`WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

PAUL HESTEHAUGE, ***Applicant,*** **vs.** **WAYNE CHARKINS; LAURIE CHARKINS; CALIFORNIA STATE AUTOMOBILE ASSOCIATION INTER-INSURANCE BUREAU; and TRI-STAR RISK MANAGEMENT (Adjusting Agent),** ***Defendant(s).***	**Case No. SFO 0452026** **OPINION AND DECISION AFTER RECONSIDERATION**

We previously granted the petition for reconsideration of defendant, California State Automobile Association Inter-Insurance Bureau (defendant), to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.[1]

Defendant's petition sought reconsideration of the July 24, 2003 Findings, Award, and Order issued by the workers' compensation administrative law judge (WCJ). In relevant part, that decision found that applicant, Paul Hestehauge (Mr. Hestehauge), sustained industrial injury to his head, entire body, brain and left wrist in a fall on November 15, 2000, while employed as a painter by homeowners, Wayne Charkins (Mr. Charkins) and Laurie Charkins (Mrs. Charkins), the insureds of defendant. In finding that Mr. Hestehauge was employed by Mr. and Mrs. Charkins, the WCJ determined in substance: (1) because Mr. Hestehauge was performing work for which a contractor's license was required, and because he did not have the requisite license, he was an employee under Labor Code section 2750.5;[2] (2) although Mr. Hestehauge was an employee under section 2750.5, not all employments are covered by the Workers' Compensation Act and, here,

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[1] After the order granting reconsideration, Commissioner Cuneo was assigned to the panel to replace Commissioner Murray, who is on leave.

[2] All further statutory references are to the Labor Code, unless otherwise specified.

Mr. Hestehauge had not worked a sufficient number of hours to qualify as a residential "employee" under sections 3351(d) and 3352(h); and (3) notwithstanding the fact that Mr. Hestehauge did not qualify as an "employee" under sections 3351(d) and 3352(h), he nevertheless qualified as an "employee" under section 3715(b) because he was engaged in casual employment where the work was contemplated to be completed in not less than ten working days and where the total labor cost of the work was not less than $100.

Defendant's petition contended, in substance: (1) that the WCJ *correctly* decided that Mr. Hestehauge was not an "employee" of Mr. and Mrs. Charkins under sections 3351(d) and 3352(h) because, in the 90 days prior to his injury, he had not worked at least 52 hours for them and had not earned at least $100 from them; but (2) that the WCJ *incorrectly* decided that Mr. Hestehauge was an "employee" of Mr. and Mrs. Charkins under section 3715(b) because that section applies only to *uninsured* employers and because, in any event, the evidence does not establish that Mr. Hestehauge's painting job for Mr. and Mrs. Charkins was contemplated to be completed in not less than ten working days.

Mr. Hestehauge filed an answer asserting, in substance, that he was properly found to be an "employee" pursuant to section 3715(b) because, prior to January 1, 1977, he would have been a covered employee under former sections 3352(a) and 3354, and because the second paragraph of section 3715(b) expressly states the Legislature's intent to make "no change in the law" as it existed before January 1, 1977 with respect to the three classes of employees set forth in first paragraph of section 3715(b).

For the reasons that follow, we agree with the WCJ that Mr. Hestehauge was *not* an "employee" of Mr. and Mrs. Charkins under sections 3351(d) and 3352(h) because, in the 90 days prior to his injury, he had not both worked at least 52 hours for them and earned at least $100 from them. Nevertheless, we conclude that Mr. Hestehauge *was* an "employee" of Mr. and Mrs. Charkins under section 3715(b): (1) because it applies to all residential employees listed therein, including those employed by *insured* employers; (2) because it is the Legislature's express intent that the three types of residential employees listed therein are covered under the Workers'

Compensation Act if they would have been covered by the law in effect prior to January 1, 1977; and (3) because the pre-1977 law covered residential employees if *either* the work being performed was contemplated to last more than 10 days *or* the total labor cost was at least $100.00, and here Mr. Hestehauge's work met the latter requirement.[3]

I. BACKGROUND

On November 15, 2000, Mr. Hestehauge suffered very serious injuries to his head, spine, and other body parts when, while doing a painting job at the home of Mr. and Mrs. Charkins, he fell approximately 15 feet.[4] Apparently, at the time of his accident, Mr. Hestehauge had been doing "prep" work (i.e., sanding and scraping) on the 18-foot high cathedral ceiling of the Charkins' living room, while standing on a six-foot ladder that was resting on a 12-foot scaffold.

Mr. Hestehauge is an Australian who had been temporarily in California at the time of his injury. He was not a licensed painting contractor here. He and his wife came to California in the Fall of 2000 for a working holiday. Specifically, Mr. Hestehauge came to California to paint the residence of John Emmery, but, in addition, Mr. and Mrs. Hestehauge were visiting with Mr. Emmery and were touring sites in Northern California. Mr. Emmery, who is a California licensed painting contractor, had lived in Australia for a number of years and had been friends with (and had had painting work done by) Mr. Hestehauge for some 15 years.

Mr. Hestehauge met Mr. and Mrs. Charkins socially through Mr. Emmery. At some point, Mr. Hestehauge agreed with Mr. and Mrs. Charkins to do some painting at their house. Although Mr. Charkins is a California-licensed glazing contractor and was aware that people doing contractor's work in California had to be licensed, neither he nor Mrs. Charkins ever asked Mr. Hestehauge if he had a license. Also, Mr. and Mrs. Charkins each testified they never had any

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[3] Section 3715(b)(3) contains language that potentially could be read to suggest that the wages and/or hours necessary to qualify as a covered "employee" are now somewhat different than they were before January 1, 1977. This discrepancy will be discussed in part I-C-5 of this opinion.

[4] There are no medical reports in evidence, so the record does not disclose the actual extent of Mr. Hestehauge's injuries. The seriousness of his injuries, however, is reflected in part by the $763,170.83 lien claim from the Stanford University Medical Center, covering medical treatment from November 15, 2000 through January 5, 2001.

written or oral agreement with Mr. Hestehauge about how much he would be paid for the work, either as a job or by the hour. They testified they merely had agreed with Mr. Hestehauge that he would paint their living room and dining room, and possibly their kitchen.[5]

On the first day of the job, Mr. Hestehauge arrived at Mr. and Mrs. Charkins' house sometime between 7:00 AM and 9:00 AM. His accident occurred at about 10:00 AM.

After the accident, Mr. and Mrs. Charkins had others complete the painting work that Mr. Hestehauge was going to perform.

Mr. Emmery finished the living room, but he also painted some trim and hung some doors. The various witnesses' recollections differed as to how long it took Mr. Emmery to complete this work, but for the most part the witnesses stated that Mr. Emmery's work was finished in anywhere from three days to one week. It appears undisputed, however, that Mr. Emmery did not work steadily over this period, but only intermittently. He was paid about $1,500 to $2,000 for this work.

Another contractor was hired to paint the dining room, as well as the family room and some trim. It took one painter one week (weekdays only) to complete this work.

Mr. Charkins also testified that, at one time, he and his brother-in-law had painted the living room and dining room in two days, working from early in the morning to late in the day (but not evenings). Mr. Charkins also estimated that, working alone, it would have taken him four weekends (eight days) to paint the living room, dining room and kitchen.

Mr. Hestehauge returned to Australia after his accident. Thus, he did not testify at trial. Also, no deposition, affidavit, or declaration from him was offered in evidence.

At the mandatory settlement conference (MSC), the parties raised the issues of industrial injury, insurance coverage, and employment. With respect to the latter issue, applicant alleged that he was an "employee" under section 3715(b)(3) and defendant alleged no "employment" under sections 3351(d) and 3352(h).

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[5] Mr. and Mrs. Charkins purchased or supplied all the "product" (i.e., the paint, caulking, spackle, putty, etc.). Mr. and Mrs. Charkins also supplied the scaffold and ladder. (The scaffold was from Mr. Charkins' glazing business.)

At trial, the issues of industrial injury and employment were raised again. The issue of insurance coverage, however, was withdrawn. In that regard, the Minutes of the trial noted: "[S]ubsequent to the [MSC,] [d]efendant's attorney sent a letter advising that California State Automobile Association Interinsurance Bureau will provide coverage and pay for any liability that may be assessed against Mr. and Mrs. Charkins in these proceedings."[6]

II. DISCUSSION

A. Under Section 2750.5, Mr. Hestehauge Was An Employee, Not An Independent Contractor.

When a worker performs services for a homeowner for which a contractor's license is required (see Bus. & Prof. Code, §7000 et seq.), but the worker does not in fact possess the requisite contractor's license, the worker must be found to be an employee of the homeowner for purposes of workers' compensation. (Lab. Code, §2750.5; *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (*Meier*) (1985) 40 Cal.3d 5 [50 Cal.Comp.Cases 562].)

The evidence establishes that Mr. Hestehauge was not a licensed contractor in California. Moreover, a contractor's license was required for the work he was hired to perform. That is, under California law, if the total labor and materials for a job exceeds $500 (see, Bus. & Prof. Code, §7048), then a contractor's license is required for painting work. (Bus. and Prof. Code, §§7026, 7058(a), 7059; Cal. Code Regs., tit. 16, §§832, 832.33; see, *Furtado v. Schriefer* (1991) 228

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[6] Because California State Automobile Association Interinsurance Bureau has admitted to coverage and has accepted liability for any workers' compensation benefits awarded, we will not address any potential issues regarding coverage under Insurance Code section 11590.

In any event, the WCJ's decision specifically found: "Defendant California State Automobile Association Inter-insurance Bureau insured Defendant[s] Wayne Charkins and Laurie Charkins for workers' compensation." Defendant's petition for reconsideration did not challenge this finding of insurance coverage, so that issue is now waived. (Lab. Code, §§5902, 5904.)

Cal.App.3d 1608 [56 Cal.Comp.Cases 266].)[7] Here, the total labor and materials for the painting job exceeded $500. The testimony and deposition transcripts offered at trial reflect that Mr. Hestehauge was hired by Mr. and Mrs. Charkins to paint a large living room with an 18-foot high cathedral ceiling and a dining room, and that after his injury they paid Mr. Emmery $1,500 to $2,000 just to complete the living room portion of the job.

Accordingly, as found by the WCJ, Mr. Hestehauge was an employee of Mr. and Mrs. Charkins, and not an independent contractor, for workers' compensation purposes – unless he was otherwise excluded by law from "employee" status.

B. At The Time Of His Injury, Mr. Hestehauge Did Not Have The Requisite Earnings Or Hours To Qualify As An "Employee" Under Sections 3351(d) And 3352(h).

Although section 2750.5 mandates that Mr. Hestehauge be deemed an employee of Mr. and Mrs. Charkins, the existence of an employment relationship under section 2750.5 does not necessarily mean that Mr. Hestehauge is entitled to workers' compensation benefits. Some employment relationships are specifically excluded from coverage under the Workers' Compensation Act. (Lab. Code, §3352.) Thus, an "employee" under section 2750.5 may be outside the Act's coverage if he or she is a "residential" employee under section 3351(d) who has

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not met the time and earnings requirements of section 3352(h).[8] (*State Comp. Ins. Fund v.*

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[7] The Business and Professions Code provides that the term "contractor" includes any "specialty contractor." (Bus. & Prof. Code, §7026.) Also, the Business and Professions Code provides that: "A specialty contractor is a contractor whose operations involve the performance of construction work requiring special skill and whose principal contracting business involves the use of specialized building trades or crafts." (Bus. & Prof. Code, §7058(a).) The Business and Professions Code further provides that the Contractors State License Board (CSLB) "may adopt reasonably necessary rules and regulations to effect the classification of contractors …" (Bus. & Prof. Code, §7059(a).) In accordance with this authority, the CSLB has adopted regulations defining the categories of "specialty contractors" (Cal. Code Regs., tit. 16, §832), specifically including painting contractors. (Cal. Code Regs., tit. 16, §§832 [C-33], 832.33.)

