

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

MARCO ANTONIO LOPEZ, *Applicant*

vs.

**SANTA BARBARA INVESTORS and/or
AD&D CONSTRUCTION; SPARTA INSURANCE COMPANY,
administered by GALLAGHER BASSETT; and
STATE COMPENSATION INSURANCE FUND, *Defendants***

**Adjudication Number: ADJ9810139
Los Angeles District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration, the contents of the Report and the Opinion on Decision of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's Report and Opinion on Decision, which are both adopted and incorporated herein, we will deny reconsideration.

In addition to the reasons provided by the WCJ in the Report and the Opinion on Decision, we note that Alfredo Perez was the part owner of AD&D Construction and Alfredo's Painting. (Minutes of Hearing and Summary of Evidence (MOH/SOE) 10/6/20, at pp. 3:17-18; 6:6-7.) Mr. Perez entered into a contract with Santa Barbara Investors (SBI) "for painting, flooring, and a new roof. He did all the work himself except for the roofing job." (*Id.* at p. 3:19-20.) Mr. Perez hired Elias Roofing to do the roofing job (*id.* at p. 3:21-22) and issued payments to Elizardo Macharigue from Elias Roofing. (*Id.* at p. 5:18-21, defendant's Exhibits D, E, F, G, H, I.) The location of the job was at 1725 Orizaba Avenue in Long Beach. (*Id.* at 5:15-17.)

Applicant testified that he worked on Orizaba Street doing roofing work for three days, having been hired by someone name Elias (MOH/SOE, 12/15/20, at p. 3:3-4, 10-11), that Elias paid him (*id.* at p. 5:18-19), and that Alfredo paid Elias. (*Id.* at p.5:23-24.)

Labor Code¹ section 3351 broadly defines the term “employee” for workers’ compensation purposes, as follows: “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.) Section 3357 further provides that “[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.) Finally, section 5705 explicitly states that the employer has the burden of proving that “an injured person claiming to be an employee was an independent contractor or otherwise excluded from the protection of this division where there is proof that the injured person was at the time of his or her injury actually performing service for the alleged employer.” (Lab. Code, § 5705(a).)

The WCJ believed applicant’s testimony that he was at the Orizaba house doing roofing work under the direction and control of Elias Roofing. 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].) Based on this unrebutted testimony, applicant made a sufficient showing that he rendered services to Elias Roofing for roofing work at the Orizaba house. It was defendant’s burden of proof to overcome the presumption of employment and here, defendant did not do so. No evidence rebutting applicant’s testimony, such as the possible testimony of Elizardo or Elias, was presented.

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

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 21, 2021

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

**MARCO ANTONIO LOPEZ
MOORE AND ASSOCIATES
TOBIN LUCKS
STATE COMPENSATION INSURANCE FUND**

PAG/abs

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

**REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION**

Introduction

Defendant, State Compensation Insurance Fund ("SCIF"), has filed a timely, verified Petition for Reconsideration, dated April 23, 2021, challenging the undersigned workers' compensation administrative law judge's (hereinafter "WCJ") Findings and Order dated April 7, 2021. Therein, it was determined that the Applicant was an employee of Defendant, AD&D Construction, insured by SCIF, by virtue of applicant being deemed an employee of the uninsured sub contract or that was hired by AD&D Construction, Elias Roofing. SCIF contends that the evidence did not justify this WCJ's determination and that this WCJ acted in excess of her power and authority.

SCIF contends that applicant was not an employee of AD&D Construction. Codefendant and applicant's attorney filed Answers to the Petition, and the undersigned WCJ agrees with what both codefendant and applicant set forth in their Answers in regards to a finding of employment with AD&D Construction, insured by SCIF.

II

FACTS

Applicant claims an injury on March 24, 2014, while working at a roofing job on Orizaba Street in Long Beach. Both defendants deny employment. This WCJ found that the testimony and evidence submitted were a sufficient basis for a finding of employment as to AD&D, insured by SCIF. Defendant filed the subject Petition for Reconsideration, arguing, in summary, that the applicant was non-credible as a witness and that the documents submitted do not corroborate his testimony nor his employment allegation.

