MEMORANDUM

To: Professor Kerry O'Neil and Audrey Tan

From: Gejing Tong

Date: November 22, 2010

Re: Buckman file, No. 222: Workers' compensation for injuries suffered while "roping" at a job site

Peter Buckman has hired us to help him decide whether to file an application for adjudication of his workers' compensation claim against Roger Wallace, which Wallace's insurance carrier has denied, for injuries Buckman suffered while working at Wallace Vineyards. This memorandum analyzes whether Buckman would prevail if he filed such an application. You have asked me to examine only two prongs: (1) whether Buckman qualifies as an "employee" generally entitled to workers' compensation and (2) assuming Buckman was an employee, whether his workers' compensation claim would be barred under the horseplay doctrine. You have also told me to use only cases decided in or after March 1989 when researching the first prong. As instructed, I have researched both issues exclusively under California law and limited my research to cases involving workers' compensation claims rather than tort claims, licensing requirements or construction.

QUESTIONS PRESENTED

A. Does a hiree, who used his own goats and electric fence to conduct vineyard maintenance at the vineyard of his hirer for the last three years in a row, qualify as an "employee" generally entitled to workers' compensation, given that the hirer often watched his work?

B. Assuming the hiree was an employee, would his workers' compensation claim be barred under the horseplay doctrine, given that before he got injured while roping goats at the hirer's vineyard, the hirer had seen him roping goats and told him not

to rope the goats?

BRIEF ANSWERS/RECOMMENDATION

A. Probably yes. The hiree probably qualifies as an "employee" generally entitled to workers' compensation because the hirer hired the hiree for the past three years in a row to conduct vineyard maintenance at the hirer's vineyard and controlled the means and manner of the hiree's work by watching his work .

B. Probably yes. Assuming the hiree was an employee, his workers' compensation claim might be barred under the horseplay doctrine because even though the injury was suffered at the hirer's vineyard, horseplay was constituted since roping goats was not in the scope of the hiree's employment, and "condonation" exception to the horseplay rule did not apply since the hirer made objection.

Based on my research and your instructions, Buckman probably can prove he was an "employee" generally entitled to workers' compensation, but his workers' compensation claim would likely be barred under the horseplay doctrine because his conduct might be horseplay and the "condonation" exception to the horseplay rule did not apply; thus, he should probably not file such an application.

STATEMENT OF FACTS

On May 25, 2010, Peter Buckman, a hiree who was conducting

vineyard maintenance, fell down and got injured when he was roping goats at Wallace vineyards, his hirer's vineyard. Buckman has already filed a workers' compensation claim to the insurance company but it was denied.

In 2007, Buckman and his brother started a business called Maple Ridge Goats, which used goats to provide a variety of services such as vineyard maintenance to property owners who needed weeds trimmed or eliminated in a natural and inexpensive way. Buckman and his brother used their own goats, herd dog, and electric fence to provide their services which demanded certain skills such as how to set up the electric fence. The price of their services depended on various factors such as the size of the property. Their fee did not depend on the duration of their services.

Roger Wallace was the owner of Wallace Vineyards, a small winery. For the past three years in a row, Wallace Vineyards hired Maple Ridge Goats to conduct vineyard maintenance right after the buds opened on the vines. Wallace often visited the job site and watched those work. Wallace had complained the goats did not eat a certain weed and might have told Buckman he was going to take a deduction out of the fee if the weed could not be moved.

In order to have the freedom to pick their own jobs, Buckman and his brother provided a standard contract that listed

the price to Wallace, in which stated they were "independent contractor," and Wallace had to consent to the set price.

Buchman and his brother sometimes practiced roping goats which was mostly for entertainment, but also could be useful for working with goats as they asserted. Wallace saw Buckman roping the goats a few days before the injury. Wallace said he laughed at first and then told Buckman to stop roping; however, Buckman said Wallace just told them it was not a good idea, so he did not take the advice seriously and kept roping goats until he got injured.