[8] Section 3351 provides, in relevant part:

Workers' Comp. Appeals Bd. (*Meier*), *supra*, 40 Cal.3d at p. 14 [50 Cal.Comp.Cases at p. 569]; *Cedillo v. Workers' Comp. Appeals Bd*. (2003) 106 Cal.App.4th 227, 235 [68 Cal.Comp.Cases 140, 146] ("[S]ection 3351, subdivision (d) includes in its definition of an employee persons who are hired to make repairs on a residence. … However, section 3352, subdivision (h), which applies to unlicensed contractors [who are employees under section 2750.5], excludes from coverage as an employee [an] unlicensed worker, who works at the residence less than the required 52 hours."); *Furtado v. Schriefer*, *supra*, 228 Cal.App.3d at pp. 1615-1617 [56 Cal.Comp.Cases at pp. 270-271] ("Section 2750.5 supplements the definitions of employee and independent contractor found in the workers' compensation statutory scheme. It does not purport to override those definitions.").)

Section 3352(h) excludes from the definition of "employee" a section 3351(d) worker who, within the 90 days preceding the injury, *either* worked less than 52 hours for the employer *or* earned less than $100 from the employer. Because section 3352(h) uses the disjunctive, a section 3351(d) employee is excluded unless he or she has *both* worked at least 52 hours for the employer *and* has earned $100 from the employer within the 90-day period. (*Cedillo v. Workers' Comp. Appeals Bd*., *supra*, 106 Cal.App.4th at pp. 234-235 [68 Cal.Comp.Cases at pp. 145-146]; *Stewart v. Workers' Comp. Appeals Bd*. (*Porter*) (1985) 172 Cal.App.3d 351, 355-356 [50 Cal.Comp.Cases 524, 527]; *Fulton v. Nichols* (1978) 43 Cal.Comp.Cases 1137, 1137-1138 (Appeals Board en banc); see also, *State Farm Fire & Cas. Co. v. Workers' Comp. Appeals Bd*.

> " 'Employee' 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."

Section 3352 provides, in relevant part:

> " 'Employee' excludes 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 … , 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 … ."

(*Leonard*) (1997) 16 Cal.4th 1187, 1194 [62 Cal.Comp.Cases 1629, 1632-1633].) Moreover, the 52-hour/$100 test is applied *as of the day of the injury*. That is, the test is *not* whether, but for the injury, the residential employee would have worked 52 hours and earned $100 had he or she completed the job contemplated. Rather, the test is whether, including the day of injury, the residential employee actually had worked 52 hours and earned $100. (*Carter v. Workers' Comp. Appeals Bd*. (*Miller*) (2001) 66 Cal.Comp.Cases 1346 (writ den.); *20th Century Ins. v. Workers' Comp. Appeals Bd*. (*Miller*) (1993) 58 Cal.Comp.Cases 278 (writ den.); *Basilico v. Truck Insurance Exchange* (1993) 21 Cal. Workers' Comp. Rptr. 298 (Appeals Board panel); *Aguilar v. Safeco Ins. Co*. (1993) 21 Cal. Workers' Comp. Rptr. 212 (Appeals Board panel).)

Here, only Mr. and Mrs. Charkins offered testimony regarding the issue of whether Mr. Hestehauge had worked 52 hours for them and had earned $100 from them in the 90 days preceding his injury. It is questionable whether their testimony even establishes that Mr. Hestehauge had earned the requisite $100 as of the time of his injury, given that he had worked only for about one to three hours before he was injured and given that there was no apparent agreement between him and Mr. and Mrs. Charkins regarding payment. But, even if we were to assume that Mr. Hestehauge had earned $100 or more as of the time of his injury, it is clear he had not then worked the requisite 52 hours. Therefore, as found by the WCJ, he is excluded under section 3352(h).

C. Mr. Hestehauge Is An "Employee" Within The Coverage Of The Workers' Compensation Act Under Section 3715(b).

Nevertheless, the WCJ further concluded under section 3715(b) that Mr. Hestehauge was a statutorily covered "employee" of Mr. and Mrs. Charkins because he was a "person described in subdivision (d) of Section 3351 who [was] ... engaged in casual employment where the work contemplated [was] to be completed in not less than 10 working days … and where the total labor cost of the work [was] not less than one hundred dollars ($100)." (Lab. Code, §3715(b)(3).) The WCJ rejected defendant's argument that a residential employee within section 3715(b) may file a workers' compensation claim only if his or her employer is *uninsured*. Defendant had based this

argument on the facts: (1) that section 3715(b) states that its three classes of residential employees may file an application with the WCAB, which the WCAB "shall hear and determine … and shall make the award to the claimant as he or she would be entitled to receive *if the person's employer had secured the payment of compensation as required* …" (defendant's emphasis); and (2) that section 3715(b) is in an Article of the Labor Code entitled "*Uninsured* Employers Fund" (defendant's emphasis). The WCJ concluded there is nothing in section 3715(b) suggesting that it brings an injured employee within the coverage of the Workers' Compensation Act only in cases where the employer is *uninsured*. To the contrary, the WCJ stated that section 3715(b)'s reference to section 3351(d) – which *includes* residential workers within the definition of "employee" for workers' compensation purposes – indicates that section 3715(b) employees are a special class of residential workers who need not meet the wage and hour limitations of section 3352(h) as of the dates of their injuries and who may file a workers' compensation claim, whether their employers are insured or uninsured.

Since 1977, section 3715(b) has essentially read as follows:

> "(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. The appeals board shall hear and determine the application for compensation in like manner as in other claims, and shall make the award to the claimant as he or she would be entitled to receive if the person's employer had secured the payment of compensation as required, and the employer shall pay the award in the manner and amount fixed thereby, or shall furnish to the appeals board a bond, in any amount and with any sureties as the

> appeals board requires, to pay the employee the award in the manner and amount fixed thereby.
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> "It is the intent of the Legislature that the amendments to this section by Chapter 17 of the Statutes of 1977, make no change in the law as it applied to those types of employees covered by this subdivision prior to the effective date of Chapter 1263 of the 1975 Regular Session."[9]

The "types of employees covered" by section 3715(b) to which its second paragraph refers are the three types of section 3351(d) "residential" employees to which its first paragraph refers: (1) household domestic service employees employed by one employer for over 52 hours per week (Lab. Code, §3715(b)(1)); (2) part-time gardeners working at an individual's private dwelling, where the gardening work for that individual regularly exceeds 44 hours per month (Lab. Code, §3715(b)(2)); and (3) casual employees working on jobs 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 $100.00 (Lab. Code, §3715(b)(3)).

In order to fully understand the meaning of section 3715(b) with respect to these types of residential employees, it is necessary to review some legislative history, specifically: (1) the law relating to residential employees in effect immediately before January 1, 1977, which was "the effective date of Chapter 1263 of the 1975 Regular Session" to which the second paragraph of section 3715(b) refers, i.e., the effective date of Assembly Bill No. 469, Stats. 1975, chapter 1263 (hereafter, "AB 469"); (2) the law relating to residential employees in effect from January 1, 1977 to March 25, 1977, which was the effective date of "Chapter 17 of the Statutes of 1977" to which

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[9] There have been minor changes to section 3715(b) since 1977.

In 1980, section 3715(b) was amended: (1) to substitute "in addition to proceeding" for "in lieu of proceedings" in the first sentence of the first paragraph; (2) to substitute "this chapter" for "this article" in the first sentence of the first paragraph; and (3) to substitute "amendments to this section by Chapter 17 of the Statutes of 1977" for "provisions of this bill" in the second paragraph. (Stats. 1980, ch. 852, §10; Stats. 1980, ch. 1091, §5.)

In 1987, section 3715(b) was amended: (1) to redesignate subsections "(b)(i)," "(b)(ii)," and "(b)(iii)" as "(b)(1)," "(b)(2)," and "(b)(3)" in the first sentence of the first paragraph; and (2) to make gender changes in the first paragraph. (Stats. 1987, ch. 202, §1.)

In 1989, section 3715(b) was amended to add "any" in two places in the last sentence of the first paragraph. (Stats. 1989, ch. 2461, §1.)

the second paragraph of section 3715(b) refers, i.e., the effective date of Assembly Bill No. 133, Stats. 1977, chapter 17 (hereafter, "AB 133"); and (3) the law relating to residential employees in effect beginning on March 25, 1977.[10]

Before delving into this legislative history, however, we will set forth some of the basic principles of statutory construction.

1. The Principles of Statutory Construction.

When construing a statute, the Appeals Board's fundamental purpose is to determine and effectuate the Legislature's intent. (*DuBois v. Workers' Comp. Appeals Bd*. (1993) 5 Cal.4th 382, 387 [58 Cal.Comp.Cases 286, 289]; *Nickelsberg v. Workers' Comp. Appeals Bd*. (1991) 54 Cal.3d 288, 294 [56 Cal.Comp.Cases 476, 480]; *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230 [38 Cal.Comp.Cases 652, 657].) Because the statutory language generally provides the most reliable indicator of that intent, the Appeals Board's first task is to look to at the language of the statute itself. (*Ibid.*; e.g., also, *People v. Smith* (2004) 32 Cal.4th 792, 797.)

If the statutory language is clear and unambiguous, then there is no room for interpretation and the Appeals Board must enforce the statute according to its plain terms. (*DuBois v. Workers' Comp. Appeals Bd.*, *supra*, 5 Cal.4th at pp. 387-388 [58 Cal.Comp.Cases at p. 289]; *Atlantic Richfield Co. v. Workers' Comp. Appeals Bd.* (*Arvizu*) (1982) 31 Cal.3d 715, 726 [47 Cal.Comp.Cases 500, 508].)

If, however, the statutory language is ambiguous and susceptible of more than one reasonable interpretation, then the Appeals Board may look beyond the statutory language to other evidence that helps elucidate the Legislature's intent. (*In re Reeves* (2005) 35 Cal.4th 765, 771; *Estate of Griswold* (2001) 25 Cal.4th 904, 911.) These extrinsic aids to interpretation may include the statute's legislative history, its ostensible purposes, the wider historical circumstances surrounding it, the public policy underlying it, and its contemporaneous administrative

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[10] The WCAB acknowledges and appreciates the seminal and extensive work on the section 3715(b) issue done by Judge Richard L. Newman. (See *Galdamez v. Munday* (1999) 27 Cal. Workers' Comp. Rptr. 19 (Appeals Board panel decision).

construction. (*Nolan v. City of Anaheim* (2004) 33 Cal.4th 335, 340; *In re Marquez* (2003) 30 Cal.4th 14, 20; *Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1003; *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387; *Pacific Gas & Electric Co. v. Workers' Compensation Appeals Bd*. (*Bryan*) (2004) 114 Cal.App.4th 1174, 1180 [69 Cal.Comp.Cases 21].) Moreover, statutory phrases are not to be read in isolation; rather, they must be harmonized, both internally and with the entire statutory scheme of which they are a part, to the extent possible. (*State Farm Mut. Auto. Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1043; *Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd*. (*Steele*) (1999) 19 Cal.4th 1182, 1194 [64 Cal.Comp.Cases 1, 8-9]; *DuBois v. Workers' Comp. Appeals Bd*., *supra*, 5 Cal.4th at p. 388 [58 Cal.Comp.Cases at pp. 289-290]; *Moyer v. Workmen's Comp. Appeals Bd*., *supra*, 10 Cal.3d at pp. 230-231 [38 Cal.Comp.Cases at p. 657].) Further, meaning must be given to every word or phrase, if possible, so as not to render any portion of the statutory language mere surplusage. (*Hassan v. Mercy American River Hosp*. (2003) 31 Cal.4th 709, 716; *Moyer v. Workmen's Comp. Appeals Bd*. (1973) 10 Cal.3d 222, 230 [38 Cal.Comp.Cases 652]; *Dept. of Corrections v. Workers' Comp. Appeals Bd*. (*Stentz*) (2003) 109 Cal.App.4th 1720, 1725-1726 [68 Cal.Comp.Cases 853]; *McGee Street Productions v. Workers' Comp. Appeals Bd*. (*Peterson*) (2003) 108 Cal.App.4th 717, 723 [68 Cal.Comp.Cases 708].)

