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BEFORE THE INSURANCE COMMISSIONER
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of **CONNOLLY RANCH, INC.,**	)	**FILE AHB-WCA-17-24**
Appellant,	)	
From the Decision of the **STATE COMPENSATION INSURANCE FUND,**	)	
Respondent.	)	

DECISION & ORDER

I. Introduction

Connolly Ranch, Inc. ("Appellant") challenges State Compensation Insurance Fund's ("SCIF's") decision to charge Appellant premium for alleged-employee Celeste Garamendi ("Garamendi") for the policy period beginning January 1, 2017, and ending January 1, 2018 (the "Policy Period").

Appellant contends SCIF was not entitled to charge premium for Garamendi because she was neither Appellant's employee nor covered by Appellant's policy (the "Policy"). SCIF maintains Garamendi was Appellant's employee and covered under the Policy, and that the total remuneration imputed to her for the Policy Period was properly calculated and correctly assigned

to Classification Code 0038(1). SCIF also contests the Commissioner's jurisdiction to determine employee classification.

For the reasons discussed below, the Commissioner finds as follows: (1) the Insurance Commissioner has jurisdiction to determine Garamendi's employee status in this case; and (2) Garamendi was not Appellant's employee and was not a covered "employee" during the Policy Period.

II. Issues Presented

1. Does the Insurance Commissioner have jurisdiction to determine an individual's employee status?

2. Was Garamendi properly classified as an "employee" of Connolly Ranch for the purposes of workers' compensation insurance as enunciated in Labor Code section 3351?

3. Did SCIF properly charge Appellant workers' compensation insurance premium in connection with Garamendi's "employment" during the Policy Period?

4. Assuming SCIF properly charged premium for Garamendi, did SCIF err in assigning Garamendi's payroll to Classification Code 0038(1) "Stock Farms-beef cattle and horses"?

III. The Parties' Contentions

A. Appellant's Contentions

Appellant argues SCIF may not charge premium for Garamendi during the Policy Period because Garamendi was not its employee as defined by Labor Code sections 3350 et seq.[1] Specifically, Appellant contends Garamendi served on Appellant's board of directors for the entire Policy Period and received no pay or other consideration for her services, and is thus excluded as an employee under Labor Code section 3351.[2] Appellant further maintains that

[1] Appellant's Written Closing Argument, dated January 9, 2018 ("App. Closing Arg."), at pp. 1-1 through 1-5.
[2] *Ibid.*

because Garamendi did not have "an appointment or contract of hire" she was not Appellant's employee under section 3351.[3]

Appellant also argues that because Garamendi was an unpaid corporate officer for approximately the first five months of the Policy Period, SCIF was not entitled to charge any premium in connection with her services pursuant to the USRP[4] and Labor Code.[5] In addition, Appellant maintains that even if Garamendi had been a paid employee, SCIF may not charge premium for her services since SCIF removed her from the Policy by retroactive endorsement.[6]

Lastly, Appellant argues that if any remuneration must be imputed to Garamendi during the Policy Period, it should be allocated between USRP Classification Codes 0038(1) "Stock Farms- beef cattle and horses" and 8810(1) "Clerical Office Employees- N[ot] O[therwise] C[lassified]" because she performed work described in each of those categories.[7]

B. SCIF's Contentions

SCIF argues Garamendi was Appellant's employee during the entire Policy Period by virtue of being an "officer and director," and therefore SCIF was entitled to charge premium for her work.[8] In particular, SCIF maintains that a private corporation's unpaid director is not excluded from employment.[9]

In addition, SCIF asserts that because Garamendi was Appellant's executive officer during a portion of the Policy Period, SCIF could charge premium based on the USRP's

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[3] *Ibid.*
[4] California Workers' Compensation Uniform Statistical Reporting Plan-1995 (Cal. Code Regs., tit. 10, § 2318.6). All citations herein are to the version of the USRP in effect during the Policy Period, i.e., the version that took effect on January 1, 2017 (See USRP Part 1, Section I, Rule 3.)
[5] App. Closing Arg. at p. 1-5.
[6] *Ibid.*
[7] Appellant's Post Hearing Reply Brief, dated January 24, 2018 ("App. Reply Br.") at p. 1-4.
[8] SCIF's Post Hearing Brief, dated January 12, 2018 ("SCIF Post Hearing Br.") at pp. 2, 7-8.
[9] *Id.* at p. 6

minimum remuneration rules even if Garamendi did not receive any pay.[10] And SCIF claims remuneration based on the fair market value of Garamendi's work should be imputed for the remainder of the Policy Period.[11]

SCIF also argues that Garamendi's entire imputed remuneration for the Policy Period should be assigned to USRP Classification Code 0038(1) rather than 8810(1), because Garamendi performed work covered by the former category, which disqualifies any portion of her payroll from being assigned to the latter category under the USRP's terms.[12]

Lastly, SCIF argues the Insurance Commissioner lacks jurisdiction to determine Garamendi's employee status under the Labor Code.[13]