DISCUSSION

Injury suffered by an "employee" is generally compensable. S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations, 769 P.2d 399, 403 (Cal. 1989). However, injury suffered by an "employee" while engaged in horseplay is not generally compensable. Hodges v. Workers' Comp. Appeals Bd., 147 Cal. Rptr. 546, 548 (Ct. App. 1978).

A. Whether Buckman Qualifies As an "Employee"

The principal test of an employment relationship is whether the hirer has the right to control the manner and means to accomplish the result of the hiree's work. Borello, 769 P.2d at 404. An independent contractor is not an "employee" because the hirer has no right to control the manner and means to accomplish the result of the hiree's work. Id. at 403. The purpose of the

legislation is to broaden the scope of employee so that the coverage of injuries becomes more comprehensive. Id. at 406. Therefore, besides the principal test, several secondary factors in determining whether a hiree is an employee have been developed: (1) whether the service is an integral part of the hirer's business; (2) whether the service requires certain skills; (3) whether the hiree invests in materials required for the service; (4) whether the hiree gets paid by time or by job; (5) whether the hiree and the hirer have formed long-lasting working relationship; and(6) whether the hiree and hirer believe they are in an employment relationship. Lara v. Workers' Comp. Appeals Bd., 105 Cal. Rptr. 3d 769, 773 (Ct. App. 2010); Borello, 769 P.2d at 404.

The court has held that sharefarmers in Borello were employees , in which growers hired sharefarmers to harvest cucumbers. 769 P.2d at 401. First, although the growers did not supervise the harvest, "the harvest involved only simple manual labor which could be performed in only one correct way." Id. at 408. Second, since the growers' business included agricultural operations from planting to the sale of the cucumber, the harvest was an integral part of the growers' business. Id. at 407. Moreover, the harvest did not require any certain skills. Id. In addition, the harvest took place on the growers' premises at a time determined by the cucumbers' maturity. Id. at

408. Besides, many sharefarmers returned to the growers every harvest. Id. Finally, the contract which stated the sharefarmers were independent contractors between the growers and the sharefarmers was not decisive since no real bargaining took place. Id. at 409-10.

On the other hand, the court has held that gardener was an independent contractor in Lara, in which a diner hired a gardener to prune bushes. 105 Cal. Rptr. 3d at 769, 770. First, the gardener did it without directions. Id. at 774. Second, pruning bushes was distinct to operating resteraunt, so the gardener's service was separate from the diner's business. Id. Moreover, the gardener provided all the equipment required for the job. Id. at 771. In addition, the gardener was paid on a "job-by-job" basis. Id. at 774. Last, neither the gardener nor the diner believed they were in an employment relationship. Id.

In this case, Buckman probably does not qualify as an "employee" because Wallace did not control the means by which Buckman did his job, and Buckman used certain skills for the work, provided equipment for the work, got paid by the job as opposed to hour, and did not believe he was in an employment relationship. Like the diner in Lara, who did not give directions to the gardener about the manner and means to accomplish the pruning, here, Wallace complained only in order to emphasize the result of Buckman's work rather than

supervising Buckman's manner or means to accomplish the work. Besides, unlike the sharefarmers in Borello, who just provided simple labor, Buckman's work required certain skills such as how to establish a fence. Also, Buckman provided his materials required for the work, just like the gardener in Lara who brought his own equipment to work. Further, similar to the gardener in Lara who was paid on a "job-by-job" basis, Buckman got paid by job based on different factors such as the size of the vineyard. Last, Buckman did not believe he was in an employment relationship just as the gardener in Lara.

