WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MARK ZELDES, *Applicant*

vs.

ALEX METSON; STATE FARM INSURANCE adm. by SEDGWICK CMS; ALTAPACIFIC TECHNOLOGY GROUP; FARMERS INSURANCE EXCHANGE adm. by FARMERS INSURANCE GROUP, *Defendants*

Adjudication Number: ADJ10753903
Fresno 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.

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/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCTOBER 5, 2021

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

MARK ZELDES
SEF KRELL
HANNA BROPHY
GOLDMAN, MAGDALIN & KRIKES

PAG/*pc*

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

1.	Applicant's Occupation:	Disputed
	Age at Injury:	54
	Date of Injury:	11/26/2016
	Parts of Body Alleged Injured:	Upper extremity, hip, shoulders, lower extremities, multiple other
2.	Identity of Petitioner:	Defendant State Farm Insurance
	Timeliness:	The Petition was timely filed on 8/6/21
	Verification:	The Petition was Verified.
3.	Date of Award:	7/15/21
4.	Petitioner contends:	

a. The finding of employment per Labor Code Section 2750.5 is not supported by the evidence.

b. The finding of no employment relationship between the applicant and AltaPacific is not supported by the evidence.

II
FACTS

The applicant alleged that he injured multiple body parts including his upper extremity, hips, shoulders and lower extremities when he fell from the roof or a ladder on November 26, 2016. The applicant alleged at the time of his injury he was employed by either AltaPacific, insured by Farmers Insurance exchange, or by Alex Metson as the homeowner, insured by State Farm Insurance.

The issue of Applicant's employment status proceeded to trial with testimony taken over the course of six days.

There is no dispute in the testimony that the applicant initially contacted AltaPacific, a technology and software development company, for the purpose of developing software that was needed to run a hydroponics system that applicant had been developing. Initially, Applicant met with Alex Metson who was the CEO of AltaPacific about development and purchase of the software. Subsequently, the parties entered into a joint business venture to develop the hydroponics system. There was conflict in the testimony as to the nature and terms of the business venture.

The applicant testified that he was hired as an employee of AltaPacific to build a prototype of the hydroponics system. As part of his employment package, he was to be paid $1,800 per month, biweekly, have his vehicle repaired, be

provided with dental care and a clothing and furniture allowance. According to applicant's testimony, this employment arrangement was to last for 90 days after which he would become a part owner in the Mistoponics LLC. (Summary of Evidence, 3/11/21, pg. 3:20-26; 4:1-4, 10:2-10.) The applicant later testified that he was not sure if he was hired by AltaPacific, or by the group of Mr. Melson and his friends to build the Mistoponics system. The applicant was paid by checks from AltaPacific, Alex Metson's personal account and by Kelly Poole, a friend of Mr. Melson who was interested in the project. (*Id.* At 11:10-13.)

Both the applicant and Mr. Melson testified that the Mistoponics prototype was being constructed within the personal dwelling of Alex Melson. The applicant testified that in order to make final installation of the prototype within an open air atrium of Mr. Metson's condominium, it was necessary to repair some of the wooden beams over the atrium which were rotted by replacing some of the beams. This was necessary to allow corrugated plastic to be placed on the roof to protect the prototype from the weather. According to applicant's testimony, this work was being done for about three to four weeks prior to his injury and the corrugated plastic was attached to the roof using nails and caulking. (*Id.* At 5:17-23.)

The applicant also testified that on the day of his injury, Mr. Melson asked him to make some repairs on the molding above the garage of the condominium. According to the applicant, these repairs had been requested by the homeowner's association to be done prior to a repainting project. (Id. at 5:23 - 6:4.) This testimony was corroborated by testimony of Don Shroyer, who testified that he was on the Board of Directors of the homeowner's association and spoke with Mr. Melson about the needed repairs. He heard Mr. Melson ask the applicant to take care of the repairs. (Summary of Evidence, 11 /17/20, pg. 2: 17-33)

Much of the applicant's testimony conflicted with testimony given by Mr. Melson. Mr. Melson denied that he had directed the applicant to make any repairs to the outside of his condominium prior to it being repainted. (Summary of Evidence, 9/3/20, pg. 2:26 -3:5.) Mr. Metson denied that he had hired the applicant as an employee of AltaPacific but rather was helping him out. (Id at pg. 4:37-5:18.) He testified that he gave the applicant a place to live and money on which to live but could not recall how much money he gave the applicant. (*Id.* at 3:41-46.) Mr. Melson did admit that he gave the applicant two checks for $800 each. (*Id.* at 4:42-45.) Mr. Melson was aware of and agreed to the applicant placing plastic sheeting on the roof of his condominium to keep the rain out, but he was not present when the work was being done. (*Id.* at 5:31-37.)