IV. Procedural History

Appellant initiated these proceedings on August 24, 2017, by filing a written appeal with the Insurance Commissioner contesting SCIF's determination that 1) Garamendi was Appellant's employee during the Policy Period, for whom SCIF was entitled to charge premium under the Policy, 2) a minimum payroll of $48,100 would be imputed to Garamendi for the Policy Period, and 3) Garamendi's entire payroll would be applied to USRP Classification Code 0038(1) for that period. SCIF filed its written response on October 2, 2017, after obtaining an extension of time to respond.[14]

Administrative Law Judge Clarke de Maigret (the "ALJ") conducted an evidentiary hearing in the California Department of Insurance's San Francisco hearing room on December

[10] *Id.* at pp. 7-8
[11] SCIF Post Hearing Reply Brief, dated January 26, 2018 ("SCIF Reply Br.") at pp. 9:23-10:23.
[12] SCIF Post Hearing Br. at pp. 7:20-27, 8:21-25.
[13] *Id.* at pp. 2:1-3:18.
[14] The Workers' Compensation Insurance Rating Bureau of California filed a written response on September 15, 2017, electing not to actively participate in this appeal.

11, 2017.[15] Mark V. Connolly, Esq. appeared on behalf of the Appellant. David Freitas, Esq. appeared on behalf of SCIF.

The following individuals testified on Appellant's behalf at the hearing: 1) Celeste Garamendi, a member of Appellant's board of directors, and 2) Mark V. Connolly, Appellant's Chief Executive Officer and legal counsel.

The following individuals testified on SCIF's behalf at the hearing: 1) Susan Venegas, SCIF's Assistant Underwriting Manager, 2) Brian Gray, Director, Classification Administration and Education at the WCIRB, 3) Lisa Coleman, Underwriting Consultant for SCIF, and 4) Mary Smith, SCIF's Chief Actuarial Officer.

The evidentiary record includes the foregoing testimony, the pre-filed documentary evidence identified in the parties' respective exhibit lists, and SCIF Exhibit 224, which was introduced at the hearing. All of the foregoing evidence was admitted at the hearing. Certain confidential stock ownership and bank account information was redacted from some of the admitted exhibits, and the unredacted versions of those documents were conditionally sealed in the record.

In January 2018, Appellant submitted a written closing argument and both Appellant and SCIF submitted written post-hearing briefs and replies.

On January 22, 2018, the ALJ provided written notice to the parties that he intended to take official notice of a portion of a SCIF workers' compensation insurance rate filing with the Insurance Commissioner. The ALJ took official notice of that information on February 5, 2018.

[15] These proceedings were conducted in accordance with Cal. Code of Regs., tit. 10, § 2509.40. through 2509.78 and the administrative adjudication provisions of the California Administrative Procedure Act referenced in section 2509.57 of those regulations.

The ALJ closed the evidentiary record on February 5, 2018, at which time this case was submitted for decision.

On February 28, 2018, the ALJ submitted a Proposed Decision to the Commissioner.

On April 27, 2018, the Commissioner issued a Notice of Non-Adoption of Proposed Decision, in which he directed the ALJ to take additional evidence concerning whether Garamendi performed services for pay.

On August 2, 2018, the ALJ held a supplemental evidentiary hearing. Celeste Garamendi and Mark V. Connolly again testified on Appellant's behalf, and that testimony became part of the evidentiary record. SCIF called no witnesses at the supplemental hearing. No additional documents were admitted in evidence.

Appellant and SCIF each submitted a post-hearing brief concerning the issues presented at the supplemental hearing. The ALJ re-closed the evidentiary record on August 27, 2018, at which time this case was again submitted for decision.

On September 4, 2018, the ALJ submitted an Amended Proposed Decision and recommended its adoption as the decision of the Insurance Commissioner.

On October 29, 2018, the Commissioner issued a Notice of Non-Adoption of Amended Proposed Decision, and chose to decide the case upon the record, and now decides this matter.[16]

V. Findings of Fact

The Commissioner makes the following factual findings based on a preponderance of the evidence in the record:

[16] See title 10, Cal. Code Regs. section 2509.69, subd. (d).

A. Connolly Ranch and Celeste Garamendi

Appellant is a family-owned California corporation operating a cattle ranch near Tracy, California.[17] Appellant was incorporated in the early 1980s,[18] but the ranch has been in its chief executive officer, Mark. V. Connolly's ("Connolly's") family, since the 1870s.[19]

Connolly is Appellant's majority shareholder.[20] Connolly's shares are community property of Connolly and his wife, Celeste Garamendi.[21] Their children own the remainder of the corporation's shares.[22]

Garamendi's first contact with the ranch occurred when she married Connolly in 1988.[23] In approximately 2005, Garamendi joined Appellant's board of directors, a position she still holds today.[24] During the Policy Period, Appellant's board consisted of four directors.[25]