If a statute is ambiguous, then, after considering the foregoing aids to statutory construction, the Appeals Board must choose the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute and to avoiding an interpretation that would lead to absurd consequences. (*Torres v. Parkhouse Tire Service, Inc.*, *supra*, 26 Cal.4th at p. 1003; *Estate of Griswold*, *supra*, 25 Cal.4th at p. 911; *Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 977-978.)

Also, in interpreting any workers' compensation statute, the Appeals Board must be cognizant of the mandate that workers' compensation laws "shall be liberally construed … with the purpose of extending their benefits for the protection of persons injured in the course of their employment." (Lab. Code, §3202.) In accordance with this legislative mandate, it is well settled

that "[w]here provisions of [workers' compensation] laws are susceptible of an interpretation either beneficial or detrimental to injured employees or an ambiguity appears, they must be construed favorably to the employees." (*Granado v. Workmen's Compensation Appeals Bd*. (1968) 69 Cal.2d 399, 404 [33 Cal.Comp.Cases 647, 651]; accord: *Dept. of Corrections v. Workers' Comp. Appeals Bd.* (*Antrim*) (1979) 23 Cal.3d 197, 203-204 [44 Cal.Comp.Cases 114, 119].) Similarly, it has been said: (1) that the liberal construction mandate "provides a means for resolution of ambiguities in the statutes which affect coverage ... [and] if there are two reasonable interpretations of an ambiguous statute, one providing for coverage and one not, we must decide for coverage" (*State Farm Fire & Cas. Co. v. Workers' Comp. Appeals Bd*. (*Leonard*), *supra*, 16 Cal.4th at p. 1196 [62 Cal.Comp.Cases at p. 1634]); (2) that "[i]f a [workers' compensation] provision … may be reasonably construed to provide coverage or payments, that construction should usually be adopted even if another reasonable construction is possible" (*Arriaga v. County of Alameda* (1995) 9 Cal.4th 1055, 1065 [60 Cal.Comp.Cases 316, 322]; accord: *Dept. of Corrections v. Workers' Comp. Appeals Bd.* (*Antrim*), *supra*, 23 Cal.3d at p. 206 [44 Cal.Comp.Cases at p. 121]); and (3) that workers' compensation statutes "must be liberally construed in favor of the employee unless otherwise *compelled* by the language of the statute." (*General Foundry Service v. Workers' Comp. Appeals Bd*. (*Jackson*) (1986) 42 Cal.3d 331, 337 [51 Cal.Comp.Cases 375, 379] (emphasis added).)

We now apply these principles to the interpretation of section 3715(b).

2. The Law In Effect Immediately Before January 1, 1977.

We begin by reviewing the relevant statutory scheme as it existed immediately before January 1, 1977.

Immediately prior to January 1, 1977, the Workers' Compensation Act's general definition of "employee" was fairly broad. (Former Lab. Code, §3351) Nevertheless, section 3352 specifically *excluded* several types of employment from the definition of "employee" for workers' compensation purposes. This exclusion encompassed three types of residential employment. (See, generally, *In-Home Supportive Services v. Workers' Comp. Appeals Bd*. (*Bouvia*) (1984) 152

Cal.App.3d 720, 735 [49 Cal.Comp.Cases 177, 187-188].) Yet, for each of these three types of excluded residential employments, there was an exception, based on meeting certain wage and/or hour thresholds, that brought some residential "employees" within the coverage of the Workers' Compensation Act.

Just before January 1, 1977, one type of residential worker *excluded* from the definition of "employee" was "[a]ny person whose employment [was] both *casual* and not in the course of the trade, business, profession, or occupation of his employer." (Former Lab. Code, §3352(a) (emphasis added).)[11] In this regard, former section 3354 provided: " 'Casual' refers only to employments where the work contemplated is to be completed in not exceeding 10 working days, without regard to the number of men employed, *and* where the total labor cost of such work is less than one hundred dollars ($100); such amount not to include charges other than for personal services." (Former Lab. Code, §3354 (emphasis added).)

Nevertheless, because former section 3354 used the conjunctive, an employment was considered "casual" and, therefore, excluded, only when the work was to be completed in no more than ten days *and* the total labor cost was less than $100.00. Thus, residential employees were not considered "casual" and were *covered* under workers' compensation if *either* the work contemplated was more than 10 days *or* the total labor cost was at least $100.00. (*Daniels v. Johnson* (1940) 38 Cal.App.2d 619, 621-622 [5 Cal.Comp.Cases 110] (employee hired to do painting was a *non-excluded* employee, who was therefore able to bring a civil action against an uninsured employer under former section 3706, where it was contemplated that the work would not be completed in ten days, even though the total labor cost was only $50); *Ensign v. Workmen's Comp. Appeals Bd*. (*Geddes*) (1966) 31 Cal.Comp.Cases 288 (writ den.) (practical nurse hired to work in home was a *non-excluded* employee where, although the work was to last for only five

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[11] The phrase "[c]ourse of the trade, business, profession or occupation of his employer" included "all services tending toward the preservation, maintenance, or operation of the business, business premises, or business property of the employer." (Former Lab. Code, §3355.) Therefore, the "casual" employment exclusion applied primarily to work performed in connection with the maintenance or use of a residence. (E.g., *Hardware Mutual Casualty Co. v. Industrial Acc. Com*. (*Johnson*) (1941) 6 Cal.Comp.Cases 215 (writ den.); *Fraire v. Frenzel* (1947) 12 Cal.Comp.Cases 235.)

days, her earnings were to be $21 per day – a total labor cost of $105); *State Comp. Ins. Fund v. Industrial Acc. Com*. (*Wilson*) (1960) 25 Cal.Comp.Cases 215 (writ den.) (employment not excluded as casual where, although it was contemplated that the job would take only two to four days, the total labor cost exceeded $100).)

A second type of residential worker then excluded from the definition of "employee" was "[a]ny person engaged in household domestic service except as provided in Section 3358.5." (Former Lab. Code, §3352(f).) The term "household domestic service" was defined "to include, but not be limited to, the part-time care and supervision of children in a private residence." (*Id*.)

Nevertheless, not all household domestic workers were outside of the Workers' Compensation Act because the definition of "employee" expressly *included* "[a]ny person engaged in household domestic service who is employed by one employer for over 52 hours per week ... ." (Former Lab. Code, §3358.5.)

A third type of residential worker then excluded from the definition of "employee" was "[a]ny person engaged as a part-time gardener in connection with a private dwelling; provided, the number of hours devoted to such work for any individual does not regularly exceed 44 hours per month. ... ." (Former Lab. Code, §3352(h).)

Nevertheless, because of the 44-hour per month threshold of former section 3352(h), part-time gardeners who regularly worked more than the 44 hours per month *were* covered by the Workers' Compensation Act.

Prior to January 1, 1977, the three types of residential employees *included* within the definition of "employee" – i.e., employees involved in jobs lasting more than 10 days or having total labor costs of at least $100; domestic service employees employed at least 52 hours per week; and part-time gardeners employed at least 44 hours per month – had the same rights as any other "employees" covered by the Workers' Compensation Act.

More specifically, before January 1, 1977, workers' compensation generally was the exclusive remedy for any covered "employee" against his or her employer. (Former Lab. Code, §§3600, 3601.) For covered employees, however, the exclusive remedy rule did not apply if the

employer was *uninsured*. That is, former section 3706 provided: "If any employer fails to secure the payment of compensation, any injured employee or his dependents may bring an action at law against such employer for damages, as if this division did not apply." (Former Lab. Code, §3706.) Also, former section 3715 provided, in relevant part:

> "Any employee whose employer has failed to secure the payment of compensation as required by this division, … may, in lieu of proceedings against his employer by civil action in the courts as provided in Section 3706, file his application with the appeals board for compensation and the appeals board shall hear and determine such application for compensation in like manner as in other claims and shall make such award to such claimant as he would be entitled to receive it set in such employer had secured the payment of compensation as required, and such employer shall pay such award in the manner and amount fixed thereby or shall furnish to the appeals board a bond, in such an amount and with such sureties as the appeals board requires, to pay such employee such award in the manner and amount fixed thereby." (Former Lab. Code, §3715.)

Thus, under former sections 3706 and 3715, "any employee" covered by the Workers' Compensation Act could assert either a workers' compensation claim or a civil action against an *uninsured* employer, although the "in lieu of" language of former section 3715 meant that an employee of an uninsured employer *had to elect* between the civil remedy or the workers' compensation remedy. The employee could *not* proceed against the uninsured employer both with a negligence action in Superior Court *and* with a workers' compensation claim before the WCAB. (*Felix v. Workmen's Comp. Appeals Bd*. (1974) 41 Cal.App.3d 759, 763 [39 Cal.Comp.Cases 611, 613]; *Jenkins v. Workmen's Comp. Appeals Bd*. (1973) 31 Cal.App.3d 259, 262-263 [38 Cal.Comp.Cases 201, 204].)

If an included employee elected a workers' compensation remedy against an uninsured employer, and if the uninsured employer failed to timely pay the award made under section 3715,

then the Uninsured Employers Fund ("UEF")[12] was designated to pay the award. (Former Lab. Code, §3716.)

Before January 1, 1977, however, the three classes of residential workers who were statutorily *excluded* from workers' compensation coverage – i.e., casual employees involved in jobs lasting 10 days or less and with total labor costs of $100 or less; domestic service employees employed less than 52 hours per week; and part-time gardeners employed less than 44 hours per month (former Lab. Code, §§3352(a), (f), & (h), 3354.) – could *not* file a workers' compensation claim, whether their employers were insured or uninsured, and they were not entitled to receive UEF benefits, if the employers were uninsured. These workers were limited to bringing a negligence action against their employers in civil court. (Former Lab. Code, §§3600(a), 3602; see also, *Cedillo v. Workers' Comp. Appeals Bd.*, *supra*, 106 Cal.App.4th at pp. 236-237 [68 Cal.Comp.Cases at pp. 147-148]; *Rosas v. Dishong* (1998) 67 Cal.App.4th 815, 822 [63 Cal.Comp.Cases 1376, 1381].) Moreover, because these employers were not required to insure these statutorily *excluded* employees, the provisions of former section 3708 – entitling the injured employee to a rebuttable presumption that the injury resulted from the *uninsured* employer's negligence and barring the *uninsured* employer from raising the defenses of the employee's contributory negligence or assumption of the risk – were not available to these three classes of *excluded* residential workers. (Compare *Daniels v. Johnson*, *supra*, 38 Cal.App.2d at pp. 621-622 [5 Cal.Comp.Cases 110].)

3. The Law In Effect From January 1, 1977 To March 25, 1977.

All of the foregoing statutes remained intact until January 1, 1977, the effective date of AB 469.[13]

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[12] We will also use "UEF" to refer to the current designation of that Fund, i.e., the Uninsured Employers Benefits Trust Fund.

[13] To reiterate, it is AB 469 to which the second paragraph of section 3715(b) refers when it states: "It is the intent of the Legislature that the amendments to this section by Chapter 17 of the Statutes of 1977, make no change in the law as it applied to those types of employees covered by this subdivision *prior to the effective date of Chapter 1263 of the 1975 Regular Session*." (Emphasis added.)

AB 469 significantly changed the previously existing legislative scheme with respect to residential employees. As discussed in more detail immediately below, it amended the definition of "employee" to include *all* casual employees, domestic service employees, and gardeners – regardless of the hours worked or the wages paid for the job – except for those employed by a parent, spouse or child. Concurrently, AB 469 sought to protect residential employers by requiring that comprehensive personal liability policies contain a provision including workers' compensation coverage.[14]

Specifically, AB 469 repealed former sections 3352(a), (f), and (h), which had excluded casual employees, many domestic service employees, and many gardeners from workers' compensation coverage. At the same time, AB 469 added section 3351(d), which specifically extended the statutory definition of "employee" to include: "[*a*]*ny person* employed by the owner of a private dwelling, whose duties are incidental to the ownership, maintenance, or use of the dwelling, including the performance of household domestic service." (Emphasis added.) Section 3351(d), as added, further stated: "For the purpose of this subdivision, household domestic service shall include, but not be limited to, the care and supervision of children in a private residence." Thus, the legislative history of section 3351(d) indicates it was intended to expand the workers' compensation system to include most casual employees, domestic service employees (including babysitters), and gardeners who previously had been excluded under former sections 3352(a), (f), and (h). (*Scott v. Workers' Comp. Appeals Bd*. (1981) 122 Cal.App.3d 979, 985 [46 Cal.Comp.Cases 1008, 1012]; see also, *Fichera v. Workers' Comp. Appeals Bd*. (*May*) (1980) 46 Cal.Comp.Cases 26, 27 (writ den.); 3 Cal. Workers' Comp. Rptr. 161 & 186 (1975).) The only exception was that AB 469 expressly excluded from the definition of "employee" any residential worker employed by his or her parent, spouse, or child. (Lab. Code, §3352(a).)