Mr. Melson testified that there had been an operating agreement entered into by the applicant and Mr. Melson on behalf of AltaPacific for the formation of the Mistoponics LLC. According to that agreement AltaPacific and the applicant would each contribute money for the formation of the corporation but since the applicant did not have any money, his contribution would be in the form of a

loan to be paid back within a certain time frame. (Summary of Evidence, 11/17/20, pg. 8:3-18.) The applicant claimed that he had signed the operating agreement under duress. He claimed that the terms of the written operating agreement were different than those discussed in prior meetings because the written agreement did not include that he was to be paid wages, a clothing allowance, dental care and car repairs until such time as the project was functional. His prior discussions also did not include him repaying part of the initial investment. (Summary of Evidence, 4121/21, pg. 4:13-18; 6:37-7:15.)

The issue of applicant's employment was submitted and the undersigned found that the applicant was not an employee of AltaPacific at the time of his injury but that he was performing work upon the building owned by Mr. Melson that required a contractor's license. The applicant did not have a contractor's license and he had earned more than $100 and worked for more than 52 hours in the 90 calendar days preceding his injury on activities for which a contractor's license is required. Pursuant to Labor Code Section 2750.5, the applicant was an employee of the homeowner, Alex Melson, at the time of his injury. It was Ordered that Alex Melson provide workers' compensation benefits to the applicant. It is from these Findings and Order that Defendant seeks Reconsideration. No answer has been received from Applicant or co-defendant.

III
DISCUSSION

Under Labor Code Section 2750.5, there is a rebuttable presumption that a worker performing services for which a contractor's license is required pursuant to Chapter 9 of Division 3 of the 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. Under BPC 7026, a contractor is "any person who undertakes to or offers to undertake to, or purports to have the capacity to undertake to, or submits a bid to, or does himself or herself or by or through others, construct, alter, repair, add to, subtract from, improve, move wreck or demolish any building, ... " Labor Code Section 2750.5 further adds that "any person performing any function or activity for which a license is required ... shall hold a valid contractors' license as a condition of having independent contractor status." The California Supreme Court, in *SCIF v. WCAB* (Meier) (1985) 50 CCC 562, held that LC 2750.5 is applicable in workers' compensation cases. The Court of Appeals has held that LC2750.5 creates a conclusive presumption that an unlicensed person performing work requiring a license is an employee. (*Blew v. Homer* (1986) 51 CCC 615, 617.)

Defendant contends that the work being done by the applicant on the Mistoponics prototype is excluded from the requirement for a contractor's license by California Business and Professions Code section 7045 which excludes sales or installation of any finished products, materials or merchandise that do not become a fixed part of the structure. Defendant cites those portions

of the testimony that support the moveable nature of the prototype to support that it was not a fixed part of the structure. However, Defendant completely ignores the portion of the testimony concerning the need to repair and replace wooden beams in preparation of adding plastic sheeting to the roof of the condominium in order to enclose the atrium. Clearly, replacement of ceiling beams and installing plastic sheeting which was attached with nails and caulking falls within the type of work that requires a contractor's license. Additionally, Mr. Melson also testified that there were parts of the prototype and lights that had been affixed to the condominium. (Summary of Evidence, 2/3/21, pg. 6:5-6.)

Defendant contends that the court relied upon the uncorroborated testimony of the applicant to establish that he performed work requiring a contractor's license to support the finding of an employment relationship with the homeowner. However, Mr. Melson also testified that he gave his approval to the applicant to install the covering of the atrium. In addition, Exhibit I shows photos of the plastic sheeting partially installed on the roof of Mr. Metson's condominium.

