

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

STEPHEN AMOS, *Applicant*

vs.

**LUCHETTI CHILDREN'S TRUST, MARKEL INSURANCE COMPANY, ET AL.,
*Defendants***

**Adjudication Number: ADJ12002549
Santa Rosa District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Pursuant to our authority, we accept petitioner's supplemental pleading. (Cal. Code Regs., tit. 8, former § 10848, now § 10964 (eff. Jan. 1, 2020).) Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will deny reconsideration.

We have given the WCJ's credibility determinations great weight because the WCJ had the opportunity to observe the demeanor of the witnesses. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determinations. (*Id.*)

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER



/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 13, 2021

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

**STEPHEN AMOS
PETERSEN LAW
MULLEN FILIPPI
KARASOFF ASSOCIATES
LAURA CHAPMAN
EDD-SDI
OD-LEGAL UNIT**

PAG/bea

I certify that I affixed the official seal of
the Workers' Compensation Appeals
Board to this original decision on this date.
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REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I. INTRODUCTION

Defendant, Markel Insurance Company, through their attorney Paul Karasoff, filed a verified and timely Petition for Reconsideration challenging the Findings and Order dated January 28, 2021.

Applicant claims to have sustained an industrial injury to his right upper extremity, right hand and right fingers on August 1, 2018 during the course of his employment as a construction laborer. He was age 20 on the date of injury.

This matter proceeded to trial and was submitted after three days of trial. In the Findings and Order, the undersigned WCJ found that 1) The Luchetti Children's Trust was the applicant's employer at the time of injury; 2) the applicant was a residential employee within the meaning Labor Code §3351(d); 3) the applicant was not an "excluded employee" as set forth in Labor Code §3352(a)(8); 4) the applicant was not an employee of JL Construction, Inc., JL Builders, Inc., or JL Modular, Inc. on the date of injury; and 5) no general/special employment relationship existed at the time of applicant's injury.

Petitioner contends:

- a. The Judge's Findings and Order that the Luchetti Children's Trust, rather than the Luchetti Ranch Partnership, was the employer at the time of the industrial injury is not supported by substantial evidence and is contrary to established law. *Petition p. 7, line 10- p. 8, line 9,*
- b. The Judge's Finding and Order that the Luchetti Children's Trust was the applicant's employer at the time of the industrial injury is inconsistent with Labor Code Section 3300 (a)(b)(c) and (d) and *Portico Management Group LLC v, Harrison (201 1) 202 Cal. App. 4th 464,473, Petition p 8, lines 10-23,*
- c. The Judge's Finding that the Applicant was not an "excluded employee" as set forth in Labor Code Section 3352(a)(8) is erroneous and is not supported by substantial evidence because the Luchetti Ranch Partnership was not the owner or occupant of a residential dwelling within the meaning of Labor Code Section 3351(d). *Petition p. 8, line 24- p. 10, line 19.*
- d. The Judge's Finding that no general or special employment relationship existed between Applicant and the Jeff Luchetti

Construction, Jeff Luchetti Builders and/or Jeff Luchetti Modular is erroneous. *Petition p. 10, line 20 p, 12, line 19.*

II.

FACTS

A. THE PARTIES

Luchetti Children's Trust/Peter Luchetti

The seven Luchetti siblings are the individual trustees of the Luchetti Children's Trust, including both Peter Luchetti and Jeff Luchetti. (MOH/SOE, 9/30/20, p. 8, lines 40-41.) The Luchetti Children's Trust and the seven Luchetti children own the ranch in Middletown, a house in Lake Tahoe and a rice farm, (MOH/SOE, 9/30/20, p. 8, lines 43-45; p. 12, lines 32-33.)

At issue in this case, is the property in Middletown consisting of a house and aranch. They have different physical addresses but are both owned by the Luchetti Children's Trust. (MOH/SOE, 9/30/20, p. 9, line 6-7.) Specifically, the ownership paperwork for the house parcel lists the seven children individually as well as the Luchetti Children's Trust. (MOH/SOE, 9/30/20, p. 9, lines 9-10.)

Peter Luchetti is one of the seven Luchetti siblings and trustees. According to the general understanding among the siblings, Peter Luchetti deals with the financial aspects of the ranch. (MOH/SOE, 9/30/20, p. 15, lines 28-30.)

Petitioner, Markel Insurance Company, is the worker's compensation carrier for the Luchetti Children's Trust.

Luchetti Ranch Partnership

The Luchetti Ranch Partnership was created as an administrative convenience. (MOH/SOE, 9/30/20, p. 17, lines 43-44.) According to the testimony of Luchetti's Certified Public Accountant, John Maher, the partnership enables them to run expenses through a common account. (MOH/SOE, 9/30/20, p. 17, lines 44-45.) Mr. Maher further testified that the partnership is not considered a business and the majority of the expenses are personal expenses for tax purposes. (MOH/SOE, 9/30/20, p. 18, lines 7-8.)

