100-168; HT, 50:3-25).

During the 1999 policy year, KWA paid $67,652.89 for projects performed by the workers (Exh. 167, Bates Nos. 180-185), largely as a result of the extraordinary project for BNSF and the exceptional amount of work that the project generated. However, this was an anomaly and not a normal year for KWA (HT, 46:9-25, 47, 48, 49:1-13). The 2000 policy year was more demonstrative of a conventional year for KWA, and in that year, KWA paid

$27,664.05 to sub-consultant workers for projects for KWA'S clients (Exh. 168, Bates Nos. 186-189).

The Workers

During the 1999 and 2000 policy years, the workers included the following individuals:

Jeffrey B. Hicks, a certified Industrial Hygienist and a biochemist in business with Geomatrix since 1994 (Exhs. 142; 165, Bates No. 127);

Earl Hobson, a retired California Highway Patrolman who had extensive training in commercial vehicle safety (Exhs. 107-110, 143-144);

Kevin Hubbard, a certified Environmental Trainer and Assessor, specializing in waste operations, emergency response and Hazmat compliance with DOT and IATA (Exhs. 111-115, 145-147, 165);

Robert Masterson, a Registered Geologist and owner of Masterson & Associates, who had his own employees, performed work on projects for other companies in addition to KWA, held a fictitious business name statement and had advertisements in the telephone book (Exhs. 118-129, 148-154);

Harold Peters, a registered professional engineer who specialized in safety engineering and was certified in hazardous materials management (Exhs. 155-157);

Leta Suarez, an investigator and trainer certified in hazardous materials management or Hazmat, who had her own business and held a fictitious business name statement (Exhs. 158-160);

Thomas Wheeler, a registered professional geologist (Exhs. 137-139, 163-164);

Pat Cullen, a registered professional geologist associated with the firm Brown & Caldwell (Exhs. 101-103, 140-141);

George Wheeldon, a consulting geologist who advertised his company, Wheeldon Geology Consulting, in the telephone book (Appellant's Exhibit List, p. 2; Exh. 162; Exh. 166, Bates No. 177);

Charles Skinfeld, a trainer certified in hazardous materials management or Hazmat (Exhs. 130-132; Exh. 166, Bates No. 170);

Tom Joy, a safety inspector who performed safety inspections on trucks (Exhs. 116-117);

Keith and Glenn Walsh, safety inspectors who performed terminal inspections (Exhs. 133-136; Exh. 165, Bates No. 156; Exh. 166, Bates Nos. 175-176);

Earl Byers (Exh. 100; Exh. 166, Bates No. 157) and James (Jim) Herbertson (Exhs. 105-106; Exh. 166, Bates No. 159), trainers who performed driving training for KWA.

There is no evidence in the record on what Rick Harden did; he only worked briefly for KWA in 1999 (Exh. 104; Exh. 167, Bates No. 182). Appellant's unrebutted testimony was that all of KWA's sub-consultant workers were independent contractors (Exh. 7, Bates 35-40, specifically Bates 35, para. (d); HT, 12:6-23, 13:18-25, 14:1-25, 15:1, 60:8-25). It is inferred that Rick Harden was included in this description and performed similar work.

LEGAL ANALYSIS

The Workers' Compensation Act

The California Workers' Compensation Act (Act) is codified in California Labor Code sections 3200, et seq. Courts have long held that the Workers' Compensation Act is to be liberally construed with the purpose of extending benefits. The Act must be liberally construed

to extend benefits to persons injured in their employment. (Lab. Code section 3202.) Liberal construction governs all aspects of workers' compensation. "If a provision of the Act may reasonably be construed to provide coverage or payments, that construction should be adopted, even if another reasonable construction is possible." (*Arriaga v. County of Alameda* (1995) 9 Cal. 4th 1055.)

The Act extends only to injuries suffered by an employee, which arise out of and in the course of his or her employment. (Lab. Code sections 3600, 3700.) Under the California Labor Code, an employer is defined as: "Every person including any public service corporation, which has any natural person in service." (Lab. Code section 3300.) 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, but does not include independent contractors." (Lab. Code section 3351.) An independent contractor is defined 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 only and not as to the means by which such result is accomplished." (Lab. Code section 3353.)

One seeking to avoid liability has the burden of proving that persons whose services he has retained are independent contractors rather than employees (Lab. Code sections 3357; 5705, subd. (a)).

