

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

JOSE PACHECO, *Applicant*

vs.

**THE MIGUELINA F. GONZALEZ LIVING TRUST; STATE FARM MUTUAL AUTO
INSURANCE COMPANY c/o SEDGWICK, CMS, *Defendants***

**Adjudication Number: ADJ14574358
Los Angeles District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration in order to allow us time to further study the factual and legal issues in this case. We now issue our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the Findings and Order and Opinion on Decision (F&O) issued by a workers' compensation administrative law judge (WCJ) on April 11, 2023. By the F&O, the WCJ found that, at the time of his alleged injuries, applicant was not an employee of defendant pursuant to Labor Code section 3352(a)(8).¹

Applicant contends that the WCJ erroneously determined that he was not defendant's employee at the time of his alleged injury, and that the WCJ improperly relied upon an older, inapplicable version of section 3352(a)(8) in reaching his conclusion to the contrary.

The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition for Reconsideration (Petition) be denied. We have not received an answer to the Petition from defendant.

We have reviewed the record in this case and have considered the allegations in the Petition and the contents of the WCJ's Report. For the reasons discussed below, we will rescind the F&O and return this matter to the WCJ for further proceedings and a new decision.

¹ All further statutory references are to the Labor Code unless otherwise noted.

BACKGROUND

Applicant filed a claim for an industrial injury on October 27, 2020 to his face, teeth, arm, wrist, nervous system, hands, and fingers, and “multiple body parts” when he fell from an eight-foot ladder while working as a roofer at a house located in Los Angeles. Defendant denied liability for the claim, raising the defense that applicant was not an “employee” eligible for workers’ compensation pursuant to sections 3351(d) and 3352(a)(8). (See Def. Pretrial Conference Statement, November 30, 2021, p. 3; Def. Petition for Removal, February 4, 2022, p. 1.)

On February 23, 2023, the matter proceeded to trial on the issues of employment and the application of sections 3351(d) and 3352(a)(8). During trial, applicant testified that, on the date of his alleged injury, he was taken to a house in Los Angeles, where he was told that he would be performing construction. (Minutes of Hearing and Summary of Evidence (MOH/SOE), February 23, 2023, p. 3; see also Deposition of Jose Pacheco, App. Exh. 1, August 26, 2021, p. 13.) Applicant was unable to identify the owner of the house and was not asked for the house’s address. Applicant explained that the job was for one day, that the work would last five to seven hours, and that he would be paid \$20.00 per hour. (MOH/SOE, February 23, 2023, p. 3; App. Exh. 1, pp. 13, 23.) Applicant explained that he was on a ladder installing a “wooden mesh” on the house when a support fell and hit his face, causing him to fall off the ladder, break his arm, and lose consciousness. (MOH/SOE, February 23, 2023, p. 3; App. Exh. 1, pp. 14, 23, 27.) Applicant stated that, before he fell off the ladder, he had been working for roughly five hours and that he was never paid for the work that he had done. (MOH/SOE, February 23, 2023, pp. 3-4.)

On April 11, 2023, the WCJ issued the disputed F&O, concluding that applicant was not defendant’s employee pursuant to section 3352(a)(8) because he failed to meet the minimum wage and hour requirements set forth therein. (F&O, April 11, 2023, p. 2.)

On April 18, 2023, applicant filed a timely Petition for Reconsideration of the F&O.

DISCUSSION

As noted above, the only finding issued by the WCJ in the F&O was that applicant was not defendant’s employee pursuant to section 3352(a)(8). (Lab. Code, § 3352(a)(8).) However, section 3352(a)(8) is merely an *exclusion* to the definition of “employee” under the Workers’ Compensation Act (Act). In only ruling on the exclusion, the WCJ overlooked the fact that the Act requires a consecutive step process, whereby the determination of “employee” status must

precede the application of any exclusion. (See Lab. Code, §§ 3351, 3357; *Cedillo v. Workers' Comp. Appeals Bd. (Cedillo)* (2003) 106 Cal.App.4th 227 [68 Cal.Comp.Cases 140, 145]; *Unicare Ins. Co. v. Workers Comp. Appeals Bd.* (1996) 61 Cal.Comp.Cases 1516, 1517 (writ den.)) Here, the WCJ failed to determine whether applicant was, in fact, an employee before determining whether he was excluded from that definition pursuant to the statutes cited by defendant.

Section 3351 defines “employee” 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....” (Lab. Code, § 3351.) Under section 3357, “[a]ny person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee.” (Lab. Code, § 3357.) “[T]he fact that one is performing work and labor for another is prima facie evidence of employment and such person is presumed to be a servant in the absence of evidence to the contrary.” (*Narayan v. EGL, Inc. (Narayan)* (2010) 616 F.3d 895, 900 [75 Cal.Comp.Cases 724].) “Once the presumption of employment comes into play, the burden shifts to the employer to establish that the injured person was an independent contractor or otherwise excluded from protection under the Workers’ Compensation Act. [citations omitted].” (*Barragan v. Workers’ Comp. Appeals Bd. (Barragan)* (1987) 195 Cal.App.3d 637, 642 [52 Cal.Comp.Cases 467]; Lab. Code, § 5705.)