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[14] Although enacted in 1975, AB 469 did not take effect until January 1, 1977. Presumably, this was to allow residential employers a reasonable period of time to obtain workers' compensation insurance policies covering the substantially broadened class of residential employees. (See *State Farm Fire & Cas. Co. v. Workers' Comp. Appeals Bd*. (*Leonard*), *supra*, 16 Cal.4th at pp. 1204-1207 [62 Cal.Comp.Cases at pp. 1641-1643] (Werdegar, J., Dissenting).)

To help protect both this broad new class of covered residential employees and their employers, however, AB 469 added provisions to the Insurance Code requiring that any comprehensive personal liability insurance policy (i.e., a homeowner's policy) issued, amended, or renewed on or after January 1, 1977 must provide for workers' compensation coverage of any section 3351(d) employee, unless: (1) the services of such employee were in connection with the business pursuits of the insured; or (2) the policyholder opted out by certifying that he or she employed no residential employee not excluded by the parent, spouse, or child provision of section 3352. (Former Ins. Code, §§11590, 11591, 11592; see also, *State Farm Fire and Cas. Co. v. Workers' Comp. Appeals Bd*. (*Leonard*), *supra*, 16 Cal.4th at p. 1194, fn. 3 [62 Cal.Comp.Cases at p. 1632, fn. 3].)

Moreover, AB 469 left intact the provisions of former sections 3706 and 3715. Thus, "any employee" whose employer had failed to secure the payment of compensation could still elect to pursue either a workers' compensation claim or a civil action against an *uninsured* employer. Further, former section 3716 still provided that, if the employee chose a workers' compensation remedy against an uninsured employer, and if the uninsured employer failed to timely pay the award, UEF would pay it. (Former Lab. Code, § 3716.) Thus, UEF benefits became available to this now broadly expanded group of residential employees.

But, AB 469's coverage of almost all residential employees under the Workers' Compensation Act lasted only from January 1, 1977 until March 25, 1997. (*Fulton v. Nichols*, *supra*, 43 Cal.Comp.Cases at p. 1138.)

By early in the 1977 legislative session, concerns arose about AB 469. (See generally, 5 Cal. Workers' Comp. Rptr. at pp. 18, 44-45 (1975); *State Farm Fire and Cas. Co. v. Workers' Comp. Appeals Bd*. (*Leonard*), *supra*, 16 Cal.4th at pp. 1205-1206 [62 Cal.Comp.Cases at pp. 1642-1643] (Werdegar, J., Dissenting); *Fichera v. Workers' Comp. Appeals Bd*. (*May*), *supra*, 46 Cal.Comp.Cases at p. 27.) Some critics argued that, because AB 469 included no wage or time restrictions, it extended residential employee coverage too far, e.g., to the casual babysitter or to "the kid who washes your car." Other critics feared that AB 469 would create significantly

increased demands against UEF to pay the workers' compensation claims of residential employees because: (1) many homeowners employing residential workers would *not* have or obtain a comprehensive personal liability insurance policy – which, necessarily, would include a workers' compensation provision covering residential employees; or (2) homeowners who did have such general liability policies would elect to "delete" their workers' compensation coverage by certifying they employed no residential workers in the home (former Ins. Code, §11592), perhaps without realizing that even a one-time casual hiring was included and could lead to liability for benefits.[15] Thus, as stated by Justice Werdegar: "These flaws in the 1975 legislation led the Legislature to fear that numerous householders would be deemed employers with employees subject to workers' compensation, but would not have insurance to cover benefits if the workers were injured."[16]

4. The Law In Effect Beginning March 25, 1977.

In response to the debate over AB 469, the Legislature passed AB 133, which took effect as urgency legislation on March 25, 1977.[17] In essence, AB 133 was enacted to "limit the far-reaching liability [that had been] imposed on employers of domestic workers" by AB 469. (9 Pac. L. J. 683 (1978).) Also, AB 133 contained an urgency clause, which stated: "Because the workers' compensation insurance coverage anticipated by … Chapter 1263 [AB 469] is not readily available to many thousands of persons who would be employers under the act, it is necessary that this act take effect immediately." (Stats. 1977, ch. 17, §32.)

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[15] There was also some concern that AB 469's version of section 3351(d) included only persons employed by *owners* of private dwellings, leaving uncertain the status of those employed by *renters.* (Senate Industrial Relations Committee Analysis of AB 133, at p. 2.)

[16] Supporters of AB 469, both in labor and the insurance industry, countered by asserting that several thousand policies covering section 3351(d) workers had already been sold in the state, and that the workers' compensation remedy provides a surer way to compensate injured household workers than requiring them to sue in civil court. (5 Cal. Workers' Comp. Rptr. at p. 18.)

[17] To reiterate, it is AB 133 to which the second paragraph of section 3715(b) refers when it states: "It is the intent of the Legislature that the amendments to this section *by Chapter 17 of the Statutes of 1977*, make no change in the law as it applied to those types of employees covered by this subdivision prior to the effective date of Chapter 1263 of the 1975 Regular Session." (Emphasis added.)

As relevant here, the essence of AB 133 was that it reduced the number of residential employees covered under the Workers' Compensation Act by excluding ***most*** such workers unless they met certain wage and hour criteria. Nevertheless, the coverage of residential employees was not cut back to *pre-AB 469* levels because some employees who would have been excluded prior to AB 469 were now *included* if they met the wage and hour thresholds. Moreover, AB 133 essentially *re-included*, as covered "employees," the three classes of residential employees who had been covered by the Act prior to AB 469.[18]

Specifically, the provisions of AB 133 most relevant here are as follows.

AB 133 amended section 3351(d) to its present form and added current section 3352(h). (See fn. 8, *supra*.) Thus, *in general*, section 3351(d) residential workers became included within the statutory definition of "employee" only if they met both the wage *and* the hour thresholds set by section 3352(h) – that is, they generally qualified as "employees" only if they had worked 52 hours for the employer and had earned at least $100 from the employer within the 90 days before the injury. (See pp. 6-8, *supra*.)

Also, AB 133 amended section 3715 to add subdivision (b), as well as to add a phrase to what then became subdivision (a) – i.e., adding "except an employee as defined in subdivision (d) of Section 3351." Thus, after these amendments, section 3715 read, in relevant part, as follows:

> "(a) Any employee, except an employee as defined in subdivision (d) of Section 3351, whose employer has failed to secure the payment of compensation as required by this division, … may, in lieu of proceedings against his employer by civil action in the courts as provided in Section 3706, file his application with the appeals board for compensation and the appeals board shall hear and determine the application for compensation in like manner as in other claims and shall make such award to such claimant as he would be entitled to receive if such employer had secured the payment of compensation as required, and such employer shall pay such award in the manner and amount fixed thereby or shall furnish to the appeals board a bond, in such amount and with such sureties as the appeals board

[18] Once again, there are some discrepancies between the three classes of residential employees covered by AB 133 as compared to the three classes of residential employees who had been covered prior to AB 469. These discrepancies will be discussed in part I-C-5 of this opinion.

requires, to pay such employee such award in the manner and amount fixed thereby.

"(b) Notwithstanding this section or any other provision of this article except Section 3708, any person described in subdivision (d) of Section 3351 who is (i) engaged in household domestic service who is employed by one employer for over 52 hours per week, (ii) engaged as a part-time gardener in connection with a private dwelling, if the number of hours devoted to such gardening work for any individual regularly exceeds 44 hours per month, or (iii) 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 men 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 lieu of proceedings against his employer by civil action in the courts as provided in Section 3706, to file his application with the appeals board for compensation. The appeals board shall hear and determine such application for compensation in like manner as in other claims, and shall make such awards to the claimant as he would be entitled to receive if such person's employer had secured the payment of compensation as required, and such employer shall pay the award in the manner and amount fixed thereby, or shall furnish to the appeals board a bond, in such amount and with such sureties as the appeals board requires, to pay such employee such award in the manner and amount fixed thereby.

"It is the intent of the Legislature that the provisions of this bill [i.e., AB 133] make no change in the law as applied to those types of employees covered by this subdivision prior to the effective date of Chapter 1263 of the 1975 Regular Session [i.e., AB 469]."[19]

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[19] As noted above (see fn. 9, *supra*), the second paragraph of section 3715(b) was amended in 1980 to substitute "amendments to this section by Chapter 17 of the Statutes of 1977" for "provisions of this bill" in the second paragraph. Thus, the second paragraph of section 3715(b) now reads:

> "It is the intent of the Legislature that the amendments to this section by Chapter 17 of the Statutes of 1977 [i.e., AB 133], make no change in the law as it applied to those types of employees covered by this subdivision prior to the effective date of Chapter 1263 of the 1975 Regular Session [i.e., AB 469]."

Further, AB 133 repealed Insurance Code sections 11590, 11591, and 11592, but concurrently adopted new sections (with the same numbers) in their place. The new sections again required that any comprehensive personal liability insurance policy issued or renewed on or after January 1, 1977 must contain a provision for workers' compensation coverage of any section 3351(d) employee; they similarly provided an exception for employees engaged in the trade, business, profession, or occupation of the insured; but, they eliminated the insured homeowner or renter's ability to opt out of coverage by certifying that he or she employed no residential employee not excluded by section 3352. (Ins. Code, §§11590, 11591, 11592; see also, *State Farm Fire & Cas. Co. v. Workers' Comp. Appeals Bd*. (*Leonard*), *supra*, 16 Cal.4th at pp. 1193-1194 [62 Cal.Comp.Cases at pp. 1631-1633].)[20]

Additionally, AB 133 added section 3354, providing that "employers of employees defined in subdivision (d) of Section 3351 shall not be subject to … any … penalty provided by law, for failure to secure the payment of compensation for such employees." Section 3354, however, also provided: "This section shall not apply to employers of employees specified in subdivision (b) of Section 3715, with respect to such employees."

Finally, AB 133 amended section 3708 – which was the section establishing that, in an injured employee's civil action against an uninsured employer, the injured employee is entitled to a rebuttable presumption that the injury resulted from the uninsured employer's negligence and the uninsured employer is not entitled to the defenses of the employee's contributory negligence or assumption of the risk. Specifically, AB 133 amended section 3708 to provide that it does *not* apply to any section 3351(d) employee, but AB 133 also specifically provided that section 3708 *does* apply to any employee described in section 3715(b).

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[20] AB 133 further provided, however, that if an employer had purchased a comprehensive personal liability insurance policy *before March 25, 1977*, then such a pre-March 25, 1977 purchase would not be deemed as a section 4151 election to cover any section 3351(d) residential employee who would otherwise be excluded by the wage and hour thresholds of section 3352(h). (Lab. Code, §4156; see also, *Fulton v. Nichols*, *supra*, 43 Cal.Comp.Cases at p. 1138.)

4. Interpreting Section 3715 And AB 133 In Light Of Their Language, The Foregoing Legislative History, Related Statutes, And The Liberal Construction Mandate.

a. The Workers' Compensation Act covers the three classes of section 3351(d) residential employees listed in section 3715(b), whether or not their employers are insured.