It is defendant's burden to show that the work done by the applicant is excluded under Labor Code Section 3352(a)(8) as taking less than 52 hours and earning less than $100. (*Velazquez v. Lerma*, 2018 Cal. Wrk. Comp. P.O. LEXIS 385.) While the applicant testified that he was making repairs to the beams and attaching the plastic sheeting on the roof for three to four weeks, the homeowner offered no rebuttal testimony. There was no clear testimony provided by either party as to how much the applicant was being paid specifically for the repairs to the ceiling beams and installation of the plastic sheeting. There is evidence, however, in the form of checks as well as testimony from both parties that clearly indicate that more than $100 was paid to the applicant by the homeowner regardless of whether it was characterized as "helping him out" or a loan rather than a salary. By failing to keep an accounting of what money was being paid in exchange for specific services, the defendant has failed to meet his burden of proving that less than $100 was paid in exchange for the work that required a contractor's license.

Mr. Melson, having an electrical contractor's license, either knew or should have known the consequences of having an unlicensed individual performing work requiring a contractor's license.

Defendant contends that with regards to the building of the Mistoponics prototype, Mr. Melson was only involved within his capacity as a major shareholder and CEO of AltaPacific and not as an individual. Defendant contends that the testimony of Mr. Melson demonstrates that he did not personally exercise control over the applicant's activities in such a way as to establish an employment relationship. The undersigned agrees that Mr. Melson did not personally hire the applicant to build he prototype and did not base a

finding of employment on the level of control exerted by Mr. Melson. The finding of employment as explained above was based upon Mr. Metson's decision as the owner of the condominium to utilize an unlicensed individual to perform work on property owned by him and not by AltaPacific that required a contractor's license. Mr. Melson could have avoided such liability by hiring a licensed contractor to perform that portion of the work. The presumption of employee status cannot be rebutted by the factors that would be used to establish independent contractor status for a person who does not hold a contractor's license. (*Chin v. Namvar* (2008) 73 CCC 1577, 1584)

With regards to defendant's contention the applicant was an employee of AltaPacific, the undersigned did not find that portion of the applicant's testimony to be credible as compared to the testimony of Mr. Melson.

IV
RECOMMENDATION

It is recommended that the Petition for Reconsideration be denied.

Respectfully submitted,
DEBRA SANDOVAL
Workers' Compensation Judge

OPINION ON DECISION

EMPLOYMENT

Employment by AltaPacific

The applicant contends that he was hired by AltaPacific with terms of employment consisting of $1,800 per month, repair of his vehicle, dental care, a clothing allowance and a furniture allowance. (MOH, 3/11/21, 3:21 -4:4.) The employment was to last for 90 days at which time he would become a partner in the Mistoponics LLC. (MOH, 3/11/21, 10:8 -10.)

Mr. Melson provided contradictory testimony that the applicant was never hired by AltaPacific but rather that AltaPacific and the applicant intended to enter into a joint business venture to build a specialized hydroponics system to be owned by the Mistoponics LLC. Mr. Metson characterized the money provided to the applicant as either a loan which was to be repaid out of the anticipated future profits of Mistoponics or as gratuitous payments to help the applicant get back on his feet.

Labor Code Section 3357 provides a presumption in favor of employees stating, "any person rendering service for another, other than as an independent contractor or unless expressly excluded herein, is presumed to be an employee." However, in this case the evidence does not support that the applicant was rendering services to AltaPacific. The nature of AltaPacific's business is technology and software development. (MOH, 2/3/21, 1:13 -14.) It is not disputed that the applicant initially contacted AltaPacific about hiring them to produce the software needed to run the hydroponics system that the applicant wanted to develop. Subsequently, it appears that the primary shareholders in AltaPacific became interested in entering into a business arrangement with the applicant which would eventually lead to sharing of profits produced by this hydroponics system through the Mistoponics LLC.

This anticipated business relationship is further evidenced by the operating agreement in which AltaPacific would be entitled to 66. 7% of the profits and the applicant would be entitled to 33.3% of the profits. (Exh. 4.) While the court notes that the operating agreement is unsigned, it does provide support for Mr. Metson's testimony that the nature of the arrangement between AltaPacific and the applicant is more accurately characterized as a joint business venture as opposed to an employer/employee arrangement. In performing the work of building a prototype of the Mistoponics system, the applicant was rendering services in furtherance of Mistoponics LLC of which the applicant would have been a major shareholder.

Further support of the applicant not being an employee of AltaPacific is provide by applying the factors established in *S. G. Borello & Sons, Inc. v. DIR*.

It appears that the work being performed by the applicant was for a specified result of producing the prototype, it was not the type of work ordinarily done in the course of AltaPacific's business, the alleged employer did not specify or control the manner in which the work was to be done and it was the applicant not the alleged employer who had the specialized knowledge and skill to accomplish the goal of building the prototype.