In approximately 2007, Garamendi also became Appellant's chief financial officer.[26] The board of directors removed her from that position on March 27, 2017, in an effort to prevent SCIF from applying the USRP's minimum remuneration rules to her.[27] Garamendi ceased being an executive officer at that time.[28] Thus, she was an executive officer of the corporation for only 21 weeks in 2017.[29]

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[17] Administrative Hearing Transcript of Proceedings on December 11, 2017 ("Tr."), at p. 84:100-16; Exh. 101 at pp. 101-2, 101-4.
[18] Tr. at p. 95:8-11.
[19] Tr. At pp. 84:7-13, 86:1-7.
[20] Tr. At pp.30:14-31:2; Exh.101 at p.101-3.
[21] Tr. at p. 96:2-4.
[22] Exh. 101 at p. 101-3.
[23] Tr. At p. 41:21-23.
[24] Tr. at pp. 41:24-25, 46:7-9.
[25] Exh. 102.
[26] Tr. at pp. 41:24-25, 46:7-9.
[27] Tr. at p.43:8-17; Exh. 129 at p. 129-3.
[28] Tr. at p.43:8-11; Exh. 129 at p. 129-3.
[29] Tr. at p. 43:8-11; Exh. 129 at p. 129-3.

Connolly and Garamendi both live and work on the ranch.[30] During the Policy Period, Garamendi performed both ranch work in the field and office work. Her ranch work included caring for cattle and horses, and repairing and maintaining fences, water systems, corrals, buildings, vehicles, and other ranch facilities.[31] Her office services consisted mainly of bookkeeping activities, including assisting in the preparation of financial statements, maintaining corporate records, paying expenses, and maintaining and managing corporate funds.[32] Some of Garamendi's services during the Policy Period were essential to Appellant, in that if Garamendi had not performed them, someone else would have needed to.[33]

During the Policy Period, Garamendi performed 74 hours of office services and 192 hours of field work on the ranch.[34] Of that, 48 hours of office services and 122 hours of field work were performed after March 27, 2017, the date Garamendi was removed as an executive officer.[35] Although Appellant employed part-time staff during the Policy Period, Appellant did not have any regular employees performing the same or similar work as Garamendi.[36]

Garamendi received no compensation or other direct financial benefit for any service she provided.[37] She performed those services because she enjoyed the work and because she wanted to benefit the family business, as well as her husband, her children, and their posterity.[38]

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[30] Tr. at pp. 86:20-87:12; Exh. 2; Exh. 114 at p. 114-12.
[31] Tr. at p. 66:2-6; Exh. 2 at p. 2-1.
[32] *Ibid.*
[33] Supplemental Hearing August 2, 2018 Transcript ("Supp. Tr.") at pp. 18:20-20:7.
[34] Exh. 2 at p. 2-3.
[35] Tr. at pp. 65: 17-66:6; Exh. 2 at p. 2-3.
[36] Tr. at pp. 54: 15-23, 59:4-14, 68:22-69:25.
[37] Tr. at pp. 43:23-25, 45:8-11, 87:20-88:3; Supp. Tr. at p. 9:15-21.
[38] Tr. at pp. 45:25-46:1, 133:24-135:22; Supp. Tr. at pp. 9:23-10:21, 11: 1-5.

B. The Policy and its Endorsements

Appellant procured a workers' compensation insurance policy from SCIF for the Policy Period, January 1, 2017 to January 1, 2018.[39] The Policy insured Appellant against workers' compensation liability to its employees, subject to the Policy's provisions.[40]

Part Five, section A, of the Policy states in part, "All premium for this policy will be determined by our manuals of rules, rates, rating plans and classifications."[41]

Part Five, section C, of the Policy provides in part, "Premium for each work classification is determined by multiplying a rate times a premium basis. Remuneration is the most common premium basis."[42]

SCIF's January 2017 Rating and Underwriting Manual specifies:

> **Unsalaried Employees**
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> Basis of Premium: Except as otherwise provided herein, the payroll for each individual who serves without pay and who is not subject to exclusion from the Workers' Compensation Act by Section 3352 of the Labor Code shall be computed as though such individual received the same remuneration as normally received by a regular employee of the insured doing the same or similar work. If there are no regular employees performing the same or similar work, payroll will be computed at the fair market value for the services being performed...[43]

Page 28 of SCIF's Workers' Compensation Insurance Rate Filing No. 10-7967, filed with the California Department of Insurance on November 9, 2010, contains language identical to the preceding paragraph.[44]

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[39] Exh. 1 at p. 1-016.
[40] Exh 104 at p. 104-10.
[41] *Ibid.*
[42] *Ibid.*
[43] Exh. 105 at p. 105-1.
[44] Order Taking Official Notice, dated February 5, 2018 ("Official Notice Order").

On January 19, 2017, SCIF issued Endorsement 1516 to the Policy, which was retroactive to January 1, 2017.[45] That Endorsement extended coverage to Garamendi under the Policy as an "Officer[] and Director[]."