Based on the actual language of section 3715, the language and legislative history of AB 133, the language and purpose of related statutes, and the liberal construction mandate of section 3202, we conclude that any section 3351(d) residential employee *within one of the three limited classes specified by section 3715(b)* – i.e., any domestic worker working for one employer more than 52 hours per week; any part-time gardener working for one employer more than 44 hours per month; or any employee involved in work lasting at least ten days and having labor costs of at least $100 (i.e., essentially, the three classes of residential employees who had been covered by the Workers' Compensation Act prior to the enactment of AB 469)[21] – may file a workers' compensation claim against *any* employer, *insured or uninsured*, and, if the employer is *uninsured*, may receive UEF benefits and/or pursue a civil action.[22] That is, we conclude that AB 133's enactment of section 3715(b) had three essential purposes: (1) to expressly re-include, as covered employees, the three classes of residential workers who had been covered before AB 469, without making them subject to the same wage and hour limitations that other section 3351(d) employees are subject to by virtue of section 3352(h), which was added by AB 133; (2) to expressly allow these three classes of residential employees to pursue civil claims, if their employers are uninsured; and (3) to expressly provide that these three classes of residential employees may receive UEF benefits, if their employers are uninsured.

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i. The actual language of section 3715(b)

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[21] Once again, there are discrepancies between current section 3715(b)(3), on the one hand, and former sections 3352(a) and 3354, on the other, that will be discussed in part I-C-5 of this opinion.

[22] See fn. 9, *supra*. Section 3715(b) was amended after AB 133 to provide that a workers' compensation claim may be filed against an uninsured employer "in addition to" a civil action, rather than "in lieu of " of a civil action. After this amendment, therefore, the employee no longer had to elect between a civil and a workers' compensation remedy. (See *Felix v. Workmen's Comp. Appeals Bd.*, *supra*, 41 Cal.App.3d at p. 763 [39 Cal.Comp.Cases at p. 613]; *Jenkins v. Workmen's Comp. Appeals Bd.*, *supra*, 31 Cal.App.3d at pp. 262-263 [38 Cal.Comp.Cases at p. 204].)

In so concluding, we begin by relying on the language of section 3715(b) itself. This language expressly declares the Legislature's intention *not* to change the workers' compensation laws as they applied to the three types of section 3715(b) residential employees who were covered prior to AB 469 – i.e., it declares a legislative intent to re-vest those employees with the same rights they had before AB 469, including the right to file workers' compensation claims against both insured and uninsured employers and the right to receive UEF benefits.

That is, the second paragraph of section 3715(b), as enacted by AB 133, stated:

> "It is the intent of the Legislature that the provisions of this bill [i.e., AB 133] *make no change in the law as it applied to those types of employees covered by this subdivision prior to the effective date of Chapter 1263 of the 1975 Regular Session* [i.e., AB 469]." (Emphasis added.)[23]

Once again, the "types of employees covered by this subdivision" to which the second paragraph of section 3715(b) refers are the three types of section 3351(d) "residential" employees to which the first paragraph of section 3715(b) refers: (1) household domestic service employees employed by one employer for over 52 hours per week (Lab. Code, §3715(b)(1)); (2) part-time gardeners regularly working for one employer for more than 44 hours per month (Lab. Code, §3715(b)(2)); and (3) casual employees where the work is contemplated to be not less than 10 working days and where the total labor cost is not less than $100.00 (Lab. Code, §3715(b)(3)). *These are essentially the same three classes of residential employees who were covered by the Workers' Compensation Act prior to AB 469 and who could then pursue a workers' compensation claim, regardless of whether the employer was insured or uninsured*, i.e.: (1) household domestic service workers

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[23] As previously noted, the second paragraph of section 3715(b) now reads:

> "It is the intent of the Legislature that *the amendments to this section by Chapter 17 of the Statutes of 1977* [i.e., AB 133], make no change in the law as it applied to those types of employees covered by this subdivision prior to the effective date of Chapter 1263 of the 1975 Regular Session [i.e., AB 469]."

Thus, the phrase "amendments to this section by Chapter 17 of the Statutes of 1977" has been substituted for "provisions of this bill."

employed by one employer for over 52 hours per week (former Lab. Code, §3358.5); (2) part-time gardeners regularly working for one employer for more than 44 hours per month (former Lab. Code, §3352(g)); and (3) other residential employees where the work contemplated was to be completed in more than 10 working days or where the total labor cost was at least $100 (former Lab. Code, §§3352(a), 3354).[24]

Because the second paragraph of section 3715(b) expressly states the Legislature's intent to "make no change in the law" as it applied to section 3715(b) residential employees prior to AB 469, and because these section 3715(b) residential employees are essentially the same as those who were covered prior to AB 469,[25] then the language of section 3715(b) establishes that the Legislature's intent was to restore to section 3715(b) employees the same rights they enjoyed prior to AB 469, including the right to proceed with a workers' compensation claim against either an *insured* or an *uninsured* employer, and the right to file a civil claim and/or receive UEF benefits if the employer is *uninsured*.[26]

ii. The legislative history of section 3715(b)

Our reading of the actual language of section 3715(b) is also consistent with its legislative history.

Prior to the January 1, 1977 effective date of AB 469, only the three classes of residential employees mentioned earlier were *covered* by the Workers' Compensation Act. (Former Lab. Code, §§3358.5, 3352(g); 3352(a), 3354.) *All other residential employees were not covered*. (Former §§3352(a), (f), & (h); see also former §3354.) The three classes of *covered* residential employees had the same rights as other employees covered under the Act, including the rights to file a workers' compensation claim against an uninsured employer and to receive UEF benefits.

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[24] The discrepancies between current section 3715(b) and former sections 3352(a) and 3354 will be addressed in part I-C-5 of this opinion.

[25] See fns. 3, 18, 21, and 24, *supra*.

[26] Because section 3715(b) is in Article 2 of Chapter 4 of Division 4 of the Labor Code – entitled "*Uninsured* Employers Fund" – it is clear that these three classes of residential employees are entitled to UEF benefits, if their employers are uninsured.

AB 469, however, *repealed* former sections 3352(a), (f), and (h), which had *excluded* most domestic service workers, most gardeners, and most other residential employees from workers' compensation coverage. It then amended the definition of "employee" to *include* all domestic service workers – regardless of the type of employment, the hours worked, or wages paid for the job – except for those employed by a parent, spouse, or child. (Former Lab. Code, §§3351(d), 3352(a).) Thus, AB 469 was clearly intended to broadly *expand* the types of residential employees covered by the Workers' Compensation Act. That is, AB 469 not only continued the pre-January 1, 1977 workers' compensation coverage for the three classes of residential employees described in current section 3715(b), but it also brought workers' compensation coverage to a whole new array of residential employees. Moreover, all of these residential employees – including the large new group not previously covered – could file workers' compensation claims, whether or not their employers were uninsured, and could receive UEF benefits if their employers were uninsured.

Subsequently, AB 133 was enacted. Clearly, AB 133 was intended to diminish the far-reaching scope of coverage that AB 469 had established for residential employees**.** Nevertheless, there is no indication that AB 133 was intended to *eliminate or reduce* the workers' compensation coverage and the rights of those residential employees *who had enjoyed coverage prior to AB 469*. To the contrary, as discussed above, AB 133 enacted section 3715(b): (1) whose second paragraph specifically states: "It is the intent of the Legislature that the provisions of this bill [i.e., AB 133] *make no change in the law* as applied to those types of employees covered by this subdivision prior to the effective date of [AB 469]" (emphasis added); and (2) whose first paragraph then essentially lists three types of residential employees who had been covered by the Workers' Compensation Act prior to the January 1, 1977 effective date of AB 469.[27]

Moreover, AB 133 did *not* restrict coverage for residential employees as narrowly as the workers' compensation laws had prior to AB 469. Instead, AB 133 extended coverage to many residential employees who had been excluded before AB 469, if they *both* worked at least 52 hours

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[27] See fns. 3, 18, 21, and 24, *supra*.

for the employer *and* earned $100 from the employer in the 90-day period preceding the injury. The fact that AB 133 *expanded* the scope of coverage for residential employees beyond the levels that had existed prior to January 1, 1977 further suggests that, in enacting section 3715(b), the Legislature did not mean to *diminish* the coverage of – or the rights of – the three classes of residential employees who already had been entitled to claim workers' compensation benefits prior to January 1, 1977, whether or not their employers were uninsured.

iii. Harmonizing section 3715(b) with related statutes

In addition, our reading of the language of section 3715(b) harmonizes it with related statutes.

Section 3600(a) specifically states, in relevant part: "Liability for the compensation provided by this division … *shall … exist against an employer for any injury* sustained by his or her employees arising out of and in the course of the employment." (Emphasis added.) The "shall" language of section 3600(a) connotes a mandatory right or obligation. (Lab. Code, §15 [" '[s]hall' is mandatory and 'may' is permissive"]; see also, *Smith v. Rae-Venter Law Group* (2003) 29 Cal.4th 345, 357; *Jones v. Tracy School Dist*. (1980) 27 Cal.3d 99, 109; *Morris v. County of Marin* (1977) 18 Cal.3d 901, 907.) The "any" language of section 3600(a) means there are no restrictions or limitations on the term modified. (See *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798; *U.S. ex rel. Barajas v. U.S*. (9th Cir. 2001) 258 F.3d 1004, 1011.) Thus, section 3600(a) provides that liability for each and every injury covered by the Workers' Compensation Act shall exist, whether the employer is insured or uninsured.

Also, workers' compensation generally is the *exclusive* remedy for an industrially injured employee. (Lab. Code, §§3600(a), 3601(a), 3602; see also, e.g., *Claxton v. Waters* (2004) 34 Cal. 4th 367, 372-373 [69 Cal.Comp.Cases 895]; *Employers Mutual Liability Ins. Co v. Tutor-Saliba Corp*. (1998) 17 Cal.4th 632, 637 [63 Cal.Comp.Cases 132].) Indeed, the main exception to the exclusive remedy rule has been for *uninsured* employers. (Lab. Code, §3706.) Thus, a reading of section 3715(b) to allow the three classes of employees listed therein to bring workers' compensation claims against *insured* employers is consonant with the exclusive remedy rule.

Further, the Labor Code requires "[*e*]*very* employer" – with the exception of the State – to secure the payment of compensation, either by purchasing a workers' compensation insurance policy or by obtaining a certificate of consent to self-insure. (Lab. Code, §3700 (emphasis added).) The Labor Code also provides various penalties for failing to secure the payment of compensation, including empowering the WCAB to award both a ten-percent increase in compensation and attorney's fees against a willfully uninsured employer. (Lab. Code, §§4554, 4555.)[28] The obvious purpose of these penalties is to create an incentive for employers to insure or otherwise secure the payment of workers' compensation. And, in this regard, when AB 133 was enacted, it not only added section 3715(b), *it also added section 3354*. Section 3354 provides in essence that employers of section 3351(d) employees are *not* subject to any statutory penalties for failing to secure the payment of compensation, *unless the section 3351(d) employees are those described in section 3715(b)*.[29] It would be incongruous, if not outright nonsensical, for the Legislature both to require employers of section 3715(b) employees to obtain workers' compensation insurance (Lab. Code, §3700) and to make employers of section 3715(b) employees subject to all penalties for failing to insure (Lab. Code, §3354) – thereby creating an incentive for employers of section 3715(b) employees *to obtain workers' compensation insurance* – if section 3715(b) employees are entitled to workers' compensation only where their employers are *uninsured*. Moreover, prior to January 1, 1977, the employers of the three classes of employees listed in section 3715(b) were

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[28] Also, among other things, an employer who fails to secure the payment of compensation may be convicted of a misdemeanor (Lab. Code, §3700.5), may be ordered to stop all use of employee labor (Lab. Code, §3710.1), and may be subject to monetary penalties outside of workers' compensation. (Lab. Code, §3712, 3722.)

[29] Specifically, section 3354 states:

> "Employers of employees defined by subdivision (d) of Section 3351 shall not be subject to the provisions of Sections 3710, 3710.1, 3710.2, 3711, 3712, and 3722, or any other penalty provided by law, for failure to secure the payment of compensation for such employees.
>
> "*This section shall not apply to employers of employees specified in subdivision (b) of Section 3715, with respect to such employees.*" (Emphasis added.)

subject to penalties for failing to secure the payment of compensation. Thus, the provision of section 3354, which makes employers of section 3715(b) employees subject to penalties for failing to obtain insurance, is consistent with section 3715(b)'s intent to "make no change in the law" with respect to these three classes of residential employees.