California Labor Code section 2750.5 includes a rebuttable presumption that a worker performing services for which a license is required pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, or who is performing such services for a person who is required to obtain such a license, is an employee rather than an

independent contractor. However, the type of services for which licenses are required under this section relate to miscellaneous safety provisions including safety on railroads (caboose), buildings, elevators, window cleaners, aerial passenger tramways, underground telephones, ships and vessels, tanks and boilers, volatile flammable liquids, amusement rides and tunnels and mines (*Division of Industrial Safety v. The Municipal Court for the Los Angeles Judicial District Of Los Angeles County, et al.* (1976) 61 Cal. App. 3d 696).

None of the workers that KWA used as sub-consultants during the relevant policy periods were involved in any of the services that required licenses as specified in sections 7000, et seq., of the Business and Professions Code. Therefore, further analysis under the California Labor Code section 2750.5 is not useful under the facts in this case, which must instead be analyzed under governing case law.

Case Law

Borello Analysis

The primary case offering guidance in determining whether a worker is an employee or an independent contractor is *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal. 3d 341. The Supreme Court held that farm laborers who worked for a grower, Borello, were employees rather than independent contractors, because, among other reasons, Borello retained control over the laborers' work and failed to meet the burden of proof under the statutory "control-of-work" test.

The Court reviewed the historical development of worker status law and noted that at common law, the dispositive factor in determining worker status was the amount of control exercised by the alleged employer over the person, with the intent of limiting the employer's

vicarious liability for the acts of its employee (*Borello, supra,* 48 Cal. 3d at pp. 350-352). The Court further noted that courts have since moved away from the literal application of the statutory control test alone. Instead, while courts hold that the right to "control work details" is a significant consideration, they have adopted several secondary factors as indicative of the nature of a service relationship (*Borello, supra,* 48 Cal. 3d at pp. 350-352).

In reviewing the history of independent contractor worker status, the Borello court stated:

> The distinction between independent contractors and employees arose at common law to limit one's vicarious liability for the misconduct of a person rendering service to him. The principal's supervisory power was crucial in that context because '. . . [the] extent to which the employer had a right to control [the details of the service] activities was . . . highly relevant to the question whether the employer ought to be legally liable for them . . . .' (citations omitted.) Thus, the 'control of work details' test became the principal measure of the servant's status for common law purposes.

Borello, supra, 48 Cal. 3d at p. 350.

In evaluating whether a worker was an employee or an independent contractor, the Borello court looked at more than just the strict application of the control-of-work test in isolation. The court considered the control-of-work test as the most significant measure of the six-factor test developed in other jurisdictions, but attempted to balance all six. The six-factor test discussed in *Borello, supra,* at pp. 354-355 included:

1) the control-of-work test;
2) worker's investment in equipment or materials required for his task, or his employment of helpers;
3) the opportunity for profit or loss depending on the worker's managerial skill;
4) whether the service rendered requires a special skill;
5) the degree of permanence of the working relationship; and
6) whether the service rendered was an integral part of the employer's business (citations omitted).

The Borello court also considered several other factors in its analysis of worker status. Additional factors were derived principally from the Restatement Second of Agency. These include:

> (a) whether 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;
> (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. (citations omitted).
>
> Generally, . . . the individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations. (citations and footnote omitted).

Borello, supra, 48 Cal. 3d at p. 351.

...

The court also considered the purpose of and the public policy underlying the Act:

> 1) to ensure that the cost of industrial injuries will be part of the cost of goods, rather than a burden on society; 2) to guarantee prompt, limited compensation for an employee's work injuries, regardless of fault, as an inevitable cost of production; 3) to spur increased industrial safety; and 4) in return, to insulate the employer from tort liability for his employees' injuries (citations omitted).

Borello, supra, 48 Cal. 3d at p. 354.

...

> . . . [the] protections conferred by the Act have a public purpose beyond the private interests of the workers themselves. Among other things, the statute represents society's recognition that if the financial risk of job injuries is

> not placed upon the businesses which produce them, it may fall upon the public treasury.

Borello, supra, 48 Cal. 3d at p. 358.

The Borello court noted that the Act's express exclusion of independent contractors recognized those situations where the risk of work injuries are a business expense of the independent contractor who has freely and willingly chosen the burdens and benefits of self-employment. "This is the balance to be struck when deciding whether a worker is an employee or an independent contractor for purposes of the Act." (*Borello, supra*, 48 Cal. 3d at p. 354.)