In the apparent belief that Garamendi was actually not an executive officer, SCIF issued Endorsement 9930 on April 17, 2017, which removed Garamendi's name from Endorsement 1516.[46] Endorsement 9930 was retroactive to January 1, 2017.[47] Also on April 17, 2017, SCIF issued Endorsement 9926 to the Policy, which eliminated Endorsement 1516 from the Policy.[48] Endorsement 9930 was retroactive to January 1, 2017, as well.[49] No subsequent endorsements were issued to expressly cover Garamendi as an executive officer.[50]

The USRP is incorporated in its entirety without modification in SCIF's 2017 workers' compensation insurance rate filings with the Insurance Commissioner.[51]

VI. Applicable Law and Analysis

Appellant contends Garamendi is not an "employee" as provided under Labor Code section 3351 and thus, SCIF may not impute premium to her services.[52] Appellant also argues SCIF's removal of Garamendi from the Policy bars it from collecting premium.[53] Lastly, Appellant argues any imputed premium must be split between Classification Code 0038(1) "Stock Farms-beef cattle and horses" and 8810(1) "Clerical Office Employees-N[ot] O[therwise] C[lassified]."[54] SCIF asserts that, although Garamendi was unpaid as either an officer or director,

[45] Exh. 1 at p. 1-021.
[46] Exh. 1 at p. 1-061.
[47] *Ibid.*
[48] Exh. 1 at p. 1-062.
[49] *Ibid.*
[50] Tr. at p. 176:5-23.
[51] Tr. at p. 224:13-19.
[52] App. Closing Arg. at pp. 1-1 through 1-5.
[53] *Id.* at p. 1-5.
[54] App. Reply Br. at p. 1-4.

she was nevertheless an "employee," and further argues the Insurance Commissioner lacks jurisdiction over the employee status issue.[55]

After considering the evidence on the record, arguments made by counsel, and the statutory authority and case law, the Commissioner finds that Garamendi was not an "employee" under Labor Code section 3351, and that SCIF is not entitled to premium for her service to Connolly Ranch.

A. The Insurance Commissioner Has Jurisdiction to Determine Employee Status As a Threshold Matter in the Context of Workers' Compensation Insurance Rating Application Appeals.

1. Applicable Law

Insurance Code section 11737, subdivision (f), requires that the Insurance Commissioner hear and decide disputes over an insurer's application of its rating system. Specifically, that section confers the Insurance Commissioner with jurisdiction to hear appeals by persons "aggrieved by the application of" an insurer's rate-related filings:[56]

> Every insurer or rating organization shall provide within this state reasonable means whereby *any person aggrieved by the application of its filings* may be heard by the insurer or rating organization on written request to review the manner in which the rating system has been applied in connection with the insurance afforded or offered... Any party affected by the action of the insurer or rating organization on the request may appeal… to the commissioner who… may affirm, modify, or reverse that action…
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> * * *

Both the Insurance Commissioner and state courts have consistently recognized the Commissioner's jurisdiction to decide matters involving a worker's status. The Insurance

[55] SCIF Post Hearing Br. at pp. 2: 1-3:18.
[56] Ins. Code § 11737, subd. (f). The rate-related filings are described in Ins. Code §§ 11730, subds. (g) and (j), and 11735.

Commissioner has issued numerous decisions involving employee status determinations under Labor Code sections 3350 et seq., including the precedential decision *In the Matter of the Appeal of KWA Safety & Hazmat Consultants, Inc.*[57] And in *Antelope Valley Press v. Poizner*, the Court of Appeal affirmed the Insurance Commissioner's employee status determination in a workers' compensation rate application appeal turning on whether a worker was an "independent contractor" or an "employee" under the Labor Code.[58] In so doing, the court noted that the administrative case arose under section 11737, subd. (f), and it did not question the Insurance Commissioner's jurisdiction.[59]

In order to adjudicate this issue, the Commissioner must first determine if the person subject to the allegedly misapplied rating system is an "employee" at all. Employee status and employee exemptions directly affect the application of the insurer's filings because an insurer may collect premium only with respect to employees.[60] Collecting premium for non-employees is a direct misapplication of the USRP and the rate filings.[61] If an insurer erroneously classifies an employer's workers as "employees," it means that the insurer improperly applied its filed rates to those individuals' imputed payroll and overcharged the employer. This is a clear misapplication of an insurer's rates and rating plan, which apply only to employees. Also, the

[57] *In the Matter of the Appeal of KWA Safety & Hazmat Consultants, Inc.* (Cal. Ins. Comm'r 2002) AHB-WCA-01-22. The Commissioner designated this decision as precedential pursuant to Gov. Code § 11425.60. At issue was whether SCIF had properly classified workers as employees rather than independent contractors.
[58] *Antelope Valley Press v. Poizner* (2008) 162 Cal.App.4th 839, 857.
[59] *Id.* at p. 842, 850 (applying the substantial evidence standard to the Commissioner's decision resolving a dispute whether a worker was an independent contractor or employee: "When an administrative order or decision does not involve or substantially affect a fundamental vested right of the person challenging that decision or order, the substantial evidence test is applied by the trial court in a section 1094.5 review.")
[60] It should be noted that the definition of "employee" under the Labor Code is incorporated indirectly in each insurer's rate-related filings. Those filings uniformly incorporate the USRP by reference, and the USRP, in turn, defines "employee(s)" as "[e]very person in the service of an employer for whom the employer is obligated to provide workers' compensation benefits." (USRP Part I, Section II, Rule 3.) Such persons are described in Division 4 (Workers' Compensation and Insurance) of the Labor Code, most pertinently in sections 3350 et seq.
[61] The USRP is part of the Commissioner's regulations, codified at California Code of Regulations, title 10, section 2318.6.