Additionally, not only does section 3700 require employers to secure the payment of compensation, but Insurance Code section 11590 also provides, in relevant part:

> "[N]o policy providing comprehensive personal liability insurance [i.e., a homeowner's policy] may be issued or renewed in this State ... unless it contains a provision for coverage against liability for the payment of compensation … *to any person defined as an employee by subdivision (d) of Section 3351 of the Labor Code*. Any such policy ..., whether or not actually containing such provisions, shall be construed as if such provisions were embodied therein." (Emphasis added.)

Of course, the employees listed in section 3715(b) *are a subclass of section 3351(d) employees.*[30] And it would be inconsistent with the purposes of Insurance Code section 11590 to require that homeowner's policies cover "*any* person" who is an "employee" under section 3351(d) – including section 3715(b) employees – if those employees could not make a workers' compensation claim under such policies.

Finally, section 3300(a) defines an "employer" as "*every* person … which has *any* natural person in service" (emphasis added); section 5401(c) allows an "employee" to initiate a workers' compensation claim against an "employer," without providing that this right exists only when the employer is uninsured; and section 5500 provides for the filing of applications with the WCAB, without giving any indication that the filing of an application is restricted to cases where the employer is uninsured. (See also Lab. Code, §5501.)

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[30] Section 3715(b) applies to: "*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) …" (Emphasis added.)

Thus, our interpretation that a section 3715(b) employee may a file workers' compensation claim against either an insured or an uninsured employer is supported by section 3715(b)'s actual language, its legislative history, and by the overall statutory scheme.

iv. Defendant's contrary arguments fail

In arguing that the three classes of residential employees listed in section 3715(b) may file a workers' compensation claim only if the employer is *uninsured*, defendant cites to the fact that section 3715(b) is in Article 2 of Chapter 4 of Division 4 of the Labor Code, an Article entitled "*Uninsured* Employers Fund" (emphasis added). Defendant also points to the language of section 3715(b), which states that a person within one of its three identified classes of section 3351(d) employees "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 [WCAB] for compensation" and that "[t]he [WCAB] shall hear and determine the application … in like manner as in other claims, *and shall make the award to the claimant as he or she would be entitled to receive if the person's employer had secured the payment of compensation as required …*" (emphasis added). In essence, defendant asserts that the second italicized phrase of section 3715(b) explicitly and unambiguously pertains only to uninsured employers, i.e., employers who have not "secured the payment of compensation as required." In addition, it can be argued that the first italicized phrase of section 3715(b) also relates only to uninsured employers, because section 3706 is applicable only where the employer "fails to secure the payment of compensation."[31]

There are numerous problems with defendant's argument, however.

First, statutory phrases must not be read in isolation. Defendant's argument, however, is founded on isolated bits of section 3715(b); the argument does not take into consideration either the language of the balance of section 3715(b) or its legislative history. To briefly reiterate, AB 469 was enacted to *expand* the number of residential employees who could file workers'

[31] Section 3706 states: "If any employer *fails to secure the payment of compensation*, any injured employee or his dependents may bring an action at law against such employer for damages, as if this division did not apply." (Emphasis added.)

compensation claims, either against insured or uninsured employers. Although AB 133, which enacted section 3715(b), was apparently intended to narrow the scope of AB 469's expansion, AB 133 was *not* intended to reduce the scope of coverage for – or the rights of – residential employees to *below* the levels they had enjoyed prior to AB 469. Rather, the Legislature expressly intended "no change in the law" with respect to the coverage of residential employees as such coverage existed before AB 469. And, once more, the three classes of residential employees listed in section 3715(b) essentially were all included within the definition of "employee" before AB 469. (Former Lab. Code, §§3358.5, 3352(g), 3352(a), 3354.)[32] Moreover, before AB 469, these three classes of residential employees had the right to pursue claims against *all* employers, insured or uninsured.

Second, as discussed above, one of the major concerns about AB 469 was that it had expanded coverage for residential employees well beyond the levels that previously had existed. Because of the substantial increase in the types of residential employees covered, there was a concern that AB 469 would create a significant increase in demands against UEF. Thus, an apparent intention of AB 133 was to limit the number of claims for which UEF might be liable. Yet, in this context, it would be illogical for the Legislature to make section 3715(b) employees eligible for workers' compensation benefits only if their employers were *uninsured*, thereby making UEF liable if the uninsured employer did not timely pay the award (Lab. Code, §3716(a)), but then leave section 3715(b) employees completely ineligible for workers' compensation benefits if their employers are *insured*. Indeed, this would directly contravene the legislative pronouncement in section 3716(b) that: "It is the intent of the Legislature that [UEF] is created to ensure that *workers who happen to be employed by illegally uninsured employers* *are not deprived of workers' compensation benefits*, and is not created as a source of contribution to insurance carriers, or self-insured, or legally insured employers." (Emphasis added.)

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[32] See fns. 3, 18, 21, and 24, *supra*.

Third, we recognize that workers' compensation rights and obligations are wholly statutory. (*DuBois v. Workers' Comp. Appeals Bd.*, *supra*, 5 Cal.4th at p. 388 [58 Cal.Comp.Cases at p. 290]; *Johnson v. Workmen's Comp. Appeals Bd.* (1970) 2 Cal.3d 964, 972 [35 Cal.Comp.Cases 362, 367]; *Ruiz v. Industrial Acc. Com*. (1955) 45 Cal.2d 409, 414 [20 Cal.Comp.Cases 265, 268].) Thus, the Legislature can create specific exceptions to any general statutory rules. Nevertheless, a statute should be interpreted so as to be consistent with the entire scheme of which it is a part. To give an injured employee a workers' compensation remedy against an *uninsured* employer, but to deny him or her a workers' compensation remedy against an *insured* employer, is inconsistent with the exclusive remedy rule. Section 3600(a) specifically states:

> "Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person except as otherwise specifically provided in Sections 3602, 3706, and 4558, *shall ... exist against an employer for any injury sustained by his or her employees arising out of and in the course of the employment* …" (Emphasis added.)

Similarly, section 3602(a) provides

> "Where the conditions of compensation set forth in Section 3600 concur, the right to recover such compensation is, except as specifically provided in this section and Sections 3706 and 4558, the sole and exclusive remedy of the employee or his or her dependents against the employer …"

Of course, the exclusive remedy rule does not apply if the employer is *uninsured*. (Lab. Code, §3706.) Defendant's interpretation of section 3715(b), however, would turn this exception on its head, creating an exception to the exclusive remedy rule for section 3715(b) employees only if their employers are *insured*.

Fourth, defendant is correct that section 3715(b) is in Article 2 of Chapter 4 of Division 4 of the Labor Code, which is entitled "*Uninsured* Employers Fund" (emphasis added). Yet, although consideration may be given to a code's title, chapter, and section headings in interpreting a statute (*Calvillo-Silva v. Home Grocery* (1998) 19 Cal.4th 714, 727; *People v. Hull* (1991) 1

Cal.4th 266, 272), these title, chapter, and section headings are unofficial and they cannot alter the scope, meaning, or intent of a statute, or restrict its operation. (*Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1119; *DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 602; *People v. Garfield* (1985) 40 Cal.3d 192, 200; *San Joaquin Helicopters v. Dept. of Forestry & Fire Protection* (2003) 110 Cal.App.4th 1549, 1562; *City of Berkeley v. Cukierman* (1993) 14 Cal.App.4th 1331, 1340.) The reason that section 3715(b) is found in the Article of the Labor Code relating to UEF is *not* because its three classes of residential employees covered are limited to filing workers' compensation claims against *uninsured* employers. Rather, it is contained in that Article to make it clear that these section 3715(b) employees *are entitled to receive UEF benefits if their employers are uninsured*. (Lab. Code, §3716(b) ("It is the intent of the Legislature that [UEF] is created to ensure that workers who happen to be employed by illegally uninsured employers *are not deprived of workers' compensation benefits*." (Emphasis added).)[33]

iv. There is no inconsistency between section 3715(b) and section 3352(h)

We recognize an argument could be made that our interpretation of section 3715(b) undermines the wage and hour limitations of section 3352(h). Not so. The section 3352(h) wage and hour limitations were added by AB 133 so as to narrow the broad scope of coverage, established by AB 469, for residential employees *who had not been covered by the Workers' Compensation Act prior to AB 469*. Yet, as discussed above, the three classes of employees listed in section 3715(b) *were* covered under the Act before AB 469,[34] and these three classes of employees had (and still have) their own special hour and/or wage limitations – which are different than those established by section 3352(h).

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[33] E.g., also, *DuBois v. Workers' Comp. Appeals Bd.*, *supra*, 5 Cal.4th at p. 389 [58 Cal.Comp.Cases at p. 290] (the purpose of UEF is "to create a source of benefits to the employee who otherwise would receive no benefits because of the failure or refusal of his or her employer to obtain workers' compensation liability coverage"); *Flores v. Workmen's Comp. Appeals Bd.*, *supra*, 11 Cal.3d at p. 173 [39 Cal.Comp.Cases at p. 290] ("[T]he California Legislature established [UEF] to serve as an immediate source of funds for injured workmen whose employers have failed or refused either to obtain workmen's compensation insurance or to qualify as self-insurers").)

[34] See fns. 3, 18, 21, and 24, *supra*.

Accordingly, taking into consideration all of the factors above, as well as a liberal construction mandate of section 3202 requiring the Appeals Board to find coverage unless otherwise compelled by the language of the statute, we conclude that the three types of employees listed in section 3715(b) may file workers' compensation claims against an uninsured employer.

b. Our interpretation of section 3715(b) is also consistent with the language and history of section 3715(a).

As discussed above, statutes relating to the same subject matter should be construed together and harmonized if possible; that is, a section should be interpreted in light of the whole system of law of which it is a part. Therefore, section 3715(b) should be construed in conjunction with section 3715(a).

Section 3715(a) has existed, substantially in its present form, since before AB 469. (Of course, previously, it was merely section 3715 – it was changed to section 3715(a), and the reference to section 3351(d) employees was inserted, when AB 133 added section 3715(b).) Thus, with respect to the language italicized below, section 3715(a) has long stated:

> "*Any employee*, except an employee as defined in subdivision (d) of Section 3351, *whose employer has failed to secure the payment of compensation as required by this division*, or his or her dependents in case death has ensued, *may*, *in addition to proceeding against his or her employer by civil action in the courts as provided in Section 3706*, *file his or her application with the appeals board for compensation and the appeals board* shall hear and determine the application for compensation in like manner as in other claims and *shall make the award to the claimant as he or she would be entitled to receive if the employer had secured the payment of compensation as required*."

This italicized language of section 3715(a) is in large part identical to that in section 3715(b), which, according to defendant, means that an employee may only file an application with the WCAB if the employer is *uninsured*.

However, there has never been a question that an employee covered by section 3715(a) – i.e., an "employee" covered by the Workers' Compensation Act who does *not* fall within section 3351(d) – may file a workers' compensation claim against *any* employer, *insured or*

uninsured. This was the rule prior to the enactment of AB 469 and AB 133.[35] Neither AB 469 nor AB 133 made any change to this rule.

Sections 3706 and 3715(a) do provide that, where the employer of a non-residential employee is *uninsured*, the employee also may file a civil action against the uninsured employer. As stated by *DuBois v. Workers' Comp. Appeals Bd*., *supra*, 5 Cal.4th at p. 392 [58 Cal.Comp.Cases at p. 293]:

> "[T]he Legislature [has] provided that an injured employee whose employer has failed to secure the payment of workers' compensation is not limited to the exclusive remedy of seeking compensation benefits from the UEF. The employee possesses the right to proceed against the employer in the courts, by initiating a civil action for damages (§3706), as well as to seek compensation in a proceeding before the WCAB. (§3715.)").)