With regards to the nature of the business relationship between the applicant and AltaPacific, the court finds Mr. Metson's testimony to be more credible than that of the applicant.

Employment by the Homeowner, Mr. Melson

Under Labor Code Section 2750.5, there is a rebuttable presumption that a worker performing services for which a contractor's license is required pursuant to Chapter 9 of Division 3 of the 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. Under BPC 7026, a contractor is "any person who unde1iakes to or offers to undertake to, or purports to have the capacity to undertake to, or submits a bid to, or does himself or herself or by or through others, construct, alter, repair, add to, subtract from, improve, move wreck or demolish any building, ... " Labor Code Section 2750.5 further adds that "any person performing any function or activity for which a license is required ... shall hold a valid contractors' license as a condition of having independent contractor status." The California Supreme Court, in *SCIF v. WCAB* (Meier) (1985) 50 CCC 562, held that LC 2750.5 is applicable in workers' compensation cases. The Court of Appeals has held that LC2750.5 creates a conclusive presumption that an unlicensed person performing work requiring a license is an employee. (*Blew v. Horner* (1986) 51 CCC 615, 617.)

In this case, it appears undisputed that at the time of his injury the applicant was involved in making repairs, alterations, adding to or subtracting from Mr. Metson's condominium. There is some conflicting testimony as to whether at the time the applicant fell and was injured he was working on the molding around the front of the garage area or on installing the sheeting to cover the atrium. Regardless, either activity would constitute constructing, altering, repairing, adding to, or subtracting from the building and bring the applicant's activities within the conclusive presumption of Labor Code Section 2750.5.

There is a conflict between LC 2750.5 and LC 3352(a)(8). LC 3352(a)(8) provides that a residential employee who works less than 52 hours and earns less than $100 in wages during the 90 calendar days preceding the injury is not an employee for the purposes of workers' compensation. As such, a homeowner who hires an unlicensed contractor who is injured may not be the employer for workers' compensation unless the employee worked sufficient hours and had sufficient wages under LC 3352(a)(8). It is defendant's burden to show that an

applicant is excluded under LC 3352(a)(8). (*Velazquez v. Lerma*, 2018 Cal. Wrk. Comp. P.O. LEXIS 385.)

The applicant testified that during the three to four weeks prior to his injury, the applicant had been involved in making repairs to the beams over the atrium and attaching corrugated plastic sheeting onto the roof in order to cover the atrium. The defendant provided no evidence or testimony to rebut applicant's testimony that he had performed work which required a contractor's license for more than 52 hours during the 90 days preceding his injury.

With regards to whether or not the applicant had been paid wages less than $100 during the 90 days prior to his injury, there is a conflict in the testimony. Mr. Metson testified that he had given money to the applicant for him to live off of and that he expected to have some but not all of that money repaid. (MOH, 2/3/21, 4:9-11) The applicant testified that he had been hired by AltaPacific to build the prototype of the hydroponic system which would eventually be owned by the LLC Mistoponics. Regardless of which testimony is relied upon, it is clear that the applicant was provided compensation either in the form of wages or money to live upon or housing with value of more than $100. Mr. Metson's testimony as to how much the applicant was paid and for what purpose was vague and insufficient to meet his burden of proof that the applicant had been paid less than $100 for the work he was performing during the 90 days preceding his injury which included structural repairs and additions to the condominium. Even if the applicant was being paid by AltaPacific in anticipation of forming a partnership entity, the work was of the type which required a contractor's license and was being performed by an individual who did not have the necessary contractor's license. This work was being done on property owned not by AltaPacific but by Mr. Metson as an individual.

Defendant Sedgwick contends that the applicant is not entitled to workers' compensation benefits because the money paid to the applicant was not related to repairing the molding around the garage when he was injured. Sedgwick also contends that the applicant testified that he had completed the work on the molding at the time he was injured and was working on the covering of the atrium. Sedgwick argues that since the work on the atrium was for the benefit of either AltaPacific or Mistoponics, Mr. Metson as a homeowner is not liable for the applicant's injury. However, there is nothing in the statue or the case law interpreting LC 2750.5 and LC 3352(a)(8) which require that the motivation for the work being done must only be related to maintenance of the building. Mr. Metson could have avoided liability by hiring a licensed contractor to perform the needed repairs, additions and modifications that were being done with his consent to his personal property.

DATE 7/15/2021
Debra Sandoval
WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE