

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

LUIS RENE ARANGO PACHECO, *Applicant*

vs.

**RANDY VICKREY AND GABRIELA VICKREY, individuals/homeowners;
SATE FARM INSURANCE COMPANY, administered by SEDGWICK CMS;
FIDEL URIZAR, an individual; DAVID CULBERTSON, an individual;
UNINSURED EMPLOYERS BENEFITS TRUST FUND, *Defendants***

Adjudication Number: ADJ4417519

Van Nuys District Office

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration in order to further study the factual and legal issues.¹ This is our Opinion and Decision After Reconsideration.

Defendant, David Culbertson, seek reconsideration of the “Findings of Fact and Order” (F&O) issued on October 19, 2021, by the workers’ compensation administrative law judge (WCJ). The WCJ found, in pertinent part, that applicant claims to have sustained industrial injury to his neck, left shoulder, left elbow, left wrist, and low back on June 18, 2002, and that homeowners Gabriela Vickrey and Randy Vickrey are shielded from liability under Labor Code² section 3352. The WCJ found that applicant was employed by David Culbertson on the date of injury.

Defendant argues that the WCJ erred because defendant also should have been excluded as a residential employer of applicant.

¹ Commissioner Sweeney was on the panel that issued the order granting reconsideration. Commissioner Sweeney no longer serves on the Appeals Board. A new panel member has been substituted in her place.

² All future references are to the Labor Code unless noted.

We have received an answer from defendant, State Farm, and applicant. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of the Petition for Reconsideration, the Answers, and the contents of the WCJ's Report. Based on our review of the record and for the reasons discussed below, and for the reasons provided by the WCJ in the October 19, 2021 Opinion on Decision and the Report, as our Decision After Reconsideration we will rescind the WCJ's October 19, 2021 F&O and substitute a new F&O only to clarify that Randy and Gabriela Vickery are not employers of applicant and clean up the Findings, but otherwise we will affirm the finding that David Culbertson employed applicant.

FACTS

Applicant was working on June 18, 2002 as a painter and construction laborer when he claims to have sustained industrial injury to this neck, left shoulder, left elbow, left wrist, and low back. Applicant injured himself after falling off a ladder while painting a patio cover at a residential dwelling. (Joint Exhibit 1, p. 2.)

The primary issues for trial were employment, laches, and the statute of limitations. The homeowners were joined along with their homeowner's insurance carrier, State Farm. The contractors who were alleged to have employed applicant, David Culbertson, the general contractor, and Fidel Urizar, the subcontractor, were also joined; however, they were both uninsured. (Minutes of Hearing and Summary of Evidence, February 23, 2021, p. 2, lines 18-20.) The Uninsured Employer Benefits Trust Fund (UEBTF) was also joined in this matter; however, they declined to participate at trial.

The WCJ found that the homeowners were "shielded from liability" because applicant was employed on the job site for fewer than 52 hours and thus were excluded as employees per Labor Code section 3352. (Opinion on Decision, October 15, 2021, pp. 2-3.)

Mr. Culbertson and Mr. Urizar had employed applicant for over a year prior to the accident. (MOH-SOE, *supra* at p. 6, lines 1-3.) They paid him \$100.00 per day, cash. (*Ibid.*) Applicant worked with them on four different job sites. (*Ibid.*)

Fidel Urizar is applicant's brother. (*Id.* at p. 8, lines 8-13.) Mr. Urizar instructed applicant on what to do on the job site. (*Ibid.*) Mr. Culbertson would pay Mr. Urizar in checks from which

Mr. Urizar would pay applicant in cash. (*Ibid.*) Mr. Urizar is not a licensed contractor. (*Id.* at p. 6, lines 12-13.) Mr. Urizar did not appear or participate at trial.

Mr. Culbertson was a licensed construction contractor. (MOH-SOE, July 20, 2021, p. 7, lines 4-7.) He would use Fidel Urizar to do demolition. (*Id.* at p. 7, lines 7-11.) Although Mr. Culbertson testified that he did not hire applicant to paint, both homeowners credibly testified that Mr. Culbertson was expected to paint the structure and the WCJ found their testimony more credible.