This WCJ reviewed and considered Applicant's and Defendant Gallagher Bassett's Answers to Petition for Reconsideration. As both parties pointed out, the logical steps were met so as to lead to the conclusion that AD&D, insured by SCIF, is the proper party defendant for administration of the claim. Here, AD&D Construction, a general contractor, hired Elias Roofing, a roofing subcontractor, for the Orizaba project. Elias Roofing hired Applicant to perform roofing/labor type work at the project. Applicant was not working as an independent contractor. Eli as Roofing, the applicant's actual hirer, was uninsured at the time. Therefore, the general contractor, AD&D, insured by SCIF, is liable for coverage and administration of this applicant's claim.

III

DISCUSSION

At trial, both applicant and AD&D Construction provided witness testimony. I believe AD&D Construction's Mr. Perez's testimony that he never saw the applicant or his wife (alleged assistant} and that he never directly hired them. I believe Mr. Perez had no intention of considering applicant his employee. I believe applicant did not recognize Mr. Perez when he appeared at the Los Angeles WCAB and was asked who he was or if he could point him out. I did not find applicant entirely credible on various aspects, as it appears he may be easily confused and was not a good historian, not necessarily because he was intentionally trying to deceive. This trial was only on the issue of employment, and while I found Mr. Alfredo Perez to be credible and truthful, I do believe applicant established his burden of proof that he was present at the Orizaba worksite, hired by Elias Roofing to work on the roof, that he did work on the roof for at least a day. Since applicant, like any party, must meet his burden of proof by a preponderance of the evidence per Labor Code §3202.5, the Trier of Fact must weigh all the evidence, including testimony and its credibility, to determine whether there is a sufficient record based upon which a finding of employment can be reached. *Garza v. WCAB (1970) 3 Cal.3d 312*.

As some examples as to what supported my decision and as set forth in the Opinion on Decision, Applicant's testimony, compounded with that of witness Anita Espindola on March 9, 2021(See MOH/SOE, 3/9/21, beginning on page 2, and the checks and the other documentary evidence submitted, established that applicant was not hired at this job as an independent contractor by Elias Roofing or by AD&D Construction. It is clear applicant was hired by Elias to work on the roof in his capacity as a laborer, not as an independent contractor "roofer", and not as a subcontractor of AD&D or Elias Roofing. The fact Elias Roofing was unlicensed and uninsured was an unfortunate, and possibly an unintended consequence, for AD&D Construction.

It is clear that Alfredo Perez/ Alfredo's Painting (the same as AD&D Construction) paid Elizardo Macha Rigue [Macharigue] on 3/5/14 for "roof" or "Orizaba Roof" work in March and April 2014. See Exhibits D, E, F, G. And, AD&D was paid by the investors and/or land owners for the "remodel house" project at Orizaba, as is indicated in the invoices. See Exhibits J, L, M.

The medicals also indicate he was at the job or at least was roofing and claims a fall, per Applicant's Exhibits 1 and 2, albeit both are after the job ended and are respectively dated 7/24/14 and 5/28/14 by Drs. MacArthur and Shah and also indicate a fall from a ladder while at the job.

Even if applicant had his own business, as SCIF has argued, he was not working as an independent contractor at this job and the mechanism surrounding how he was hired (picked up or hired from the hardware store and hired for labor-type work), under Elias Painting's umbrella, does not support a finding of non-employee status.

Petitioner has raised the issue of applicant's credibility repeatedly in its arguments that applicant did not establish his burden of proof on employment. The fact applicant didn't report his alleged injury in a timely fashion, or waited until after the job was over, is an issue for AOE/COE. As mentioned in the Opinion on Decision, I fully understand applicant's credibility issues and his inability to recall all the events of 2014 or the exact dates (or even the month) he worked. I also

indicated in the Opinion that I was not ruling on any other issues, but for purposes of establishing an employment relationship, I believe the submitted record was sufficient to place applicant at the Orizaba job site and working on the roof for Elias Painting.

III

CONCLUSION

Therefore, it is respectfully recommended that Defendant's Petition for Reconsideration be denied.