Although the partnership files its own tax return with its own tax ID number, it does not own any real property, including the house on the ranch

property. (MOH/SOE, 9/30/20, p. 12, lines 29-31.) The partnership was not set up as a money-making business.(MOH/SOE, 9/30/20, p. 9, lines 16-17.)

Jl Modular, Jl Construction, Jl Builders/Jeffrey Luchetti

Jeffrey Luchetti is the owner of JL Modular, JL Construction and JL Builders. (MOH/SOE, 9/30/20, p. 14, lines 21-22.) His brother, Peter Luchetti was never an owner, manager or in a position of authority in any of the JL companies. (MOH/SOE, 9/30/20, p.14, lines 22-24.)

Jeff Luchetti's firm had previously performed jobs on the ranch, including building the ranch caretaker's house, the equipment shed and the agriculture farm. (MOH/SOE, 9/30/20, p. 14, lines 4-5.) However, Jeff Luchetti was not offered the woodshed project because it was not sufficient size or nature for his company. (MOH/SOE, 9/30/20, p. 17, lines 6-8.)

The JL companies are insured by Travelers Property Casualty Company. Travelers filed a Petition for Dismissal, asserting that the JL Companies were not employing the applicant on the date of injury.

B. WORK ASSIGNMENT AND SUPERVISION

The applicant was hired by Peter Luchetti in July of 2018 to build a woodshed to hold firewood for the house. (MOH/SOE, 9/30/20, p. 10, lines 19-20.) Jeff Luchetti had nothing to do with getting the applicant set up with the woodshed job. (MOH/SOE, 9/30/20, p. 15, lines 42-43.)

Leland Sharp was the applicant's supervisor for the woodshed job. (MOH/SOE, 9/30/20, p. 4, line 27.) Leland Sharp had never been employed by Jeff Luchetti or by any of his companies. (MOI-I/SOE, 9/30/20, p. 15, lines 17-18.)

According to Jeff Luchetti's credible trial testimony, he had no role in constructing the woodshed. (MOH/SOE, p. 14, lines 35-36.) He did not provide any instruction on the woodshed job, which he considered a simple project. (MOH/SOE, 9/30/20, p. 15, lines 5-6.)

Jeff Luchetti allows Peter Luchetti or Leland Sharp to use his company accounts to buy material at various supply vendors, including the material for the woodshed project. However, his companies are reimbursed. (MOH/SOE, 9/30/20, p. 15, line 20-22.) Here, Jeff Luchetti promptly requested reimbursement for the woodshed material from the Luchetti Children's Trust. (MOH/SOE, 9/30/20, p. 15,

lines 20-25.)

C. THE INJURY

Applicant claims to have sustained an injury on August 1, 2018 to his right upper extremity, right hand and right fingers, while moving rebar for the woodshed construction project. (MOH/SOE, 9/30/20, p. 4, line 31.) The woodshed sits about 100-200 yards from the house on the Luchetti Ranch. (MOH/SOE, 9/30/20, p. 9, line 47-p. 10, line 1.) As the applicant was exiting a front loader, the bundle of rebar fell off, which threw the fork backwards and pushed his hand into the blade of the bucket. (MOH/SOE, 9/30/20, p.4, lines 31-35.)

A DWC-1 claim form was signed by Peter Luchetti on August 10, 2018. The employer was listed as "Luchetti Children's Trust (Luchetti Ranch Partnership)". (Def. Exh. AA.) The DWC-1 claim form was emailed to Markel Insurance Company on August 11, 2018. (Def. Exh. BB.) The insurance company interviewed the applicant and Leroy Sharp. (MOH/SOE, 9/30/20, p. 11, lines 12-13.)

Markel Insurance Company issued a notice on December 5, 2018 requesting that JL Construction, Inc. submit a claim for the applicant's injury to its workers' compensation insurer. A request was also made for a copy of payroll record, 1099's or any other evidence that Mr. Amos was employed by someone other than JL Construction, Inc. and the dates of when Mr. Amos and Leroy Sharp first began work at the ranch. (Def. Exh. KK.) There were no subsequent communication or notices from Markel Insurance Company.

D. WAGES

The applicant worked for JL Modular through June 29, 2018, the date of his termination. (Def. Exh. GO.) The applicant's insurance, through JL Modular, was terminated the following day, on June 30, 2018. (Def. Exh. HI-I.)

