

INTER - OFFICE MEMORANDUM

TO: ALL ATTORNEYS/CLIENTS

FROM: W. Joseph Truce

DATE: October 10, 2001

RE: **BOARD'S INSISTENCE THAT WCJ'S ANALYZE BOTH THE FACTS AND THE LAW IN SUPPORT OF THEIR DECISIONS**

As further evidence that the newly constituted Workers' Compensation Appeals Board in San Francisco- under the guidance of Chairman, Merele Rabine- continues to insist that its judges "clearly and in full detail" analyze not only the facts in a particular case but the applicable law that applies to those facts; I am enclosing a recent Opinion and **Order Granting Petition for Reconsideration and Decision After Reconsideration** in which the Board returned the case of Eddie Paul v. Bates U.S.A.; Travelers Insurance Group to the Workers' Compensation Judge as the WCJ's initial decision was inadequate.

The Eddie Paul case involved an issue of employment/independent contractor and in a brief Opinion on Decision the WCJ found that the applicant was an employee of our client.

As the Decision of the WCJ was inconsistent with the facts and the applicable law, I filed a Petition for Reconsideration and my contentions are fully set forth in the Board's opinion.

When I began practicing in the workers' compensation arena it was quite common for a party filing a Petition for Reconsideration to then file a **reply brief** to either the judge's Report on Reconsideration or the Answer to the Petition for Reconsideration.

However, the Board then promulgated WCAB Rule 10848 which holds that the only pleadings allowed are a Petition for Reconsideration, the judge's report on the Petition and the Answer filed by the responding party. However, WCAB Rule 10848 does provide that the Board may grant a request pursuant to Rule 10848 to file an additional pleading (reply).

Therefore in cases in which I think a reply is appropriate, I file with the Board a request that the Board allow a reply brief pursuant to WCAB Rule 10848 and I attach my reply brief to the request. Please note on page 2 (line 13-15) the Board commented as follows:

"Defendant has filed a request under Rule 10848 to reply to the WCJ, which is accepted . . . "

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Therefore our job may not be concluded upon the filing of a Petition for Reconsideration. We should, of course, carefully review the Answer by the responding party as well as the Report and Recommendation on the Petition for Reconsideration filed by the trial judge.

If we believe that a reply is then **appropriate** we should file and serve a request that the reply be considered by the Appeals Board- pursuant to WCAB Rule 10848.

Please note that in the Eddie Paul case the Board observed that the decision of the WCJ was not sufficient and requested that the WCJ issue a new Findings & Award "**which sets forth specifically, clearly, and in full detail the evidence the reviewed and relied upon and the reasons or grounds upon which the determination of employment, in employment by Bates U.S.A. as opposed to any other entity was made . . .**"

The Board then referred the WCJ to the leading cases on this issue. These were the same cases that were the subject of my Trial Brief and also my Petition for Reconsideration.

WJT:wf

Enclosure- Opinion and Decision re Eddie Paul v. Bates U.S.A.

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WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

Case No. VNO 378851

EDDIE PAUL,

Applicant,

vs.

BATES, U.S.A.; TRAVELERS
INSURANCE GROUP,

Defendant(s).

OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION

Defendant seeks reconsideration of the Findings and Award issued on June 27, 2001, wherein the workers' compensation administrative law judge (WCJ) determined that applicant sustained an industrial injury to his neck while employed by Bates U.S.A. as a stunt actor on February 5, 1997. The WCJ also found that applicant is entitled to temporary disability from February 6, 1997 to November 5, 1997, at the maximum rate, and that the injury caused permanent disability of 44½%. The WCJ further determined that the claim was not barred by the statute of limitations.

Defendant contends that (1) it was not the employer of applicant, arguing that he was either an employee and/or independent contractor for E.P. Industries, Scenery West, Big Eye Films, or Hyundai Corporation; (2) applicant was acting as an independent contractor at the time that he was injured; (3) applicant's claim is barred by the statute of limitations; and (4) applicant was not entitled to benefits at the maximum rate. Applicant filed an answer.

In the Report and Recommendation on Petition for Reconsideration (report) the WCJ noted that applicant was initially an independent contractor,

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1 hired to prepare and deliver an underwater car to be used in the filming of a
2 television commercial. The WCJ points out, however, that the method of
3 filming the car was "changed" and "the job became dangerous". Due to the
4 increased danger, applicant insisted that he be compensated pursuant to his
5 Screen Actor's Guild membership as a "stunt actor". The WCJ found that
6 Bates, U.S.A. was the agent for Hyundai and was present at the set for filming
7 on Catalina Island. The WCJ reported that applicant, a "very credible witness",
8 testified that Bates U.S.A. had the right to hire and fire people on the set.
9 Applicant was told that he would be on a "higher pay scale as a stunt actor and
10 that he would be covered by insurance." Thereafter, applicant's union filed a
11 grievance against Bates U.S.A., resulting in a settlement agreement that paid
12 applicant for the stunt work. The WCJ concludes that "the record shows that
13 applicant's status changed from independent contractor to employee."

14 Defendant has filed a request under Rule 10848 to reply to the WCJ,
15 which is accepted.

16 Based on the record, and for the reasons set for below, we will grant
17 reconsideration, rescind the Findings and Award issued June 27, 2001, and
18 remand this matter to the WCJ for a new Findings and Award which sets forth
19 specifically, clearly, and in full detail the evidence received and relied upon and
20 the reasons or grounds upon which the determinations of employment, and
21 employment by Bates U.S.A. as opposed to any other entity, was made. In this
22 regard the WCJ should discuss the issue within the framework of analysis
23 provided by *Borello v. Department of Industrial Relations* (1989) 48 Cal. 3rd 341,
24 54 Cal.Comp.Cases 80; *Yellow Cab v. Workers' Comp. Appeals Bd. (Edwinson)*
25 (1991) 56 Cal.Comp.Cases 34; and *Gonzalez v. Workers' Comp. Appeals Bd.*
26 (1996) 46 Cal.App.4th 1584, 61 Cal.Comp.Cases 566.

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1 While we make no decision regarding the ultimate outcome of such
2 analysis at this time, we are persuaded that a more comprehensive statement of
3 the facts and analysis of applicable law regarding applicant's relationship to
4 Bates U.S.A. is required. Similarly, we take no position at this time with regard
5 to the other issues raised herein.

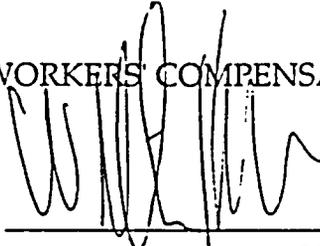
6 For the foregoing reasons,

7 **IT IS ORDERED** that defendant's Petition for Reconsideration, filed
8 July 17, 2001, be, and it hereby is, **GRANTED**.

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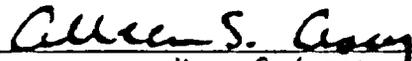
1 IT IS FURTHER ORDERED as the decision after reconsideration of the
2 Worker's Compensation Appeals Board of the Findings and Award issued
3 June 27, 2001, be, and it hereby is, **RESCINDED**, and the matter is returned
4 to the workers' compensation administrative law judge for a new decision.

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6 WORKERS' COMPENSATION APPEALS BOARD

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9 WILLIAM K. O'BRIEN

10 I CONCUR,

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12 
13 Colleen S. Casey

14 CONCURRING, BUT NOT SIGNING

15 JANICE JAMISON MURRAY
16



17
18 DATED AND FILED IN SAN FRANCISCO, CALIFORNIA

19 SEP 17 2001

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

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