DATE: May 17, 2021

Karinneh Aslanian
Workers' Compensation
Administrative Law Judge

OPINION ON DECISION

Admissibility of Exhibits:

Defendants objected to applicant's Exhibit 3, the 2011 check. However, that same exhibit was listed and entered by Defendants in Exhibits C and D. There is no prejudice nor undue harm shown by the defendant by allowing this exhibit in. Therefore, Applicant's Exhibit 3 is admitted.

Introduction:

This matter stems from an alleged injury on March 24, 2014, when applicant claimed to be working as a roofer for AD&D Construction (hereinafter "AD&D") and/or Santa Barbara Investors (hereinafter "SBI"). He alleges falling from a ladder and injuring his neck, low back, elbows, left wrist, waist, and arms. AD&D was insured by SCIF, and SBI was insured by Sparta Insurance, administered by Gallagher Bassett Services. The sole issue for trial was employment. Defendant SCIF argued applicant was not an employee, was an independent contractor, and that in the alternative, if he was considered an employee of Elias, then that would transcend the employment by AD&D and would lie with SBI instead of AD&D. Defendant SBI takes the position applicant was never an employee there at the job site, and that even if he was, he was either an independent contractor or was employed by Elias and/or AD&D, but not SBI.

Employment:

The parties submitted much testimony and exhibits in this regard, which is appreciated by the Court. The relevant exhibits and testimony will be addressed within this Opinion on Decision.

AD&D has a construction license as of 8/11/1999 (Defense Exh A). They have a SCIF policy endorsement and/or renewal on 1/23/14, effective on 2/7/14 (Defense Exh B).

There are several checks submitted by the defense. There is a check from "Nello Manciatì" (which we later understand is Elias) issued to Marco Lopez, dated 4/22/11 for \$600.00. This may have been for another job where these two individuals worked together or they entered 2011 instead of 2014. It is unclear. It also indicates in the memo portion that this is for "Roofing/Chamuco", which we later understand to be identifying the Applicant as Chamuco. (Def Exhs C & D, and Applicant's Exh 3, which was marked for identification and now admitted into evidence).

A second check is dated 3/5/14 for \$1,000 from Alfredo Perez/Alfredo's Painting and is addressed to Elizardo Macha Rigue [Macharigue]. The memo says "roof". It appears this is the check Mr. Perez was paying to "Elias Roofing" for the roofing work being done.

There was another check for \$1,000.00 issued on 3/19/14 from Alfredo Perez/Alfredo's Painting to Elizardo Macha Rigue [Macharigue] for "Roof Deposit Orizaba". (Def Exh E). There was another check for \$500 issued on 3/28/14, with the memo reading "Orizaba". (Def Exh F). Another check is issued on 3/31/14 for \$2,000, with the memo reading "Orizaba Roof". The check is signed by Alfredo Perez. (Def Exh G). There is another check on 4/3/14 for \$1,000.00 for

“Orizaba Roof”. (Def Exh H). There is another check on 4/7/14 for \$1,000.00 for “Orizaba Roof”. (Def Exh I).

Alfredo’s Painting issued an invoice dated 9/8/14 to Henry at 1725 Orizaba Avenue. The total due was \$2,455.00 and did NOT include roofing. (Def Exh J). Another invoice was filed by Alfredo’s Painting to Bill Sharp at 1725 Orizaba Avenue for \$425 for work but no roofing. (Def Exh K). There is another Alfredo’s Painting invoice issued to Bill Sharp, dated 5/5/14, for \$4,200.00, and it too does not include roofing. (Def Exh L). Then there is a large invoice dated 4/30/14, for \$43,500, listing “Re-model house”. It does not break down what is included or excluded in that remodel. (Def Exh M).

Applicant submitted a few medical reports, starting on 5/28/14 with Dr. Hitendra Shah, which appears to be about 2 to 3 months after the alleged injury. It indicates that 4/2/14 was the date of injury. What is interesting is the applicant’s history at the very first evaluation that his boss pushed a metal sheet against the ladder, causing him to fall off the ladder about 10 feet to the ground, landing on his back and hitting his head, arms, and legs. He was placed on TTD for 4 weeks, along with various treatment recommendations. (Applicant’s Exh 2). Applicant did not testify at trial about his boss pushing a metal sheet.

