**WORKERS' COMPENSATION APPEALS BOARD**

**STATE OF CALIFORNIA**

**FERNANDO CARDENAS, *Applicant***

**vs.**

**JOSE CALVILLO AND JUDITH CALVILLO, individuals/homeowners; FARMERS INSURANCE EXCHANGE, *Defendants***

**Adjudication Number: ADJ17176604**

**Los Angeles District Office**

**OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION**

Applicant seeks reconsideration of the "Findings of Fact and Order" (F&O) issued on July 15, 2024, by the workers' compensation administrative law judge (WCJ). The WCJ found, in pertinent part, that on the date of alleged injury, applicant was excluded as an employee of defendant pursuant to Labor Code[1] section 3352, because applicant worked for defendant less than 52 hours immediately preceding the injury.

Applicant argues that applicant was presumed to be an employee and that section 3352 is inapplicable because defendant's property was not a residential property or, alternatively, that applicant was contracted to work in excess of 52 hours.

We have not received an answer from defendant.

The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration, unless section 3352 is interpreted as including all contracted time, both pre-injury and post-injury, in which case the WCJ recommended granting 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

[1] All future references are to the Labor Code unless noted.

below, we will grant reconsideration and rescind the WCJ's July 15, 2024 Findings and Order and substitute a new F&O that defers the issue of whether section 3352(a)(8)(A) applies, and return this matter to the trial level for further proceedings consistent with this opinion.

## FACTS

Applicant worked as a laborer and roofer when he claims to have sustained injury on November 19, 2022 to his left leg and left hip when he fell from a roof. (Transcript of Record, March 6, 2024, p. 3, lines 14-24.) The sole issue for trial was employment, with defendant raising application of section 3352, arguing that applicant's employment was contracted to be less than 52 hours. (*Id*. at p. 4, lines 8-17.)

Applicant entered into an agreement with the defendants to replace the roofs on their home and a detached converted garage, which was rented to their daughter. (*Id*. at p. 22, lines 9-24; p. 43, lines 3-5.)

Applicant was not a licensed contractor. (Transcript of Record, May 8, 2024, p. 57, lines 3-4.)

Defendant believed the work would take two or three days to complete. (Transcript of Record, March 6, 2024, p. 58, lines 10-14.)

Applicant was injured on the second day of the job. (Transcript of Record, May 8, 2024, p. 39, lines 14-16.) Applicant returned to the site and ultimately worked six days on site. (*Id*. at p. 64, lines 18-19.)

Applicant's son finished the job, which took a total of nine days to complete. (*Id*. at pp. 46-47.)

Defendant was to pay applicant $8,800.00 to complete the job. (*Id*. at p. 55, lines 24, through p. 4.) Applicant was responsible for buying materials for the job. (*Id*. at p. 59, lines 5-7; Applicant's Exhibit 5.)

## DISCUSSION

### I.

Former section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b) (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
>
> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

(§ 5909.)

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on August 26, 2024, and 60 days from the date of transmission is Friday, October 25, 2024. This decision is issued by or on Friday, October 25, 2024, so that we have timely acted on the Petition as required by section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

According to the proof of service for the Report and Recommendation by the WCJ, the Report was served on August 6, 2024, and the case was transmitted to the Appeals Board on August 26, 2024. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on August 26, 2024.

**II.**

California law broadly defines the presumption of employment as follows: "Any person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee." (§ 3357.)

Section 3351 further defines employee, in pertinent 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 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.
>
> (i) Beginning on July 1, 2020, any individual who is an employee pursuant to Section 2775. This subdivision shall not apply retroactively.

(§ 3351(d).)

Section 3352 excludes residential employment where the following conditions apply:

(a) "Employee," excludes the following:

> (8) 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).

(§ 3352(a)(8).)

Upon establishment of employment, defendant may raise an affirmative defense that applicant is an independent contractor and/or an affirmative defense that applicant is an excluded employee.

With respect to the issue of whether applicant was an independent contractor, since applicant's injury occurred after July 1, 2020, the ABC test of employment within sections 2750.5 and 2775 et. seq. applies. However, upon the facts presented in this case and pursuant to section 2750.5: "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 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."

Here, the evidence clearly shows that applicant was hired to perform roofing services at a residential house, and that he was rendering said services when his injury occurred. Furthermore, neither the homeowners nor applicant were licensed, which is required for roofers. Accordingly, the WCJ correctly found that applicant was presumed to be an employee and not an independent contractor. (§ 2750.5.)

The next question is whether defendant met its burden of proving an exclusion under section 3352. To be clear, it is defendant's burden to prove exclusion of employment pursuant to section 3357, and it is an affirmative defense. (§ 5705(a).) If defendant fails its burden that applicant is excluded under section 3352, then applicant is an employee.

To qualify for the exclusion of employment under section 3352(a)(8), defendant must first prove that it was a residential employer. That is, defendant owned or resided in the house where applicant was working at the time of their injury, and that the employment was not a part of defendant's "trade, business, profession, or occupation." Here, we agree with the WCJ that defendant demonstrated that they owned and/or resided in the premises where applicant was working at the time of his claimed injury and that the other dwelling on the premises was not rented to a member of the public. Therefore, we do not disturb the WCJ's conclusion that section 3352(a)(8) applies.