In *Borello*, the share farmers signed an agreement stating that: they were independent contractors; Borello would not withhold their taxes; the "Share Farmer" must file separate tax returns; and Borello would not provide workers' compensation or disability insurance coverage for them (*Borello, supra,* 48 Cal. 3d at p. 347). Borello maintained no field supervisor over the laborers and did not direct their work, the laborers provided their own tools, set their own hours and decided when to pick the crop at the correct size to maximize profits, profit incentive was the only guaranty of performance and quality control, the grower had no right to discharge a laborer or his workers during the harvest and had no recourse if the laborers abandoned the field. (*Borello, supra,* 48 Cal. 3d at pp. 346-348.) The "Sharefarmers" were hired and paid on a piecework basis; they were simply paid on the size and grade of the crop they picked. The crop buyer, Vlasic, kept records of the "Sharefarmer's" harvest and issued weekly checks to pay them, and Borello physically handed out the checks. (*Borello, supra,* 48 Cal. 3d at pp. 348, 357-358.)

As in some earlier cases, the *Borello* court found the farm workers to be employees within the reach of the protective legislation of the Act. The growers retained absolute overall control of the production and sale of the crop. The workers made no capital investment beyond

simple hand tools. The workers performed manual labor requiring no special skills. Their remuneration did not depend on their initiative, judgment or managerial abilities. Their service, though seasonal, was rendered regularly and as an integrated part of the grower's business. Finally, they were dependent for subsistence on whatever farm work they could obtain. (*Borello, supra*, 48 Cal. 3d at p. 355.)

The *Borello* court also found that even though the farm workers had signed contracts with the grower stating that the farm workers were independent contractors (which thereby waived the grower's employment responsibilities and coverage under the Act), no real bargaining took place as there was a surplus of farm workers. Borello failed to demonstrate that the farm workers voluntarily undertook the independent and unprotected status (*Borello, supra,* 48 Cal. 3d at pp. 358-359.) In fact, the court stated:

> If Borello is not their employer, they themselves, and society at large, thus assume the entire financial burden when such injuries occur. Without a doubt, they are a class of workers to whom the protection of the Act is intended to extend.

Borello, supra, 48 Cal. 3d at p. 358, fn omitted.

The court also acknowledged that: "The Legislature has made clear its intent to cover agricultural workers under the Act. Their exclusion from coverage was repealed in 1959 (citations omitted)." (*Borello, supra,* 48 Cal. 3d at p. 358, fn 14.)

The Court instructed that: "The nature of the work, and the overall arrangement between the parties, must be examined to determine whether they come within the 'history and fundamental purposes' of the statute" (citations omitted)." (*Borello, supra*, 48 Cal. 3d at pp. 353-354.) "Each service arrangement must be evaluated on its facts and the dispositive circumstances may vary from case to case." (*Borello, supra*, 48 Cal. 3d at p. 354.)

Post-Borrello

Worker Status - Employee

In *Yellow Cab Cooperative, Inc., et al. v. WCAB* (1991) 226 Cal.App. 3d 1288, a cab driver was found to be an employee even though he signed a written lease agreement designating him as a lessee on the taxi cab, and indicating that among other things, he was self-employed. In reviewing the specific facts of the case, the court stated: "The dispositive question is whether the criteria and principles identified in *Borello*, when applied to the facts presented here, warrant the Board's determination that applicant was Yellow's employee for workers' compensation purposes." (*Id*, at pp. 1296-1297.) The cab drivers were controlled by Yellow Cab which assigned their shifts, instructed them on various aspects of their work, such as how to behave toward the public, their personal appearance and the appearance of their cabs, on rules of good driving, and directed them on where to go to pick up fares. (*Yellow Cab, supra*, 226 Cal.App. 3d at pp. 1298-1299). More significantly, the drivers were prohibited by Yellow Cab from driving cabs for other taxi cab companies (*Id, supra*, at 1298). Additionally, even though the lease agreement did not require the drivers to share any of the profits from fares with Yellow Cab, the court stated: "The manner of payment, . . ., is not a decisive test of employment" . . ., calling the manner of payment ". . . at most an equivocal consideration" (citations omitted). (*Id, supra*, at 1300.) Despite the lease agreement, the court found that the parties' actual conduct was the real measure of their relationship, and the lease agreement was ". . . ineffectual to create an independent contract relationship." (*Yellow Cab, supra*, 226 Cal.App. 3d at p. 1297.)

