



**LARA v. WCAB (2010) (COURT OF APPEALS, CERTIFIED FOR PUBLICATION) 182 Cal. App. 4th 393, *Provided by Laura G. Simpson of the Van Nuys Office***

The Court of Appeal in a published decision affirmed a WCAB decision finding that a gardener was an independent contractor and not an employee at the time he sustained injury and was exempt from worker's compensation coverage. Specifically, the Court held that under the factors set forth by the California Supreme Court in S. G. Borello & Sons, Inc. v. Department of Industrial Relations, 48 Cal.3d 341 (1998), the evidence supported the WCAB's finding as a matter of law that the employee was an independent contractor and not an employee. The California Supreme Court has denied a Petition seeking review of this case.

Here, a gardener fell from a roof while pruning bushes for Metro Diner. The gardener filed a worker's compensation claim against both Metro Diner and its chief shareholder (hereafter "the employer"). The Uninsured Employers Benefits Trust Fund was joined as a defendant.

Following trial, the WCJ concluded that the employer had not overcome the presumption of employment and that the applicant was an employee and injured in the course of his employment. The employer filed a petition for reconsideration based on its contention that under the employment relationship test enunciated by the California Supreme Court in Borello, no employment relationship existed and no injury arose in the course and scope of employment.

The WCAB agreed with employer's position and declared that under the factors which comprise the employment relationship test according to Borello, the evidence presented at trial did not support an employment relationship and applicant was an independent contractor. The primary component of the test according to the Court of Appeal is whether the applicant was performing duties which are an integral part of the employer's business. Here, the employer was a purveyor of food, not engaged in gardening or pruning. The next most important element of the test is whether the employer has the right to control the manner and means of the services performed by the alleged employee. The WCAB and the Court of Appeal concluded that the employer did not have the right to control the means or manner in which the pruning services were done. Other secondary factors to determine whether an employment relationship existed were considered and applied.

Here, applicant did not testify to having been employed by the employer. He did testify to having had his own pruning business for 25 years, using his own pruning equipment on all jobs, paying his own taxes, and that there was no discussion

**between the employee and the employer about ongoing work or future work or the means or manner in which the pruning would be accomplished.**

**The distinguishing factor in the Lara case is the absence of any conflicting evidence. The evidence was undisputed on each of the foregoing elements.**