On the other hand, despite the contract between them, Buckman more likely qualifies as an "employee" because Wallace often watched Buckman's work, decided the place and time of the work, and hired Buckman for the past three years in a row. Unlike Lara, in which the gardener did the work without the diner's directions, here, Wallace watched Buckman's work and demanded that Buckman either remove a certain weed or take deduction from his fee, suggesting that Wallace controlled the manner and means to accomplish the work. Also, unlike the gardener in Lara, whose work was distinct from and even unrelated to the diner's business, here, Buckman's work was an integral part of operating the vineyard. Besides, Buckman's work took place on Wallace's premises at a time right after the buds opened on the vines, which is similar to Borello, in which

the grower's decided the time and place of the harvest. Further, like Borello, in which the growers returned to Borello every harvest, here, Buckman had worked for Wallace for three years in a row, which indicates that they had formed a long-lasting working relationship. Finally, although the contract between Buckman and Wallace stated that Buckman was an independent contractor, the price was set by Buckman without bargaining, just like Borello, in which the contract was not decisive resulting from no real bargaining.

B. Assuming Buckman Was an Employee, Whether His Workers' Compensation Claim Would Be Barred Under the Horseplay Doctrine

Horseplay is conduct that may result in bodily harm by an employee, which does not "arise out of employment" or "occur in the course of employment." Argonaut Ins. Co. v. Workermen's Comp. Appeals Bd., 55 Cal. Rptr. 810, 815, 819 (Ct. App. 1967); Hodges, 147 Cal. Rptr. at 549-51. Generally, the phrase "arise out of employment" refers to the origin or cause of the injury, and the phrase "in the course of employment" refers to the time and place of the injury. Id. The court has held the employee's conduct was horseplay in Hodges, in which an employee got injured while engaged in a sparring match with his colleague. 147 Cal. Rptr. at 548-49. Because the injured employee was employed as a service adviser, engaging in a sparring match did not arise out of or in his scope of employment. Id. On the

other hand, the judge determined the horseplay rule barring workers' compensation did not apply to the employee's injury in Argonaut, in which an employee got injured while fooling around with other trainees. 55 Cal. Rptr. 810, 816-17. Because the employee was required to live on the employer's premises, the injury received by the employee while making reasonable use of the employer's premises was "in the course of employment." Id.

One major exception to the horseplay rule is the "condonation" exception: if the employer has actual or constructive knowledge of customary horseplay among his employees but voices no objection to it, the injury is, however, compensable. Argonaut, 55 Cal. Rptr. at 817. The employee in Hodges did not come under the "condonation" exception because the employer had no knowledge of the sparring match, and generally did not approve of such conduct. 147 Cal. Rptr. at 551. On the other hand, the employer in Argonaut had knowledge of the employee's "fooling around" but voiced no objection to it, so the "condonation" exception applied. 55 Cal. Rptr. 810, 818.

In this case, Buckman's conduct may not be horseplay. Similar to the employee in Argonaut who got injured "in the course of the employment," here, Buckman's injury was suffered during working hours on Wallace's vineyard. On the other hand, Buckman's conduct was more likely horseplay. Just like the employee who was a service advisor in Hodges, in which engaging

in sparring match which was not related to his job, here, roping goats was mostly for entertainment and unrelated to vineyard maintenance, suggesting Buckman's conduct was not in the scope of his employment.

Further, Buckman's claim might also come under the "condonation" exception to the horseplay rule. Similar to Argonaut, in which the employer did not stop the employee from engaging in sparring match; here, Wallace laughed at first and then merely told Buckman that roping goats was not a good idea, which may constituted approval of such conduct. However, the "condonation exception" most likely does not apply in this case because objection was made since Wallace had told Buckman to stop roping goats after laughing. As in Hodges, in which the employer did not approve the sparring match, and unlike Argonaut, in which the employer made no objection to the employee's "fooling around."

CONCLUSION

Buckman might qualify as an "employee" because Wallace controlled the manner and means to accomplish the result of Buckman's work by watching his work, deciding the place and time of the work, and hiring Buckman for the past three years in a row. In addition, Buckman's workers' compensation claim would probably be barred under the horseplay doctrine because Buckman's conduct was most likely non-condoned horseplay.