In cases involving worker status of newspaper delivery persons, courts have generally found that the workers are employees rather than independent contractors. In *Gonzalez v.*

WCAB, et al. (1996) 46 Cal.App. 4th 1584, the court relied heavily on the multi-factor analysis in *Borello, supra*, and found that newspaper deliverers were employees even though their contracts specified that they were independent contractors because they had very little control over the mode and manner in which they accomplished the desired result of their service. The alleged employer retained substantial control by retaining ownership of the papers until delivered, receiving complaints and paying piecemeal per paper until delivered.

Worker Status - Independent Contractor

The court of appeal affirmed a summary judgment in favor of employers, finding that truckers who transported goods through a brokering business (MVT) were independent contractors, not employees, in *SCIF v. Brown* (1995) 32 Cal.App. 4th 188. The holding was based on the following grounds:

1) the truckers had complete control over their working conditions and the manner in which a load was transported (including whether to hire assistants);
2) the broker's participation was limited to offering the assignments and paying compensation upon proof of delivery;
3) the broker's lack of supervision over the truckers was not a function of the unskilled nature of the job because truck driving requires abilities beyond those possessed by a general laborer;
4) the truckers signed a contract that identified them as independent contractors;
5) the truckers were engaged in a distinct occupation which afforded them entrepreneurial opportunities for their transportation services, and was not mere 'piecework;
6) it was customary for brokers to hire independents;
7) the truckers made investments in their trucks;
8) the truckers worked for other brokers as well as MVT;
9) work was performed and compensated on a job-by-job basis with no obligation on truckers to accept an assignment and no retribution for refusing assignments; and
10) the parties 'expressly and voluntarily agreed to independent contractor status.'

SCIF v. *Brown, supra,* at 32 Cal.App. 4th at p. 202.

In *SCIF* v. *Brown,* the insurance carrier argued that the truckers were employees because the broker failed to produce documentation demonstrating that the truckers had their own workers' compensation insurance, or had state or federal trucking permits; however, the court found that the carrier failed to prove that the truckers had any employees for whom they were required to obtain workers' compensation insurance or that permits were required. (*SCIF* v. *Brown, supra,* 32 Cal.App. 4th at p. 203.) "Even if it [the permit requirement] were a factor to be considered, it could not, as a matter of law, outweigh the other factors, all of which point to a conclusion of independent contractor status." (*SCIF v. Brown, supra,* 32 Cal.App. 4th at p. 198.) Further, the court held that self-employed workers are not subject to the workers' compensation system unless they *opt* to obtain a policy providing such coverage, (citations omitted). . . ., and that ". . . SCIF provides no authority that either type of documentation [permits or workers' compensation insurance policies] is the sine qua non of independent contractor status." (*Id, supra*, at 203-204.)

KWA Sub-Consultant Worker Status

The individuals who worked as sub-consultants for KWA were sophisticated individuals who were highly educated and trained. They were hazardous materials management experts, occupational safety experts, industrial hygienists, biochemists, certified engineers and geologists who had choices in their earning capacity endeavors, and chose to work as independent contractors. They were not among the groups of workers performing low-skilled tasks such as the farm laborers in *Borello, supra*, the newspaper deliverers in *Gonzalez, supra,* or the cab

drivers in *Yellow Cab, supra.* The workers that KWA used as sub-consultants were akin to the independent contractor workers who drove big-rig trucks in *SCIF v. Brown, supra.*

The following KWA sub-consultants' attributes are relevant in the *Borello* multi-factor analysis set forth on p. 14-15.