USRP requires employers to periodically report loss exposures which, by definition, are limited to employee payroll.[62] Including the pay of nonemployees or excluding the pay of employees will result in an inaccurate pure premium rate and incorrect experience modification calculations throughout the industry and undermine the purpose of the uniform classification system.[63] Therefore, employee status determinations in the context of workers' compensation insurance appeals lie squarely within the jurisdictional scope of Insurance Code section 11737, subdivision (f).

2. Analysis and Conclusions of Law

This appeal incepted from Appellant contesting SCIF's assessed premium, under Insurance Code section 11737, subdivision (f). Appellant first challenged the fact of Garamendi's classification as an employee, and secondarily her employment classification and assessed payroll as an officer of the corporation. SCIF acknowledged that section 11737, subdivision (f), grants jurisdiction to the Commissioner to decide appeals over the application of SCIF's rate filing.[64] SCIF argues that there is no precedential case law delineating the Commissioner's scope of review in a section 11737, subdivision (f) appeal, and no guidance involving the interpretation of Labor Code section 3351, subdivision (c), for the purpose of determining a policyholder's premium. SCIF also asserts that the determination of employee status for the purpose of awarding workers' compensation benefits resides exclusively with the Workers' Compensation Appeals Board ("WCAB"). SCIF appears to argue that the Commissioner's determination of a worker's status could ultimately be contrary to a WCAB decision, which would mean either that the insurer would not have collected sufficient premium

[62] See USRP, Part 4.
[63] See *ibid.*
[64] SCIF's Post Hearing Brief at 2:1-8.

to cover a worker's benefits, or conversely, that the insurer collected premium to which it was not entitled.

The structure and language of section 11737, subdivision (f), as well as case law, clearly acknowledge the Commissioner's jurisdiction to make these determinations. Contrary to SCIF's assertions, the precedential decision in *In the Matter of the Appeal of KWA Safety & Hazmat Consultants, Inc,* as well as *Antelope Valley Press v. Poizner* acknowledge the Commissioner's jurisdiction to determine employee status. The dispute over whether Garamendi was properly classified, and whether she was correctly assigned the officer's minimum payroll, gives rise to this appeal as an alleged misapplication of SCIF's filings. However, in order to reach that determination, the Commissioner must first resolve the issue of whether Garamendi is an employee. Accordingly, the Insurance Commissioner has jurisdiction to hear and decide the employee status issues in this appeal.

B. Appellant Has Met its Burden of Proof that Garamendi Was Not Its Employee for Workers' Compensation Purposes.

1. Applicable Law

Labor Code sections 3350 et seq. govern employee status for workers' compensation purposes. Under Labor Code section 3357, "[a]ny person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee."[65] "The alleged employer has the burden to overcome this presumption."[66] Under both Labor Code section 3357 and the Insurance Commissioner's regulations, Appellant bears

[65] There was no assertion by any party that Garamendi was an independent contractor during the Policy Period, and there is no question that she was not. (See *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 532; *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal. 3d 341, 351.)

[66] *Faigin v. Signature Group Holdings, Inc.* (2012) 211 Cal.App.4th 726, 737, fn. 4. Even absent the statutory presumption, Appellant bears the burden to prove that Garamendi was not Appellant's employee. (Cal. Code Regs., tit. 10, § 2509.61, subd. (a) ["A party has the burden of proof as to each fact the existence or non-existence of which is essential to the claim for relief or defense that he or she is asserting."]).

the burden to prove that Garamendi was not an employee.[67] For the reasons below, the Commissioner finds that Appellant has satisfied its burden.

Labor Code section 3351[68] defines an "employee" for the purposes of workers' compensation as "every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed ... " Subdivisions (a) through (f) of that section enumerate categories of individuals falling within the definition of employee, including "[a]ll officers and members of boards of directors of quasi-public or private corporations while rendering actual services for the corporations for pay ..." [69] Labor Code section 3351 's list is inclusive rather than exclusive, meaning that individuals may still be employees even if they fall outside of the listed categories.[70] Section 3352 excludes several categories of individuals from the employee definition.[71] Neither party asserts that any of Labor Code section 3352's exclusions applies to this appeal.