Three days later, on July 2, 2018, the applicant started the woodshed job at the ranch owned by the Luchetti Children's Trust and the seven Luchetti siblings. (MOH/SOE, 9/30/20, p. 7, lines 41-42.) The woodshed hours were turned in to Peter Luchetti. (MOH/SOE, 9/30/20, p. 7, line 18.) The applicant was paid \$1,565.00 by check on August 10, 2018 for the work performed on the woodshed from the Luchetti Children's Trust. (Def. Exh. L.) No temporary disability benefits were paid.

E. THE TRIAL

This matter proceeded to trial on the following issues: the proper employer on applicant's alleged date of injury, whether the applicant was a residential employee pursuant to Labor Code §§3351(d) and 3352(a)(8), Traveler's Petition for Dismissal, and whether the applicant was a general employee of the Jeff Luchetti Construction entities.

The applicant, Peter Luchetti, Jeff Luchetti and Jeff Maher testified at trial. The substance of their testimony is set forth above. This matter was submitted after three days of trial.

An F&O issued finding that 1) the Luchetti Children's Trust was the applicant's employer at the time of injury; 2) Applicant was a residential employee within the meaning Labor Code §3351(d); 3) Applicant was not an "excluded employee" as set forth in Labor Code §3352(a)(8); 4) Applicant was not an employee of JL Construction, Inc., JL Builders, Inc., or JL Modular, Inc. on the date of injury; and 5) no general/special employment relationship existed at the time of applicant's injury. Insurance coverage was deferred to the arbitrator.

It is from this Findings and Order that the petitioner seek reconsideration.

III.

DISCUSSION

A. THE RECORD SUPPORTS A FINDING OF LUCHETTI CHILDREN'S TRUST IS THE PROPER EMPLOYER.

The petitioner relies on the holding from *Portico Management Group LLC v. Harrison*, to support their contention that a trust cannot be an employer. (*Portico Management Group LLC v. Harrison* (2011) 202 Cal. App. 4th 464,473.) In *Portico Management Group LLC*, the Court of Appeal held that a trust was not a proper judgment debtor because it was not a person. The court found that because a trust is not an entity separate from its trustees, it cannot sue or be sued, and it cannot hold title to property. (*Portico Management Group, LLC v. Harrison (supra)* 202 Cal. App. 4th 464.)

Here, the petitioner fails to recognize that the holding in *Portico* does not prevent an action proceeding through the trustees who hold title to the property in trust, as here. (Prob. Code § 18004.)

It is undisputed that the ranch property, including the house is owned by the Luchetti Children's Trust and individually by the seven Luchetti children as trustees. (MOH/SOE, 9/30/20, p. 12, lines 32-33.) Peter Luchetti, acting solely in his representative capacity as a trustee of the Luchetti Children's Trust, contacted the applicant to work on the woodshed and exercised control over the project. (MOH/SOE, 9/30/20, p. 11, lines 37-38.) By constructing the woodshed, the applicant was clearly rendering a service for the benefit of the trustees, as owners of the house.

Conversely, the Luchetti Ranch Partnership, which was merely administrative, did not own the land and did not reap any benefit from the work performed by the applicant. (MOH/SOE, 9/30/20, p. 10, lines 45-46.) As stated in the Opinion on Decision, "Specifically, building the woodshed was for the benefit of the residents of the house, not in furtherance of a business activity or service of the Luchetti Ranch Partnership." (Opinion on Decision, 1/28/21.)

The petitioner asserts that Labor Code Section 3300, which defines who and what may be an employer, does not include trusts. (Petition, p. 8, lines 16-18.) However, partnerships are similarly omitted from the list of employers within Labor Code § 3300.

Regardless, it is presumed that a person rendering service for another is an employee unless the alleged employer affirmatively proves otherwise. (Lab. Code, § 3357; *Yellow Cab v. Workers' Comp. Appeals Bd. (Edwinson)* (1991) 226 Cal.App.3d 1288 [56 Cal.Comp.Cases 34].) This was not done here.

Accordingly, a consensual employment relationship existed between the applicant and Luchetti Children's Trust and the applicant is permitted to recover workers' compensation benefits.

B. THE HOUSE CONSTITUTED A RESIDENTIAL DWELLING CONSISTENT WITH LABOR CODE SECTION 3351(D).

Labor Code § 3351(d) covers employees who perform duties that are

incidental to ownership, maintenance or use of a "residential dwelling".

Here, the petitioner asserts that the Luchetti Ranch Partnership cannot be a residential owner or occupant within the meaning of Labor Code Section 3351. (Petition, p. 9, lines 9-12.) The finding of the Luchetti Children's Trust as the employer, renders petitioner's argument meritless.

The un rebutted evidence shows that the house was never used as a business venture, it was used as a residence. (MOH/SOE, 9/30/20, p. 10, lines 3-5.) The sole activity that generated income for the ranch in 2018 was for a grazing fee. (MOH/SOE, 9/30/20, p. 13, line 38-40.) No other business activities or services are provided on the ranch. (MOH/SOE, 9/30/20, p. 18, lines 3-7.)

