

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

ADRIAN HERNANDEZ, Applicant

vs.

COMPLETE PAINTING, INC.; SUBSTANTIAL SHAREHOLDER HARRY PAUL GLICK; SUBSTANTIAL SHAREHOLDER KELLI SMITH; HEATHER HACH-HEARNE; UNINSURED EMPLOYERS BENEFITS TRUST FUND; ALLSTATE INSURANCE COMPANY, administered by SEDGWICK CMS, Defendants

**Adjudication Number: ADJ9648968
Los Angeles District Office**

OPINION AND DECISION AFTER RECONSIDERATION

Defendant Heather Hach-Hearne seeks reconsideration of the Findings and Award (F&A) issued on January 18, 2022, wherein the workers' compensation administrative law judge (WCJ) found that (1) while employed as a painter on September 15, 2014 by defendants Complete Painting, Inc., Harry Paul Glick, Kelli Smith, and Heather Hach-Hearne, applicant sustained injury to the cervical spine and lumbar spine; (2) Complete Painting, Inc. was uninsured for workers' compensation on September 15, 2014; (3) Complete Painting, Inc. was operating under a suspended painting contractor's license pursuant to Business and Professions Code section 7125.2(a)(2) on September 15, 2014; and (4) applicant was an employee of the owner of the dwelling where he sustained injury, Hach-Hearne, pursuant to Labor Code section 3352(a)(8)(B)¹ based upon his earnings in excess of \$100.00.

Hach-Hearne contends that the WCJ erroneously failed to apply the version of section 3352 in effect on September 15, 2014, which excludes workers from being deemed employees for purposes of workers' compensation coverage if they either perform work for less than 52 hours or earn no more than \$100.00.

We did not receive an Answer.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

¹ Unless otherwise stated, all further statutory references are the Labor Code.

We have considered the allegations of the Petition and the contents of the Report. Based on our review of the record, and for the reasons stated below, as our Decision After Reconsideration, we will affirm the F&A, except that we will amend to find that applicant was not an employee of the owner of the dwelling where he sustained injury, Hach-Hearne, pursuant to section 3352(h).

FACTUAL BACKGROUND

On October 5, 2021, the parties proceeded to trial on the following issues, as relevant:

1. As to employment, is there an exception to Labor Code Sections 3351 and 3352 which is applicable?

...

3. Are the requirements met for Labor Code Section 3351 and 3352?

(Minutes of Hearing and Summary of Evidence, October 5, 2021, p. 3:2-8.)

In the Opinion on Decision, the WCJ states:

Both the applicant and witness Substantial Shareholder Harry Paul “Scotty” Glick (hereinafter “SCOTTY GLICK”) testified that the applicant was hired by Defendant COMPLETE PAINTING, INC., which obtained a contract to paint a house owned by Defendant Heather Hach-Hearne, (hereinafter “HOMEOWNER”). SCOTTY GLICK further testified that he received a contractor’s license in 2010, MOH/SOE 10-5-21, p. 5, l. 19.

COMPLETE PAINTING, INC. was required by Business and Professions Code section 7125 to have workers’ compensation insurance. Witness and Substantial Shareholder SCOTTY GLICK admitted at trial that he had not obtained workers compensation since he had first hired employees, and did not have the insurance in 2014 at the time of applicant’s injury.

(Opinion on Decision, p. 3.)

In the Report, the WCJ states:

1. Homeowner and Petitioner HEATHER HACH-HEARNE was insured for workers compensation purposes through a homeowner’s policy by Allstate Homeowner’s Insurance Company for the residence at 455 North McCadden Place, Los Angeles, CA where the injury occurred.

2. Defendant COMPLETE PAINTING, INC. and Substantial Shareholders HARRY PAUL “SCOTTY” GLICK and KELLI SMITH were uninsured for workers compensation purposes on the date of injury, MOH/SOE 10-5-21 p. 6, lines 1-2. Substantial Shareholder and Manager HARRY PAUL “SCOTTY” GLICK testified that he did not obtain workers’ compensation insurance when he obtained his valid contractor’s license in 2010 because

he did not have any employees, but did not obtain workers' compensation insurance when he later hired employees. At the time of injury, he had 6 employees, MOH/SOE 10-5-21 p.5 line 20. The Uninsured Employers' Benefit Trust Fund was joined and participated at trial.