2. Analysis and Conclusions of Law

SCIF argues that under Labor Code section 3351, Garamendi is an "employee" as a person in the service of an employer under any appointment or contract of hire, notwithstanding her position as an unpaid officer and director of the corporation. SCIF's position effectively ignores the explicit language of the Labor Code. Because SCIF issued Endorsements numbered

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[67] Labor Code § 3357; *Faigin v. Signature Group Holdings, Inc., supra*, 211 Cal.App.4th at p. 737, fn. 4; Cal. Code Regs., tit. 10, § 2509.61, subd. (a).

[68] Labor Code section 3351 was amended in 2017 by California Assembly Bill 2883 ("AB 2883"). AB 2883 left unchanged the operative language that is at issue in this appeal.

[69] Labor Code section 3351, subd. (c), emphasis added.

[70] *Waggener v. County of Los Angeles* (1995) 39 Cal.App.4th 1078, 1080-1083.

[71] Labor Code section 3352, subdivision (p), in effect during the Policy Period, excluded officers or directors from employee status if they owned at least 15 percent of the issued and outstanding stock of the corporation and executed a waiver of their rights under certain portions of the Labor Code. That provision has no applicability here, since Garamendi did not own any of Appellant's shares during the Policy Period. (Tr. at pp. 30:14-31:2; Exh. 101 at p. 101-3.)

9926 and 9930, there are no operative endorsements that include Garamendi as an "employee." The Commissioner concludes that Garamendi was not an "employee" under the Policy. As such, the Commissioner does not reach the question of whether SCIF properly assigned Garamendi's payroll to Classification Code 0038(1) "Stock Farms-beef cattle and horses."

a. Garamendi is Not an "Employee" Because She Was Not an "Officer or Member of the Board of Directors" Rendering Actual Service "*For Pay.*"

Labor Code section 3351 provides the circumstances under which a person will be considered an "employee" for the purposes of workers' compensation. The subdivisions contained therein further provide specific circumstances under which a person would be considered an "employee." Subdivision (c), by its plain language, enunciates the specific circumstances in which an officer or member of the board of directors will be considered an "employee."

Labor Code section 3351(c) provides, in relevant part:

> "Employee" means every person *in the service of an employer* under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed, and *includes*:
>
> . . .
>
> (c) All officers and members of boards of directors of quasi-public or private corporations *while rendering actual service for the corporations for pay*. An officer or member of a board of directors may elect to be excluded from coverage in accordance with subdivision (p) of Section 3352.
>
> Lab. Code § 3351 (2017) (emphasis added.)

* * *

Appellant argues that if unpaid directors or officers could be employees, then the statute's "for pay" language would be superfluous.[72] Appellant urges that since the courts disfavor statutory constructions resulting in superfluous language,[73] unpaid directors or officers cannot be employees. Appellant contends that because Garamendi served as a director and officer without pay, she was not an "employee" under Labor Code section 3351, subdivision (c). SCIF, in turn, argues that subdivision (c) does not impose a limit on how unpaid officers and directors are to be analyzed under Labor Code section 3351. Instead, SCIF contends that it provides but one clear circumstance where an individual may be considered an "employee," but does not provide the exclusive means through which an "officer" or "member of the board of directors" may otherwise be considered an "employee." Ultimately, SCIF argues that the Commissioner ought to analyze Garamendi's status under the broader provisions of Labor Code section 3351, rather than subdivision (c).

The Commissioner finds Appellant's argument persuasive. While subdivision (c) is not the exclusive lens through which an employer-employee relationship in general may be examined because it specifically addresses "officers" and "members of the board of directors," it controls the employee-status analysis for purposes of the evidence presented in this case. Garamendi clearly falls within the ambit of subdivision (c), instead of the broader umbrella of Labor Code section 3351.

Subdivision (c) carves out from Labor Code section 3351 persons who are "officers and members of boards of directors of quasi-public or private corporations." It establishes that such individuals are considered "employees" while they are "rendering actual service for the corporations for pay." By including clear language indicating that the officer or member of the

[72] Exh. 129 at p. 129-2.
[73] See e.g., *Torrey Hills Community Coalition v. San Diego* (2010) 186 Cal.App.4th 429, 440.

board of directors render "actual service," and that it be "for pay," subdivision (c) narrows the circumstance in which an officer or member of the board of directors would be considered an "employee." A plain reading of Labor Code section 3351, subdivision (c) requires that an officer or member of the board of directors both render "actual service," and receive "pay" for that service, in order to be classified as an "employee." SCIF urges a reading that disregards this requirement. As the legal maxim provides: *expressio unius est exclusio alterius* – the enumeration of things to which a statute applies is presumed to exclude things not mentioned.[74] By explicitly requiring that officers' and members of boards of directors' service be "for pay," the statute excludes from the definition of employee *unpaid* officers and directors who otherwise render "actual services."