Nevertheless, the fact that sections 3706 and 3715(a) afford *dual* remedies to non-residential employees of *uninsured* employers does not mean that, where an employer is *insured*, a non-residential employee is precluded from filing a workers' compensation claim. It means only that a non-residential employee is "not limited" to a workers' compensation remedy where the employer is uninsured (*ibid*.), but is so limited where the employer is insured. Indeed, the very purpose of the exception to the exclusive remedy rule that allows injured employees to sue uninsured employers in civil court is to create an incentive for employers to insure. (*Privette v. Superior Court* (1993) 5 Cal.4th 689, 698 [58 Cal.Comp.Cases 420, 426] ("To encourage employers to obtain workers' compensation insurance for their employees, the Act's 'exclusive remedy' clause does not apply in favor of employers that fail to obtain such insurance, and consequently they are not immune from tort liability for such injuries."); e.g., also, *Le Parc Community Ass'n v. Workers' Comp. Appeals Bd*. (*Curren*) (2003) 110 Cal.App.4th 1161, 1172 [68 Cal.Comp.Cases 1041, 1049]; *Cedillo v. Workers' Comp. Appeals Bd*., *supra*, 106 Cal.App.4th

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[35] The only difference was that, prior to AB 469 and AB 133, section 3715 (now section 3715(a)) provided that if the employer was uninsured, the employee had to elect between a workers' compensation and a civil remedy. (See fn. 22, *supra*.)

at p. 236 [68 Cal.Comp.Cases at p. 147]; *Huffman v. City of Poway* (2000) 84 Cal.App.4th 975, 987 [65 Cal.Comp.Cases 1280].)[36]

To interpret section 3715(a) to mean that non-residential employees may file workers' compensation claims only against *uninsured* employers would be inconsistent with, among other things: (1) the seemingly endless line of cases awarding workers' compensation benefits to non-residential employees of *insured* employers; (2) the rule that workers' compensation generally is the exclusive remedy for an industrially injured employee, unless the employer is *uninsured* (Lab. Code, §§3600(a), 3601(a), 3602, 3706); (3) the provisions of section 3700, which requires employers to secure the payment of compensation; and (4) the provisions of the Workers' Compensation Act imposing penalties against employers are who are uninsured. (Lab. Code, §§3700.5, 3710.1, 3710.2, 3722, 4554, 4555.)[37]

Further, to interpret section 3715(a) to mean that non-residential employees may file workers' compensation claims only against *uninsured* employers would be inconsistent with the legislative history underlying section 3715.

In this regard, prior to 1971, an employee could proceed both with a workers' compensation claim *and* with a civil action against an uninsured employer, i.e., the employee did *not* have to elect between those two remedies. (Former Lab. Code, §3706; *DuBois v. Workers' Comp. Appeals Bd*., *supra*, 5 Cal.4th at p. 392, fn. 4 [58 Cal.Comp.Cases at p. 293, fn. 4]; *Flores v. Workmen's Comp. Appeals Bd*. (1974) 11 Cal.3d 171, 174 [39 Cal.Comp.Cases 289, 291]; *Jenkins*

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[36] As discussed above (p. 29 & fn. 28, *supra*), the Legislature has also created other incentives for employers to insure or otherwise secure the payment of workers' compensation. An employer who fails to secure the payment of compensation may be convicted of a misdemeanor (Lab. Code, §3700.5), may be ordered to stop all use of employee labor (Lab. Code, §3710.1), and may be subject to monetary penalties. (Lab. Code, §3712, 3722.) Also, if the injured employee elects to pursue a workers' compensation claim, the uninsured employer is subject to a 10% increase in the compensation otherwise payable (Lab. Code, §4554) and to liability for attorney's fees. (Lab. Code, §4555.)

[37] It also would be inconsistent: with section 3300(a), which defines an "employer" as "*every* person … which has *any* natural person in service" (emphasis added); with section 5401(c), which allows an "employee" to initiate a workers' compensation claim against an "employer," without providing that this right exists only when the employer is uninsured; and with section 5500, which gives no indication that the filing of an application with the WCAB is restricted to cases where the employer is uninsured. (See also Lab. Code, §5501.)

v. Workmen's Comp. Appeals Bd., *supra*, 31 Cal.App.3d at pp. 262-263 [38 Cal.Comp.Cases at p. 204].) Also, before 1971, section 3715 provided that if the employer was willfully uninsured and the employee was unrepresented, the employee could request the Labor Commissioner to assist in collecting his or her workers' compensation award from the uninsured employer. (See also, Former Lab. Code, §96 [see now, §96(i) – which also allows *represented* employees to request Labor Commissioner assistance].) Yet, "a significant problem under the pre-1971 practice was that injured workers of uninsured employers frequently faced long delays in obtaining payment and were often without funds during the critical period of their disability." (*Flores v. Workmen's Comp. Appeals Bd.*, *supra*, 11 Cal.3d at p. 174 [39 Cal.Comp.Cases at p. 291].)

Therefore, in 1971, the Legislature repealed former section 3715 and added a new section 3715. (Stats. 1971, ch. 1598, §3.) The Legislature also added a new section 3716 (Stats. 1971, ch. 1598, §4), as well as some related statutes.

The new section 3716 created UEF and provided that, if an uninsured employer failed to pay an award of workers' compensation benefits to the injured employee within ten days, then UEF would pay the award. (*DuBois v. Workers' Comp. Appeals Bd.*, *supra*, 5 Cal.4th at p. 389 [58 Cal.Comp.Cases at p. 290] (the purpose of UEF was "to create a source of benefits to the employee who otherwise would receive no benefits because of the failure or refusal of his or her employer to obtain workers' compensation liability coverage"); *Flores v. Workmen's Comp. Appeals Bd.*, *supra*, 11 Cal.3d at p. 173 [39 Cal.Comp.Cases at p. 290] ("In 1971 the California Legislature established [UEF] to serve as an immediate source of funds for injured workmen whose employers have failed or refused either to obtain workmen's compensation insurance or to qualify as self-insurers"); *Jenkins v. Workmen's Comp. Appeals Bd.*, *supra*, 31 Cal.App.3d at p. 263 [38 Cal.Comp.Cases at p. 204] ("the essence of section 3716 … is [that it] created an immediately available fund from which an injured employee's award shall be paid").) Thus, this entirely new system allowed an employee of an uninsured employer to receive his or her workers' compensation benefits promptly from UEF, rather than being forced to undertake the long and

difficult process of seeking the benefits from the uninsured employer, which was often unsuccessful because many uninsured employers became insolvent or "disappeared."

The new section 3715 provided that, if an employer was uninsured, the employee had to *elect* between a workers' compensation remedy or a civil remedy, i.e., these remedies became alternative, not cumulative. (*DuBois v. Workers' Comp. Appeals Bd*., *supra*, 5 Cal.4th at p. 392, fn. 4 [58 Cal.Comp.Cases at p. 293, fn. 4]; *Flores v. Workmen's Comp. Appeals Bd*., *supra*, 11 Cal.3d at p. 175, fn. 7 [39 Cal.Comp.Cases at p. 291, fn. 7]; *Felix v. Workmen's Comp. Appeals Bd*., *supra*, 41 Cal.App.3d at p. 763 [39 Cal.Comp.Cases at p. 613]; *Jenkins v. Workmen's Comp. Appeals Bd*., *supra*, 31 Cal.App.3d at pp. 262-263 [38 Cal.Comp.Cases at p. 204].) This change ensured that, if the employee elected to receive a workers' compensation award against the uninsured employer, then any "payment on the part of UEF would be exclusive." (*DuBois v. Workers' Comp. Appeals Bd*., *supra*, 5 Cal.4th at p. 392, fn. 4 [58 Cal.Comp.Cases at p. 293, fn. 4].)

The 1971 legislation further provided that, after paying benefits, UEF could institute a civil action against the uninsured employer to collect the monies it had paid. (Stats 1971, ch. 1598, §5 [Lab. Code, §3717].) Consequently, the risk of the insolvency – or the disappearance – of the uninsured employer fell on UEF, not the injured employee. (*Flores v. Workmen's Comp. Appeals Bd*., *supra*, 11 Cal.3d at p. 178 [39 Cal.Comp.Cases at p. 294]; *Smith v. Workers' Comp. Appeals Bd*. (2002) 96 Cal.App.4th 117, 121 [67 Cal.Comp.Cases 108, 109].)

With the creation of UEF, "*all employees* [became] automatically entitled to recover benefits for injuries 'arising out of and in the course of the employment'." (*Privette v. Superior Court*, *supra*, 5 Cal.4th at pp. 696-697 [58 Cal.Comp.Cases at p. 425] (emphasis added); see also, *Lopez v. C.G.M. Development, Inc*. (2002) 101 Cal.App.4th 430, 445 [67 Cal.Comp.Cases 1023, 1027].) That is, an injured employee would "have access to compensation under the Workers' Compensation Act, *regardless of whether their employer carried insurance*." (*Bell v. Greg Agee Construction, Inc*. (2004) 125 Cal.App.4th 453, 466 [69 Cal.Comp.Cases 1534, 1543] (italics in original).)

Accordingly, the purpose of the 1971 enactment of new sections 3715 and 3716 was *not* to provide that only employees of *uninsured* employers would be eligible for workers' compensation benefits. Rather, the purpose was to guarantee that the employees of uninsured employers *would receive benefits*.

In 1977, AB 133 amended section 3715 by adding subdivision (b), by placing the original provisions of old section 3715 into subdivision (a), and by then amending subdivision (a) to add the phrase "except an employee as defined in subdivision (d) of Section 3351." (Stats. 1977, ch. 17, §24.) However, this amendment to section 3715(a), which relates only to non-residential employees (i.e., non-section 3351(d) employees), does not manifest a legislative intent to change the scheme it established in 1971, which was designed to protect employees of *uninsured* employers, not exclude the employees of *insured* employers.

In 1980, section 3715(a) was amended again, this time substituting the phrase "in addition to proceeding" for the phrase "in lieu of proceedings."[38] Thus, section 3715(a) provided – as it now provides – that a non-residential employee of an uninsured employer "may, *in addition to proceeding* against his or her employer by civil action in the courts as provided in Section 3706, file his or her application with the appeals board for compensation." (Emphasis added.) This change, however, merely meant that a non-residential employee of an uninsured employer no longer had to *elect* between a workers' compensation remedy and a civil remedy. Instead, the employee had dual remedies. (*DuBois v. Workers' Comp. Appeals Bd*., *supra*, 5 Cal.4th at p. 392 [58 Cal.Comp.Cases at p. 293]; *Le Parc Community Ass'n v. Workers' Comp. Appeals Bd*. (*Curren*), *supra*, 110 Cal.App.4th at pp. 1173-1174 [68 Cal.Comp.Cases at pp.1050-1051]; *Huang v. L.A. Haute* (2003) 106 Cal.App.4th 284, 287, fn. 2 [68 Cal.Comp.Cases 188, 190, fn. 2]; *Aetna Casualty & Surety Co. v. Aceves* (1991) 233 Cal.App.3d 544, 558-559 [56 Cal.Comp.Cases 495, 505-506].) The creation "of these dual rights [was] consistent with legislative recognition of the limited resources of the UEF" (*DuBois v. Workers' Comp. Appeals Bd*., *supra*, 5 Cal.4th at p. 392

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[38] Section 3715(b) also had the same change made at the same time.

[58 Cal.Comp.Cases at p. 293]), i.e. it was *not* a legislative attempt to make wholesale changes to the scheme it created in 1971 so as to bar non-residential employees of *insured* employers from filing workers' compensation claims.

Accordingly, the legislative history of section 3715(a) establishes that its present language is not meant to *preclude* non-residential employees of *insured* employers from obtaining workers' compensation benefits. Rather, it is intended to maximize the chance that non-residential employees will receive timely recompense for industrial injuries sustained while employed by *uninsured* employers.

Thus, although section 3715(a) provides that non-residential employees may file an application with the WCAB and that the WCAB "shall hear and determine [the claim] … and shall make the award to the claimant as he or she would be entitled to receive *if the person's employer had secured the payment of compensation as required* …" (emphasis added), this language does *not* mean that section 3715(a) are limited to filing claims against *uninsured* employers. Accordingly, the identical language of section 3715(b) should be construed the same way, i.e., the three classes of residential employees listed therein may file workers' compensation claims against either insured or uninsured employers.

5. The Discrepancies Between Former Section 3354 And Current Section 3715(b)(3).

Although we have concluded that section 3715(b) extends workers' compensation benefits to the three types of employees listed therein, we next must examine whether Mr. Hestehauge qualifies as a covered employee under section 3715(b).