Here, the evidence shows that applicant was hired to perform construction services at a house in Los Angeles, and that he was rendering said services when his alleged injury occurred. (MOH/SOE, February 23, 2023, p. 3; App. Exh. 1, pp. 14, 23, 27.) Defendant does not argue that applicant was an independent contractor. Thus, a presumption that applicant was an employee was established, and it became defendant’s burden to rebut it. (Lab. Code, §§ 3351, 3357, 5705; *Narayan, supra*, 616 F.3d at p. 900; *Barragan, supra*, 195 Cal.App.3d at p. 642.) Here, in rebuttal, defendant argued that applicant was excluded from the definition of “employee” pursuant to sections 3351(d) and 3352(a)(8). (Lab. Code, §§ 3351(d), 3352(a)(8).)

Section 3351(d) includes in the definition of “employee” workers whom we generally refer to as “residential employees.” Section 3351(d) states:

Except as provided in paragraph (8) of subdivision (a) of Section 3352, any person employed by the owner or occupant of a residential dwelling whose duties are incidental to the ownership, maintenance, or use of the dwelling..., or whose duties

are personal and not in the course of the trade, business, profession, or occupation² of the owner or occupant.

(Lab. Code, § 3351(d).)

Section 3352(a)(8) excludes from workers' compensation coverage:

A person described in subdivision (d) of Section 3351 whose employment by the employer to be held liable, during the 90 calendar days immediately preceding the date of injury, for injuries as described in Section 5411, or during the 90 calendar days immediately preceding the date of the last employment in an occupation exposing the employee to the hazards of the disease or injury, for diseases or injuries as described in Section 5412, comes within either of the following descriptions: (a) The employment was, or was contracted to be, for less than 52 hours; (b) The employment was, or was contracted to be, for wages of not more than one hundred dollars (\$100).

(Lab. Code, § 3352(a)(8).)

Only if a worker falls within section 3351(d) *and* 3352(a)(8) is the worker outside of workers' compensation coverage. (*Cedillo, supra*, 106 Cal.App.4th at pp. 234-235.) If a worker does not meet the definition of "employee" under section 3351(d), a defendant cannot invoke the exclusion thereto set forth in section 3352(a)(8). In other words, successful application of section 3351(d) is a prerequisite to the application of section 3352(a)(8).

Here, the WCJ did not determine the issue of whether applicant was a residential employee under section 3351(d), and the record has not been sufficiently developed on this issue. Specifically, there is no evidence of: 1) the identity of the house's owner(s) or occupant(s), i.e., the employer; 2) whether the employer had a trade or business within the meaning of the statute; and 3) whether the house was, in fact, residential, i.e., personal, rather than part of any such trade or business. (Lab. Code, §§ 3351(d), 3355; see *Stewart v. Workers' Comp. Appeals Bd.* (1985) 172 Cal.App.3d 351 [50 Cal.Comp.Cases 524].) Even if we were to assume, for the sake of argument only, that defendant demonstrated each of these elements of the statute, the record lacks sufficient detail regarding the nature of applicant's duties to allow us, or the WCJ, to determine whether those duties were "incidental" to the ownership, maintenance or use of the house, or whether applicant's duties were "in the course of" the employer's trade, business, profession, or occupation, if any; if either was true, applicant would be considered a residential employee under

² Section 3355 defines "course of the trade, business, profession, or occupation" to include "all services tending toward the preservation, maintenance, or operation of the business, business premises, or business property of the employer." (Lab. Code, § 3355.)

section 3351(d). Given that these material issues of fact were not adjudicated below, we cannot interpose a finding on these issues without violating the parties' rights to due process. (See *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584]; *Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [All parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions, including the right to call and cross-examine witnesses; to introduce and examine exhibits; and, to offer rebuttal evidence.])

Therefore, the issue of whether applicant was a residential employee under section 3351(d) must be considered in the first instance at the trial level. (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 404 [65 Cal.Comp.Cases 264] [“it is well established that the WCJ or the Board may not leave undeveloped matters which its acquired specialized knowledge should identify as requiring further evidence”], citing *Garza v. Workers' Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318 [35 Cal.Comp.Cases 500]; *Lundberg v. Workers' Comp. Appeals Bd.* (1968) 69 Cal.2d 436, 440 [33 Cal.Comp.Cases 656].) *Only* if the WCJ determines that applicant is a residential employee under section 3351(d) should he consider whether defendant has also provided sufficient evidence to show that applicant is an excluded employee under section 3352(a)(8).³ (Lab. Code, §§ 5705, 5313; *Hamilton v. Lockheed Corp.* (2001) 66 Cal.Comp.Cases 473, 475 (Appeals Board en banc) [“[T]he WCJ is charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision.”].) A residential employee that does not meet the wage and hour requirements set forth in section 3352(a)(8) is not an employee for workers' compensation purposes.

³ We wish to alert the WCJ to the fact that, if the application of section 3352(a)(8) is warranted, he must determine whether defendant has satisfied its burden under the *current* version of the statute. As applicant accurately notes in its Petition, the WCJ implemented an older, inapplicable version of section 3352(a)(8) in the F&O. (F&O, p. 2.)

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the April 11, 2023 F&O issued by the WCJ is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

KATHERINE A. ZALEWSKI, CHAIR
CONCURRING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JULY 19, 2023

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

**JOSE PACHECO
MERLUZA LAW
LUNA, LEVERING & HOLMES**

AH/cs

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date.
CS