The term "pay" is not defined in section 3351 or elsewhere in the Labor Code. The California Supreme Court adopted the following dictionary definition when interpreting Labor Code section 226.7: "'Pay' is defined as 'money [given] *in return* for goods and services rendered."[75] Black's Law Dictionary also provides:

> Compensation for services performed; salary, wages, stipend, or other remuneration given for work done. (PAY, Black's Law Dictionary (10th ed. 2014))
>
> 1. Remuneration and other benefits received in return for services rendered; esp., salary or wages. (COMPENSATION, Black's Law Dictionary (10th ed. 2014))
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> * * *

Found in the definition of "pay" is the direct linkage between the service provided and the economic benefit received in exchange for that service. This linkage is found too in Labor

[74] *O'Grady v. Superior Court* (2006) 139 Cal.App.4th 1423, 1443 [44 Cal.Rptr.3d 72, 86], as modified (June 23, 2006).
[75] *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal. 4th 1094, 1104 (emphasis added.)

Code section 3351, subdivision (c): "*while rendering actual service for the corporations for pay.*" The "pay" is the inducement for "actual service." Conversely, the "actual service" is not provided gratuitously.

Here, the economic benefit accruing to Garamendi from her service to the corporation is through her community property interest in the business; a property ownership she is entitled to irrespective of whether she performed any service at all. Of course, it is to Garamendi's economic benefit that the business performs well rather than poorly. But equating economic benefit with pay strains the concept of "pay" beyond the definition provided in Labor Code section 3351, subdivision (c). Garamendi would share in the profits (or losses) of the business only by virtue of her community property interest, which she holds irrespective of performing service for the corporation. Accordingly, Garamendi had no direct monetary inducement to perform any services for the corporation.

While it is clear that Garamendi provided various services to the corporation, it does not axiomatically follow that every unrealized interest in the corporation constitutes "pay." Indeed, under this line of reasoning, any person with an interest in a corporation could be said to have received consideration in lieu of wages or salary, as it benefits the corporation (and ultimately the interested party) to forgo cash money payments (or pay payroll taxes, for that matter).

In *Hubbert v. Industrial Acci. Com.*,[76] the Court found an employment relationship between a decedent and his purported employer but in *dicta* noted that even if the decedent employee in that case was considered a "partner" of the business, he would have been considered an employee because he "received *wages irrespective* of profits."[77] In *Hubbert*, the Court found

[76] *Hubbert v. Industrial Acci. Com.* (1936) 14 Cal.App.2d 171, 173.
[77] *Ibid.* (discussing the language defining a "working member" as provided by the Workmen's Compensation Act, section 8, subdivision b. While this language concerns a separate category of "employee," the Commissioner finds *Hubbert* instructive.)

persuasive the worker's receipt of wages to be indicia of an employment relationship. This reasoning, that profit sharing alone does not establish an employment relationship, has been adopted in other workers' compensation cases as well.[78] The actual receipt of wages or salary is a vital factor in determining the existence of employment relationship.

Based on the foregoing, Appellant has met its burden by demonstrating that Garamendi did not provide "actual service" for the corporation for "pay," as required in subdivision (c). Accordingly, the burden shifts to SCIF to demonstrate otherwise. SCIF provides no evidence that Garamendi received any "pay" whatsoever in exchange for her "actual service," and its relied-upon authority is inapplicable. Since Appellant paid Garamendi no money or other financial benefit in exchange for her work,[79] her services were not "for pay." The fact that she did not perform services "for pay" is fatal to SCIF's assertion that she was an employee.

i. *Dorman* is Inapposite.

The parties' discussions of *John Hancock Mutual Life Insurance Company of Boston, Massachusetts v. Dorman*[80] are misplaced for a number of reasons. SCIF relies on *Dorman* for the proposition that even an officer receiving no pay could be considered an employee under Labor Code section 3352, subdivision (c) even though that section explicitly states that the services are to be performed "for pay."[81] Appellant distinguishes *Dorman* by arguing that it is a decision about *estoppel*, which prevented the insurer in that case from relying on Labor Code

[78] *Land v. WCAB* (2002) 102 Cal.App.4th 491, 495 (upholding WCAB finding that an unpaid university sharing in the profits of the efforts of a university administered animal husbandry program was not an "employee"); *Coburn v. WCAB* (1989) 189 Cal.Wrk.Comp. LEXIS 2347, 54 Cal.Comp.Cases 129 (finding that an unpaid university student participating in a beekeeping course and sharing in the profits of the beekeeping enterprise was not an "employee."); *Employers' Liability Assurance Corp. v. Indus. Acci. Com.* (1921) 187 Cal. 615 (unpaid partner entitled to share in the profits of a business was not an "employee.")

[79] Tr. at pp. 43:23-25, 45:8-11, 87:20-88:3; Supp. Tr. at p. 9: 15-21.

[80] *John Hancock Mut. Life Ins. Co. of Boston, Mass. v. Dorman* (9th Cir. 1939) 108 F.2d 220, 223.

[81] See SCIF Post Hearing Br. at 4; see also SCIF's State Fund Brief After Supplemental Evidentiary Hearing filed on Aug. 24, 2018 ("SCIF Supplemental Brief") at 6.

section 3351 as a shield to providing death and disability benefits. While that is true, *Dorman* is simply inapplicable because it has no bearing on the issue of whether an unpaid officer or director may be considered an "employee" under the Labor Code.