Thus, next we consider whether the provisions of subdivision (a)(8)(A) and (B) apply. That is, the issue is whether applicant met *either* of the following descriptions: (1) the employment was, *or* was contracted to be, for less than 52 hours; or (2) the employment was, *or* was contracted to be, for wages of not more than one hundred dollars ($100). (§ 3352(a)(8).)

Prior to 2017, the statute excluded from the definition of employee those who were "employed ... for less than 52 hours" or "who earned less than one hundred dollars ($100) in wages" in the 90 days before the injury. (Former § 3352, subd. (h), prior to January 1, 2017.)

However, on August 26, 2016, Assembly Bill 2883 was passed which added the current "or was contracted to be" language highlighted above. (Former § 3352, subd. (h), prior to January 1, 2018; Stats 2016 ch. 205, § 2.) Section 3352 was again amended effective January 1, 2018, renumbering the section, so that subdivision (h) is now subdivision (a)(8). (Stats 2017 ch. 770, § 4.)

We first note that it is undisputed that applicant was to be paid $8,800.00, which far exceeds the description in section 3352(a)(8)(B).

Turning to the number of hours worked, the WCJ found that: "The work under the agreement was expected by the parties to take two to three days." However, our review indicates that the record does not support this finding and requires further development. The agreement here was between defendant and applicant, and therefore, it is assumed that the agreed upon work was expected to be performed by applicant. It was the homeowner who testified that he expected both roofs to be finished within two to three days, which would be less than 52 hours. However, applicant testified that he worked six days on site. Furthermore, applicant's son worked nine days on site, which significantly calls into question whether the work was to be performed in two to three days by applicant.

We note that applicant's hours of employment must encompass all tasks performed. While it is true that applicant's commute time to and from the work site is ordinarily excluded from employment due to the 'going and coming' rule, applicant was tasked with purchasing materials for the job site and disposing of job site waste. (*Schultz v. Workers' Comp Appeals Bd.* (2015) 232 Cal.App.4th 1126, 1128, 80 Cal.Comp.Cases 16, 17.) Such tasks were a part of the employment as special errands and must be counted toward the 52-hour limit. (*Vivion v. National Cash Register Co*., (1962) 200 Cal.App.2d 597, 605; *Robinson v. George* (1940) 16 Cal. 2d 238, 244.)

Decisions of the Appeals Board "must be based on admitted evidence in the record." (*Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) The WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on an issue. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) The Appeals Board has a constitutional mandate to "ensure substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) The Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Id.* at p. 404.)

Upon return, the WCJ must make a determination as to the length of the contracted employment. If defendant cannot produce sufficient evidence that applicant was anticipated to be employed less than 52 hours, then defendant fails its burden of proving an exclusion to employment. Here, we believe the current record is too vague to establish the number of hours expected for the contracted employment, and as appropriate, further development of the record may be appropriate.

Accordingly, we grant reconsideration and as our Decision After Reconsideration, we will rescind the WCJ's July 15, 2024 Findings and Order and substitute a new F&O that defers the issue of whether section 3352(a)(8)(A) applies, and return this matter to the trial level for further proceedings consistent with this opinion.

For the foregoing reasons,

**IT IS ORDERED** that applicant's Petition for Reconsideration of the Findings of Fact and Order issued on July 15, 2024 is **GRANTED**.

**IT IS FURTHER ORDERED** that as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact and Order issued on July 15, 2024 is **RESCINDED** and the following is **SUBSTITUTED** therefor:

1. FERNANDO CARDENAS, [DOB], claims to have sustained an injury arising out of and in the course of employment to the left leg and left hip on November 19, 2022 as a Roofer/Laborer at 2656 East 109th Street, Lynwood, California, on property owned by JOSE CALVILLO and JUDITH CALVILLO, who were on that day insured by FARMERS INSURANCE EXCHANGE.

2. Applicant and Jose Calvillo entered into an agreement whereby the applicant would perform roofing services incidental to the maintenance of the two residential dwellings on the property owned by the Calvillos.

3. Jose Calvillo agreed to pay applicant $8,800.00 for said roofing services.

4. Applicant claims to have been injured while engaged in maintenance to the roofs at the property owned by the Calvillos.

5. Applicant did not hold a valid Roofing Contractor License or workers' compensation insurance on November 19, 2022. Jose Calvillo and Judith Calvillo did not hold a valid Roofing Contractor License on November 19, 2022.

6. Defendant did not meet its burden to show that applicant was an independent contractor.

7. The issue of whether applicant is an excluded employee under Labor section 3352(a)(8)(A) is deferred.

8. All other issues are deferred.

**IT IS FURTHER ORDERED** that this matter is **RETURNED** to the trial level for further proceedings consistent with this decision.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**

**I CONCUR,**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**October 24, 2024**

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

**FERNANDO CARDENAS**
**LAW OFFICES OF MOISES VAZQUEZ**
**SCOTT STRATMAN, ESQ.**

**EDL/mc**

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