Contrary to the petitioner's contention, the family house need not be a principal residence to constitute a residential dwelling pursuant to Labor Code §3351. (Petition, p.9, lines 28-29.) Prior to COVID, the average use of the main house was about 97 days per year over a period of five years. (MOH/SOE, 9/30/20, p. 12, line 46-47.) Yet, an owner is not required to live in a property for it to qualify as a residential dwelling. (*State Farm Fire and Casualty Co. v. WCAB (Leonard)* (1997) 62 CCC 1629.)

The construction of the woodshed was solely to hold wood just for the house, for the benefit of the residents. (MOH/SOE, 9/30/20, p. 10, lines 19-20.) This is further supported by Leroy Sharp, who testified at deposition that the purpose of the firewood was for the fireplace and the outside oven at the house. (Def. Exh, E, Deposition, p. 34, line 21-p. 35, line 2.) Even the petitioner fails to cite any evidence to show the ranch's business venture, in this case a grazing fee, potentially requiring the use of the firewood stored in the woodshed. As such, there is nothing to disrupt the court's finding that the applicant was a residential employee as set forth in Labor Code §3351(d).

C. **NO GENERAL/SPECIAL EMPLOYMENT RELATIONSHIP EXISTED.**

The characteristics of such dual employment are: 1) that the employee is sent by one employer (the general employer) to perform labor for another employer (the special employer); 2) rendition of the work yields a benefit to each

employer; and 3) each employer has some direction and control over the details of the work. (*Kowalski v. Shell Oil Co.* (1979) 23 Cal.3d 168 [44 Cal.Comp.Cases 134].)

Here, petitioner asserts that the applicant was a special employee of the Luchetti Ranch Partnership, who had been lent to the Ranch by his general employer, the Jeff Luchetti Construction entities. (Petition, p. 12, lines 28-29.) Yet, a review of the record compels the opposite finding.

The requisite elements of a special/general relationship are unsubstantiated and lack evidentiary support in this case. In such a relationship, the general employer, or .TL Modular as asserted by petitioner, hires and pays the wages of an employee. Here, the applicant was clearly laid off from .TL Modular on June 29, 2018. (Def. Exh. GG.) Three days later, he started the woodshed job on July 2, 2018. (MOH/SOE p. 7, lines 41-42.) The hours worked on the woodshed were turned into Peter Luchetti, not JL Modular or any other company affiliated with Jeff Luchetti. (MOH/SOE, p. 7, line 18.) Luchetti Children's Trust rendered payment to the applicant for his woodshed labor. (Def. Exh. L.) No evidence was provided to show that the applicant was paid by JL Modular or any other Jeff Luchetti companies on August 1, 2018, the date of his injury.

At the time of his injury, the applicant was not subject to the control of both employers, another essential characteristic of a general/special employment. The evidence showed that Jeff Luchetti's authority to hire or fire the applicant did not extend to the woodshed job. Jeff Luchetti credibly testified that he did not provide any direction or involvement on the woodshed job. (MOH/SOE 9/23/20, p. 5, lines 24-25.) Peter Luchetti, on behalf of the Luchetti Children's Trust, reached out to the applicant for work on the woodshed. (MOH/SOE, 9/30/20, p. 10, lines 19-20.)

Additionally, Jeff Luchetti did not furnish any material for the woodshed job. Any supplies purchased using the Jeff Luchetti company accounts, were promptly reimbursed by the Luchetti Children's Trust. (Def. Exh. II.)

Petitioner contends that the applicant "had previously been working on the Ranch property through JL Modular as recently as June 6, 2018." (Petition p.

6, lines 25-26.) However, the span of time since the applicant last worked on the ranch as an employee of Jeff Luchetti is irrelevant. Instead, the inquiry is limited to whether the applicant was an employee of Jeff Luchetti for the woodshed job. This court finds in the negative.

Finally, petitioner claims, without evidence, that the applicant's 'job at the Ranch for JL Modular involved using the same front loader on the property he was using when he was injured". (Petition p. 6, lines 27-29.) This is directly contradicted by the credible testimony of applicant himself, who stated that the front loader used at the time of the injury was not owned by Jeff Luchetti. (MOH/SOE, p. 5, lines 45-46.)

Although not specified by the petitioner, any assertion that the judge failed to make a finding on all facts in the controversy as required by Labor Code §5313, is remedied by this Report and Recommendation. (*Smales v. WCAB* (1980) 45 CCC 1026(writ denied).)

RECOMMENDATION

It is respectfully recommended that the Petition for Reconsideration be denied.

Dated: March 3, 2021

Respectfully submitted,

Katie F. Boriolo
Workers Compensation
Administrative Law Judge