DISCUSSION

Here, the evidence clearly shows that applicant was hired to perform construction services at a house, and that he was rendering said services when his injury occurred. The WCJ found that applicant's employment with the *homeowners* was excluded because applicant has not yet worked 52 hours for the homeowners at the time of his injury. The WCJ further found that Mr. Culbertson, as the general contractor of the project, employed applicant at the jobsite. Such employment is presumed because a contractor's license was required to perform the work. (§ 2750.5.)

Defendant argues that Mr. Culbertson is also excluded as an employer pursuant to Labor Code section 3715, which states, in pertinent part:

(b) Notwithstanding this section or any other provision of this chapter except Section 3708, **any person described in subdivision (d) of Section 3351** who is (1) engaged in household domestic service who is employed by one employer for over 52 hours per week, (2) engaged as a part-time gardener in connection with a private dwelling, if the number of hours devoted to the gardening work for any individual regularly exceeds 44 hours per month, or (3) engaged in casual employment where the work contemplated is to be completed in not less than 10 working days, without regard to the number of persons employed, and where the total labor cost of the work is not less than one hundred dollars (\$100) (which amount shall not include charges other than for personal services), shall be entitled, in addition to proceeding against his or her employer by civil action in the courts as provided in Section 3706, to file his or her application with the appeals board for compensation.

(§ 3715(b).)

Section 3351(d) states:

(d) 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, 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(d), (emphasis added).)

Defendant's entire argument on reconsideration is that it is also excluded from employment in this case; however, defendant's argument fails to recognize that the exception it invokes only applies to the owner or occupant of the dwelling. (See *Heiman v. Workers' Comp. Appeals Bd.* (2007) 149 Cal. App. 4th 724, 72 Cal. Comp. Cases 314, [Limiting application of section 3352 to the owners of the residence and not extending such protection to a homeowners' association].) Defendant did not own or occupy the dwelling as its residence. Accordingly, defendant is not a "residential employer" and it is not shielded from liability under section 3715 or otherwise excluded from employment under sections 3351 or 3352.

In reaching our conclusion, 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, 504-505].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determinations. (*Id.*)

Although we otherwise agree with the outcome reached by the WCJ, we will rescind and substitute a new Finding of Fact and Order to clarify that Randy and Gabriela Vickery are not employers of applicant. Section 3352 defines those persons who are *excluded* as employees in the Labor Code. As applicant is excluded as an employee, the homeowners are not employers. We otherwise affirm the outcome of the WCJ.

Accordingly, as our Decision After Reconsideration we will rescind the WCJ's October 19, 2021 F&O and substitute a new F&O only to clarify that Randy and Gabriela Vickery are not employers of applicant and clean up the Findings, but otherwise we will affirm the finding that David Culbertson employed applicant.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact and Order issued on October 19, 2021, is **RESCINDED** with the following **SUBSTITUTED** in its place:

FINDINGS OF FACT

1. Applicant Luis Pacheco, who was 46 years old on the date of injury, while employed on June 18, 2002 as a painter and construction laborer, at Newbury Park, by David Culbertson, claims to have sustained injury arising out of and in the course of employment to his neck, left shoulder, left elbow, left wrist, and low back.
2. Pursuant to Labor Code section 3352, applicant was not an employee of Gabriela Vickrey and Randy Vickrey as they owned or occupied the residential dwelling and applicant worked at the residential dwelling for less than 52 hours.
3. David Culbertson did not own or occupy the dwelling where applicant's injury occurred so that Labor Code section 3352 and 3715 do not apply to his employment of applicant.
4. Applicant's claim is not barred by the statute of limitations as the employer failed to provide applicant with a claim form or other statutory notices of his right to seek workers' compensation and thus, the statute of limitations was equitably tolled.
5. Defendant did not meet his burden of proof to show prejudice under the doctrine of laches. Furthermore, defendant, an uninsured employer, has unclean hands.

ORDER

IT IS ORDERED that this matter is returned to the trial level for further proceedings.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 27, 2024

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

**LUIS RENE ARANGO PACHECO
GLASS LAW GROUP, INC.
ROSENBERG, YUDIN & PEATMAN
LAW OFFICES OF SEF KRELL
OFFICE OF THE DIRECTOR, LEGAL UNIT (LOS ANGELES)**

EDL/mc

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