The WCJ found, under section 3715(b)(3), that Mr. Hestehauge was a covered employee because he was "engaged in casual employment where the work contemplated [was] 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 [was] not less than one hundred dollars ($100) … ." (Lab. Code, §3715(b)(3) (emphasis added).)

As discussed above, the fundamental principle of statutory construction is to determine and effectuate the Legislature's intent.

If we were to read the just-quoted phrase of section 3715(b) in isolation, it would seem that, because it uses the conjunctive, the presence of each of two elements would be required to qualify as a covered employee. That is, the work at which the employee was engaged at the time of injury: (1) would have to have been contemplated to last at least ten days; *and* (2) would have to have involved total labor costs of at least $100. Having one element, but not the other, would be insufficient.

Nevertheless, in interpreting a statute, we cannot look at an isolated phrase standing alone. We must consider the statute as a whole and harmonize all of its provisions.

In this regard, the second paragraph of section 3715(b) expressly states:

> "It is the intent of the Legislature that the amendments to this section by Chapter 17 of the Statutes of 1977 [i.e., AB 133], *make no change in the law as it applied to those types of employees covered by this subdivision prior to the effective date of* Chapter 1263 of the 1975 Regular Session [i.e., *AB 469*]." (Emphasis added.)

As discussed above, the law prior to AB 469 was that casual residential employment was *excluded* only "where the work contemplated [was] to be completed in not exceeding 10 working days, without regard to the number of men employed, *and* where the total labor cost of such work [was] less than one hundred dollars ($100); such amount not to include charges other than for personal services." (Former Lab. Code, §3354 (emphasis added).) Because former section 3354 used the conjunctive in *excluding* such employees, then residential employment was *included* if either the work was contemplated to exceed ten days *or* the total labor cost was at least $100. (*Daniels v. Johnson*, *supra*, 38 Cal.App.2d at pp. 621-622 [5 Cal.Comp.Cases 110]; *Ensign v. Workmen's Comp. Appeals Bd*. (*Geddes*), *supra*, 31 Cal.Comp.Cases 288 (writ den.); *State Comp. Ins. Fund v. Industrial Acc. Com*. (*Wilson*), *supra*, 25 Cal.Comp.Cases 215 (writ den.).)

Accordingly, there are two discrepancies between the language of the pre-AB 469 law and the language of the current law. The most significant discrepancy is that the language of the old

law brought residential employees within the coverage of the Workers' Compensation Act if they met either one of two elements – one relating to the length of the job and the other relating to total labor costs – while the language of the new law could be read to provide coverage only if *both* such elements are present. Another, albeit less significant discrepancy, is that under the former law the employee potentially could be *excluded* "where the work contemplated is to be completed in *not exceeding* 10 working days" (former Lab. Code, §3354) – i.e., the employment was potentially *included* only if it was *more than* ten days (11 days or more). However, the language of the current law potentially *includes* the employment if the work is contemplated to be completed "in *not less* than 10 working days" (Lab. Code, §3715(b)(3).) Therefore, under the new law, an employment potentially could be *included* even if it is anticipated to last only ten days, as opposed to 11 days.

We conclude that any discrepancies between current section 3715(b)(3) and the law as it existed with respect to this type of employees before AB 469 must be resolved so as to extend coverage in accordance with the prior law. We reach this conclusion for the following reasons.

First and foremost, as discussed above, the cardinal rule of statutory construction is to effectuate the intent of the Legislature. This principle is so fundamental that intent will prevail over the letter of the law, where the two are in conflict; accordingly, the letter will be read to conform to the intent, if possible. (*In re Marriage of Harris* (2004) 34 Cal.4th 210, 222; *In re Michele D*. (2002) 29 Cal.4th 600, 606; *Horwich v. Superior Court* (1999) 21 Cal.4th 272, 276; *Calatayud v. State of California* (1998) 18 Cal.4th 1057, 1065.)

Here, section 3715(b) expressly declares that, in enacting its provisions, "[i]t is the intent of the Legislature … *[to] make no change in the law* as it applies to [the] types of employees covered by this subdivision prior to the effective date of [AB 133]." (Emphasis added.) This express legislative intent must control over any statutory language inconsistent with it.

Second, as discussed above (pp. 12-13, *supra*), the liberal construction mandate of section 3202 requires that, if there is an ambiguity in a workers' compensation statute, then that ambiguity must be resolved to extend coverage, even if an alternative construction is possible. (Lab. Code,

§3202; *State Farm Fire & Cas. Co. v. Workers' Comp. Appeals Bd*. (*Leonard*), *supra*, 16 Cal.4th at p. 1196 [62 Cal.Comp.Cases at p. 1634]; *Arriaga v. County of Alameda*, *supra*, 9 Cal.4th at p. 1065 [60 Cal.Comp.Cases at p. 322]; (*General Foundry Service v. Workers' Comp. Appeals Bd*. (*Jackson*), *supra*, 42 Cal.3d at p. 337 [51 Cal.Comp.Cases at p. 379]; *Dept. of Corrections v. Workers' Comp. Appeals Bd.* (*Antrim*), *supra*, 23 Cal.3d at pp. 203-204, 206 [44 Cal.Comp.Cases at pp. 119, 121]; *Granado v. Workmen's Compensation Appeals Bd*., *supra*, 69 Cal.2d at p. 404 [33 Cal.Comp.Cases at p. 651].)

Here, a greater number of employees will be covered under section 3715(b)(3) if it is construed to provide coverage when *either* prong of the former law is satisfied – i.e., the work is contemplated to be more than ten days *or* the total labor cost is at least $100 – than if section 3715(b)(3) is construed to provide coverage only if *both* prongs of the statutory language are satisfied – i.e., the work must be contemplated to last at least ten days *and* cost at least $100.

Third, the fact that a statute uses the conjunctive rather than the disjunctive is not always determinative. If a statute uses the word "and" where the purpose or intent of the statute seems to mean "or," then this is a drafting error that may be corrected so as to effectuate the Legislature's intent and harmonize the statute's provisions. (*People v. Skinner* (1985) 39 Cal.3d 765, 775; *Bianco v. Industrial Acc. Com.* (1944) 24 Cal.2d 584, 587 [9 Cal.Comp.Cases 206]; *Utility Cost Management v. East Bay Mun. Utility Dist*. (2000) 79 Cal.App.4th 1242, 1250; *People v. Horn* (1984) 158 Cal.App.3d 1014, 1027; see also, *De Sylva v. Ballentine* (1955) 351 U.S. 570, 573 [76 S.Ct. 974, 100 L.Ed. 1415] ("the word 'or' is often used as a careless substitute for the word 'and' ").)

Here, in the face of the Legislature's express intent *not* to change the pre-AB 469 law, section 3715(b)(3)'s use of "and," rather than "or," appears to have been inartful draftsmanship.

Finally, as discussed above, the contemporaneous administrative interpretation of a statute is relevant.

Here, the Appeals Board's earliest reported interpretations of section 3715(b), as enacted in 1977, concluded that its ambiguities should be resolved so as to extend workers' compensation

coverage to residential employees *who would have been covered under the pre-1977 law*. (*May v. Fichera* (1980) 8 Cal. Workers' Comp. Rptr. 98 (Appeals Board panel), writ denied *sub nom. Fichera v. Workers' Comp. Appeals Bd*. (*May*) (1981) 46 Cal.Comp.Cases 26; *State Farm Fire & Cas. Co. v. Workers' Comp. Appeals Bd*. (*Banuelos & Rodriguez*) (1984) 49 Cal.Comp.Cases 643 (writ den.).) Other cases in more recent years also have reached the same conclusion. (*Galdamez v. Munday* (1999) 27 Cal. Workers' Comp. Rptr. 19 (Appeals Board panel); *Palmer v. National Loss Control* (1986) 14 Cal. Workers' Comp. Rptr. 133 (Appeals Board Panel).)[39]

6. Applying section 3715(b)(3) to Mr. Hestehauge's case.

Contrary to the WCJ's conclusion, the evidence does *not* establish that the work Mr. Hestehauge was engaged to perform was contemplated to last more than ten days.

Mr. and Mrs. Charkins testified, without rebuttal, that Mr. Hestehauge was hired to paint their living room and dining room, and "possibly" their kitchen. Mr. Hestehauge had spent only one to three hours on the job before his accident.

After the accident, Mr. Emmery finished the living room, but he also painted some trim and hung some doors. All of this work – including the trim and the doors, which were not part of the work Mr. Hestehauge was hired to perform – took Mr. Emmery three to five days. However, he was working intermittently, not full workdays. Thus, even a generous view of the evidence would suggest he spent no more than four full work days on the living room.

A different contractor was hired to paint not only the dining room, but also the family room and some trim. It took one painter one week (weekdays only) to complete all of this work,

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[39] Defendant's petition for reconsideration cites to a number of cases in which residential employees who had earned at least $100, but who had not worked at least 52 hours within the 90 days preceding their injuries, were found not to be covered by the Workers' Compensation Act. It is axiomatic, however, that cases are not authority for propositions they did not consider or address. (*Gomez v. Superior Court* (2005) 35 Cal.4th 1125, 1153; *People v. Alvarez* (2002) 27 Cal.4th 1161, 1176; *Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd*. (*Steele*), *supra*, 19 Cal.4th at p. 1195 [64 Cal.Comp.Cases 1].) All of cases cited by defendant, except one, were solely predicated on sections 3351(d) and 3352(h). As to the only case cited by defendant that addressed section 3715(b) (*Aubrey v. Workers' Comp. Appeals Bd*. (*Lee*) (1995) 60 Cal.Comp.Cases 408 (writ den.)), we reject that case for the reasons above. Moreover, although not cited by defendant, we also reject *Aguilar v. Safeco Ins. Co*., *supra*, 21 Cal. Workers' Comp. Rptr. 212 (Appeals Board panel.) That case apparently did not directly consider section 3715(b), but did consider at least one case which had found coverage based on the section.

including the family room and the trim, which were not to be included in Mr. Hestehauge's job. Therefore, again, even a generous view of the evidence would suggest that this painter spent no more than four full work days on the dining room.

Accordingly, we conclude that no more than a total of about eight working days were spent in painting the living room and dining room, which were the only portions of Mr. and Mrs. Charkins' home that Mr. Hestehauge was specifically hired to paint.

This conclusion is bolstered by Mr. Charkins' testimony that, at one time, he and his brother-in-law painted the living room and dining room in two days, working from early in the morning to late in the day – but not evenings. Mr. Charkins also estimated that, working alone, it would have taken him four weekends (eight days) to paint the living room, dining room and kitchen. Moreover, unlike Mr. Hestehauge, Mr. Emmery, and the other painting contractor, Mr. Charkins is not a professional painter. Therefore, the painting work that he and his brother-in-law performed likely would have taken more time than if it had been performed by professional painters.

Nevertheless, it is abundantly clear that the total labor costs for the work Mr. Hestehauge was engaged to perform exceeded $100.

As discussed earlier, the evidence is that Mr. Hestehauge was hired by Mr. and Mrs. Charkins to paint a large living room with an 18-foot high cathedral ceiling, as well as a dining room. After his injury, they paid Mr. Emmery $1,500 to $2,000 just to complete the living room portion of the job. Moreover, we infer that additional monies were paid to the other painting contractor to paint the dining room.

Because the total labor costs for the work Mr. Hestehauge was engaged to perform exceeded $100, then, consistent with the discussion above, he is a covered "employee" under section 3715(b) and he is entitled to pursue his workers' compensation claim against defendant, notwithstanding its argument that section 3715(b) applies only to *uninsured* employers.

For the foregoing reasons,

IT IS ORDERED, as the decision after reconsideration of the Workers' Compensation

Appeals Board, that the Findings, Award, and Order issued by the workers' compensation administrative law judge issued on July 24, 2003 be, and it hereby is, **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ Neil P. Sullivan

I CONCUR,

/s/ James C. Cuneo

/s/ William K. O'Brien

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

9/23/05

SERVICE BY MAIL ON SAID DATE TO ALL PARTIES AS SHOWN ON THE OFFICIAL ADDRESS RECORD, EXCEPT LIEN CLAIMANTS.