3. Defendant COMPLETE PAINTING, INC presented Homeowner-Petitioner HEATHER HACH-HEARNE with a Bid Proposal to paint the residence that included a contractor's license number, Joint Exhibit CC. . . . The Bid Proposal was accepted. Petitioner paid the full amount of the Bid Proposal to Substantial Shareholder HARRY PAUL "SCOTTY" GLICK, MOH/SOE 10-5-21 p.5 lines 24-25.
4. The applicant testified he worked for COMPLETE PAINTING, INC. from 2012 to the date of injury in 2014, MOH/SOE 10-5-21 p.6, line 19. The Applicant also testified that he was scheduled to work 8 a.m. to 5 p.m., worked all day 9-14-2014 and was injured working the next day after about 2 hours of work, MOH/SOE 10-5-21 p.6 lines 21-22 and p.7 line 7. He was paid \$120.00 per day, MOH/SOE 10-5-21 p.6 line 24.

. . . .
As noted in the Opinion on Decision, Defendant Complete Painting, Inc., the applicant's long time employer was uninsured for workers' compensation, which acted to suspend his contractor's license from the date he obtained employees and therefore required coverage, Business and Professions Code section 7125.2(a)(2). Where a subcontractor is unlicensed, workers' compensation liability for the subcontractor's employees will be imposed on the homeowner as a matter of law, *Blew v. Horner*, 1986 Cal. App. LEXIS 2348, 51 Cal. Comp. The employee of an unlicensed contractor is deemed to be the employee of the entity that hired the unlicensed contractor, *State Compensation Ins. Fund v. Workers' Comp. Appeals Bd. (Meier)* (1985) 40 Cal.3d 5, 219 Cal.Rptr 13, *Rinaldi v. Workers' Comp. Appeals Bd.*, 1988 Cal. App. LEXIS 181, 53 Cal. Comp. Cases 107.

Section 3352 excludes from the defined employees a worker hired by the homeowner to do maintenance at a residence for less than 52 hours. The applicant here worked at the residence for approximately 10 hours before he was injured, on a contract expected to take 3 days. . . .
(Report, pp. 2-5.)

DISCUSSION

Business and Professions Code section 7125.2(a)(2) provides, in relevant part, as follows:

The failure of a licensee to obtain or maintain workers' compensation insurance coverage . . . shall result in the automatic suspension of the license by operation of law in accordance with the provisions of this section, but this suspension shall not affect, alter, or limit the status of the licensee as an employer for purposes of Section 3716 of the Labor Code.

(Bus. & Prof. Code § 7125.2(a)(2).)

Section 2750.5 provides, in relevant part, as follows:

There is a rebuttable presumption affecting the burden of proof that a worker performing services for which a license is required pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of Business and Professions Code, or who is performing such services for a person who is required to obtain such a license is an employee rather than an independent contractor.
(§ 2750.5.)

Section 3351, as operative on September 15, 2014, provides in relevant part, as follows:

'Employee' means 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, and includes:

...

(d) Except as provided in subdivision (h) 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, including the care and supervision of children, or whose duties are personal and not in the course of the trade, business, profession, or occupation of the owner or occupant.
(§ 3351.)

In turn, section 3352(h), as operative on September 15, 2014, excludes from the definition of "employee" the following:

(h) Any person defined in subdivision (d) of Section 3351 who was employed by the employer to be held liable for less than 52 hours during the 90 calendar days immediately preceding the date of the injury for injuries, as defined 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 or injuries, as defined in Section 5412, or who earned less than one hundred dollars (\$ 100) in wages from the employer during the 90 calendar days immediately preceding the date of the injury for injuries, as defined 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 injuries, as defined in Section 5412.