On 7/24/14, Dr. MacArthur issued another doctor’s first report of injury, listing 4/2/14 as the date of injury. The report is difficult to read but appears to say “Initial Ortho PTP Eval 59 yo male roofer Fall ladder.” He was placed on TTD for a month, with treatment recommended. (Applicant’s Exh 1).

Applicant submitted a property report, indicating Enduravest was the owner/purchaser on 1/22/14, then became the seller to SBI on 3/20/14. It was sold by SBI to new buyers, the Rios family, on 8/22/14. (App Exh 4). It is unclear what the relevance is for this document submission other than to show the ownership chain of the property. The relevance lie with whether the injury occurred before or after the Rios’s bought the house from SBI.

Enduravest wrote a letter on 4/12/17 to applicant’s attorney, acknowledging the claim was being amended to name SBI, which was a dissolved partnership under the Enduravest Partners umbrella. They indicated that applicant was never an employee of SBI. (App’s Exh 5). According to Applicant’s Exhibit 6, the Secretary of State business entity detail results, this entity was active on 5/24/10, was canceled as of 12/17/10 and remained canceled as of 3/7/12.

I reviewed applicant’s deposition transcript (pages designated by counsel at trial), dated 12/11/17. (Def EXH N). I reviewed applicant’s testimony at trial, as well as the testimony of Alfredo Perez.

I do believe Mr. Perez was being completely truthful in his trial testimony, that he never knew or even saw the applicant or his wife. I viewed this testimony in view of other issues, such as the fact applicant and his wife seemed more upset about not being paid in full for their work at the end of the job, the fact that his various stated mechanisms of injury are not entirely matching (although they all do involve the fall and a ladder in some manner), and that all medical treatment arose much later (after he hired counsel, where he could have sought treatment immediately if he was severely injured at the time it happened), the fact applicant’s trial testimony and memory was

poor (this could be due to the lack of education, inability to fully comprehend, age of the claim, etc.), the fact applicant very likely continued working in similar type work since 2014 and even through the present, I am limited to the employment issue only. Credibility issues on any other issues aside, I must only determine if applicant was an employee of either or both defendants.

In this case, it appears that applicant was an employee of Elias Painting, but this person did not testify, despite being referred to multiple times in the trial and noting the exhibits/checks submitted with his information on it. The checks indicate roofing and/or Orizaba. It is obvious this applicant worked there at least once.

The problem is that Elias was discovered to be uninsured. Mr. Perez was insured by SCIF and he sub-contracted or assigned the roofing job to Elias. While SCIF's counsel did a fine job discrediting the applicant and his mechanism of injury and referencing applicant's deposition, I still believe he was employed at the Orizaba house construction project, and by virtue of there being no valid insurance for the subcontractor, the liability falls directly upon the insured general contractor, or AD&D Construction c/o SCIF.

I again must stress that all other aspects of this claim are in dispute and that applicant was not entirely credible, nor was he a good historian. However, I do not believe he made up a story about being on this jobsite or doing roofing work there. I believe he was at the Orizaba house doing some work and clearly there are checks to reflect that. He was in essence picked up from in front of a hardware store or drove there himself, but the limited roofing job portion that he conducted was clearly under the direction, control, and lead of Elias Roofing and not under his own business name or license. Applicant was not there as an independent contractor as SCIF has suggested. He did not contract with AD&D or Elias directly, he was not picked up or hired by AD&D or Mr. Perez, he did not set his own timeframe or hours, and there is insufficient evidence to show that he brought his own tools or would have even needed his own tools for the limited job portion he was involved with. Even if applicant had his own business, it was not under his business name or license with which he worked this particular job.

Elias did not testify and did not refute applicant's testimony, and I believe applicant was physically there on this job. Applicant has submitted sufficient evidence and testimony per Labor Code Section 3202.5 to establish a predominance of an employment relationship here. This does not extend to SBI, as AD&D is insured. The employment relationship stops at AD&D, insured by SCIF, and is only because roofing subcontractor Elias did not have coverage for his roofing business at the time. Otherwise, AD&D and SCIF would not have been found liable either.

DATE: April 7, 2021

Karinneh Aslanian
Workers' Compensation
Administrative Law Judge