1) Control of work. The sub-consultants had substantial control over their projects. They had complete control of the means and methods by which the results of their projects were accomplished. They performed one hundred percent of the actual work on their projects. KWA'S participation on the sub-consultant's projects was ministerial only. KWA'S limited involvement included: setting up the project; performing the accounting services upon receipt from the sub-consultant that the project was completed; and negotiating the charge for the project with the sub-consultant's assistance on estimating the time and cost for the project. The sub-consultants worked on projects for KWA without interference from KWA on the means and methods of accomplishing the projects;
2) Worker investment. KWA or the client occasionally made equipment or materials available but the sub-consultants invested in most of their own equipment and materials. In addition to projects for KWA, the sub-consultants worked on projects for other consulting firms with their own equipment;
3) Profit or loss opportunity. The payment by the job sub-consultants' work was performed and compensated on a job-by job basis with no obligation to accept an assignment and no retribution for refusing assignments, and the sub-consultants withheld their own taxes;
4) Special skill. The sub-consultants rendered services requiring special skills;
5) Performance and length of time. The sub-consultants' working relationship with KWA was not permanent, it was on a project-by-project basis which the sub-consultant could either accept or reject. It was mostly short-term;
6) Integral part. The sub-consultants' work was not an integral part of KWA'S business;
7) Distinct occupation. The sub-consultants were engaged in distinct occupations, which afforded them entrepreneurial opportunities for their services, the work was not mere piecework;

8) Specialist skill. In this locality, the sub-consultants' occupations were of the type that did not require direction by KWA;
9) Belief of worker. The sub-consultants and KWA believed they were creating an independent contractor relationship because when an assignment occurred, the parties signed a contract assigning the work to the sub-consultants as independent contractors;
10) Custom in the industry. It was customary in the consultant business to hire independent contractor sub-consultants, and,
11) Other work of workers. The sub-consultants were either retired, worked for other companies, had their own businesses, and some advertised their own firms.

Based on this analysis of the facts, Appellant has met its burden of proving that the sub-consultants were independent contractors, not employees. Respondent SCIF failed to submit any evidence to support its contention that KWA'S sub-consultant workers were employees (HT, 68:15-25, 69:1). Further, as in *SCIF v. Brown*, Respondent failed to prove that Appellant's sub-consultant workers had any employees for whom they were required to obtain workers' compensation insurance or that the sub-consultants were required to obtain the coverage for themselves. Moreover, Respondent failed to rebut any of Appellant's evidence that the workers Appellant hired as sub-consultants were independent contractors.

Instead, Respondent relied only on a few of the *Borello* factors in arguing that the workers were employees required to be covered under the Act. Respondent submitted that Appellant occasionally supplied training manuals as evidence of control. This is a minor factor. Respondent mistakenly argued that the sub-consultants had no potential breach of contract liability to Appellant because their contracts allowed either side to terminate the agreement with fifteen days notice, but SCIF ignored Appellant's available breach of contract action if the worker failed to complete the project without giving the requisite notice to Appellant.

Respondent claimed that the sub-consultants were employees because they did not use any of their own employees on KWA project assignments. This is not required and its absence is not evidence of status. Respondent emphasized SCIF'S risk of liability if a sub-consultant filed a claim for workers' compensation benefits (HT, 71:4-25, 72, 73:1-23). That risk exists, certainly. It is not persuasive.

In contrast, Appellant has carried its burden and shown that its role in the jobs performed by its sub-consultants was not supervisory but merely ministerial. Appellant lacked significant control over the sub-consultants' job performance, or the method and means by which the results were accomplished. SCIF has not controverted this showing with any evidence, and its arguments alone cannot overcome Appellant's showing.

DETERMINATION OF ISSUES

In numerous post-*Borello* cases, the courts have demonstrated that each case must be extensively evaluated on its own set of facts using the detailed *Borello* multi-factor analysis. Under the relevant case law and California Labor Code sections 3357 and 5705, subd. (a), and the facts in this record, Appellant has met its burden in proving that the persons whose services it retained as sub-consultant workers during the 1999 and 2000 policy years were independent contractors rather than employees.

ORDER

1) The decision of respondent State Compensation Insurance Fund to apply classification codes 8868, 8748 and 8720 of the California Workers' Compensation Uniform Statistical Reporting Plan to the sub-consultant workers retained by appellant KWA for the 1999 and 2000 policy years is overturned because the workers that KWA retained as sub-consultants were not

employees; they were independent contractors who were excluded from coverage under the Workers' Compensation Act.

2) Any increased premium due from Respondent's erroneous classification is without basis. Therefore, Appellant does not owe any premium to SCIF for its sub-consultant workers, and if Appellant paid any premium to SCIF for its sub-consultants for the 1999 and 2000 policy years, SCIF must return the payments to Appellant within one month of the date of service of this Order.

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I submit this proposed decision on the basis of the record before me and I recommend its adoption as the decision of the Insurance Commissioner of the State of California.

DATED: April 16, 2002

Lisa A. Williams

LISA A. WILLIAMS
Administrative Law Judge
Department of Insurance