In interpreting the interaction of sections 2750.5 and 3352(h), the court in *Cedillo v. Workers' Comp. Appeals Bd.*, (2003) 106 Cal.App.4th 227 [68 Cal.Comp.Cases 140] found that a homeowner who hires an unlicensed contractor to perform work for which a license is required becomes the employer of the unlicensed contractor's employees under the workers' compensation scheme unless the injured employee worked for the homeowner less than 52 hours during the 90 days preceding the date of injury or did not earn more than \$100 in wages from that person during the 90 days immediately preceding the date of injury. (*Cedillo, supra*, at pp. 236-237.)

The court reasoned:

Section 2750.5 unequivocally provides that a person lacking the requisite license may not claim to be an independent contractor. (Citations omitted.) Accordingly, the presumption that the person who employs the unlicensed contractor is the employer is conclusive. (Citations omitted.)

...

When the person seeks to hire the services through a licensed independent contractor, it is reasonable to anticipate that the independent contractor will insure against the risk and that the cost of the insurance will be passed on as part of the price of the contract. Thus it is reasonable to exonerate the hirer of the independent contractor. However, when the person performing services for which a license is required is unlicensed, the likelihood that he will insure against the risk of injury and has included the insurance cost in the price of his contract is greatly reduced. It is not unreasonable for the Legislature to conclude that effective implementation of a system of providing for workers' injuries requires liability on the part of the ultimate hirer and that he should not be able to avoid liability on the ground that he dealt with a contractor when the contractor lacked a required license. Whether or not the hirer of the unlicensed contractor must be viewed as negligent in engaging in the hiring, it is apparent that the hirer has little expectation that the contractor will have compensation and liability insurance. While it may seem anomalous to hold that the hirer is liable for compensation only if the contractor lacks the required license, and that he would not be liable if the contractor were licensed, the justification is apparent in that the Legislature has sought to assure that both licensed and unlicensed contractors and their employees will have compensation should they be injured on the job.' (Citation omitted.)

(*Cedillo, supra*, 68 Cal.Comp.Cases at pp. 144–145.)

However, the *Cedillo* court also found that where the employee performed less than 52 hours of work before sustaining injury, section 3352(h) applied to exclude the homeowner from being deemed the worker's "employer" for purposes of imposing worker's compensation liability. (*Id.*, pp. 146-148.)

Here, as stated in the Report, applicant's employer, Complete Painting, Inc., did not hold workers' compensation insurance at the time of injury; and, in consequence, it is deemed unlicensed by operation of law. (Report, p. 4 (citing Bus. & Prof. Code § 7125.2(a)(2)).) Since Hach-Hearne was the homeowner who hired the unlicensed contractor, Complete Painting, Inc., to perform the work during which applicant sustained injury, Hach-Hearne is presumed to be applicant's employer for purposes of imposing workers' compensation liability. (§ 2750.5.) But the record here, as stated in the Report, is that applicant performed less than 52 hours of work on behalf of Hach-Hearne before sustaining injury. (Report, p. 4.) And since section 3352(h), the

version of section 3352 operative at the time of applicant's injury, excludes hirers of workers injured before they have performed 52 hours of work from being deemed the "employer" of the injured worker, the finding that applicant was Hach-Hearne's employee lacks support. (*Cedillo, supra*, at pp. 144–145.) Accordingly, we will amend the F&A to find that applicant was not an employee of Hach-Hearne, the owner of the residential dwelling where the injury occurred, pursuant to section 3352(h).

Accordingly, as our Decision After Reconsideration, we will affirm the F&A, except that we will amend to find that applicant was not an employee of Hach-Hearne, the owner of the residential dwelling where the injury occurred, pursuant to section 3352(h).

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award issued on January 18, 2022 is **AFFIRMED** except that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

4. Applicant ADRIAN HERNANDEZ was not an employee of HEATHER HACH-HEARNE, the owner of the residential dwelling where the injury occurred, pursuant to section 3352(h).

* * *

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

September 7, 2022

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

**ADRIAN HERNANDEZ
LAW OFFICES OF MARICELA BERMUDEZ
LAW OFFICES OF SHELDON SINGER
OFFICE OF THE DIRECTOR – LEGAL
PURINTON, JIMENEZ, LABO & WU**

SRO/es

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