In *Dorman*, a beneficiary (the widow of an insured board member) sought to recover under a term contract for employee death and disability group coverage after her husband, the insured board member, passed away. The decedent attended the company's board meetings and "contributed his services as one experienced in the baking trade to the deliberations of the board of directors. He *received no pay from the company for any services* rendered to it."[82] The insurer contended that the board member was not an employee of its insured-employer, as he received no compensation, and was therefore ineligible for coverage under the group death and disability policy. It argued that a corporate director could not be covered under sections 629a and 629b of the California Political Code (re-codified as Insurance Code section 10200, et seq.), because the definition of "employee" provided by Labor Code section 3351 supplanted the one found in Insurance Code section 10200, et seq.[83]

The insurer argued that because the decedent was unpaid, and would not be considered an "employee" under Labor Code section 3351, he should not be considered an "employee" for the purposes of employee group death and disability coverage under Insurance Code section 10200, et seq. The Court *rejected* the insurer's position, writing:

> It is our opinion that the including provision of the section of the Labor Code *does not limit the character of employee under the provisions of the Insurance Code* and make invalid a policy insuring as an employee a director actually rendering valuable service to the corporation though without compensation.[84]

[82] *Dorman*, *supra*, 108 F.2d at 222 (emphasis added).
[83] *Id.* at 223.
[84] *Ibid.* (emphasis added.)

* * *

The discussion in *Dorman* directly addressing Labor Code section 3351 was *dicta* and had no ultimate effect on the Court's decision. More importantly, the *Dorman* court specifically concluded that the definition of "employee" under Labor Code section 3351 had no bearing on the definition of "employee" under the Insurance Code. Here, the issue is whether Garamendi meets the definition of "employee" under the Labor Code, not the Insurance Code; rendering *Dorman* wholly inapposite. Further, imputing the *Dorman* court's analysis of the Insurance Code provisions concerning death and disability claims to the Labor Code's provisions concerning workers' compensation coverage would result in absurd consequences. Relying on the *Dorman* decision to negate the "for pay" requirement in subdivision (c) would render that language meaningless– the *Dorman*-insured director was not paid at all, and contributed only his baking expertise as services as a member of the board of directors. If such an individual could be considered an "employee" under Labor Code section 3351, subdivision (c) as it exists currently, then virtually every board member or officer would be considered an employee, irrespective of compensation.

ii. SCIF's Cited Authority is Inapposite Because it Does Not Address Officers and Directors in Subdivision (c) of Labor Code § 3351.

While the parties submitted additional argument and authority regarding when an unpaid person may be considered an "employee" for the purposes of Labor Code section 3351, SCIF has not provided any convincing authority that an *unpaid officer or director* may be considered an employee. Instead, SCIF relies on case law that speaks to unpaid individuals being found to be "employees" under Labor Code section 3351– not cases interpreting the employee status of officers and members of boards of directors under subdivision (c). (See e.g. SCIF's Supplemental Hearing Brief at 8-10, discussing *Anaheim General Hospital v. WCAB* (1970) 3

Cal.App.3d 468, *Laeng v. WCAB* (1972) 6 Cal.3d 771, *Barragan v. WCAB* (1987) 195 Cal.App.3d 637), and *Arriaga v. County of Alameda* (1995) 9 Cal.4th 1055.)

Labor Code section 3351 and its subdivisions recognize the differences in power and control that workers in different positions possess over their working conditions. While it is necessary, under the larger umbrella of section 3351, to take an expansive approach to ensuring that workers with little control over their working conditions are properly compensated for the occupational hazards that they encounter, officers and directors of a corporation, like Garamendi, are not in need of the same protections because they, unlike non-officers and directors, have greater control over, and greater discretion to manage the risks of their services.

In creating separate and specific categories of "employees" under Labor Code section 3351, the Legislature understood that not all workers who perform services for another require the public policy protections inherent in the workers' compensation system. Otherwise, there would be little logic or purpose in creating criterion specific to officers and directors. The Legislature's decision to require a nexus between pay and service for corporate officers and members of boards of directors in order to create an employment relationship is consistent with the public policy goals of the workers' compensation system, and recognizes both that unpaid officers and directors have a greater degree of control over the conditions of their work, and that they are not compelled to remain in those positions by reliance on a paycheck.[85]

SCIF correctly points out the California case law that takes an expansive view towards finding an employment relationship for the purpose of workers' compensation. [86] However, the

[85] *Cf.* Labor Code section 3351, subdivision (b) (including as employees "[a]ll elected and appointed *paid* public officers.") (Emphasis added.)

[86] *See, e.g. Anaheim General Hospital v. Workers' Comp. Appeals Bd.* (1970) 3 Cal.App.3d 468, 473 (noting that that in the case of determining whether a student nurse was employee, that "[i]t is not necessary in establishing the employer-employee relationship that the compensation be paid directly to the employee [citations omitted] or that the payment for services be characterized as "wages," so long as the service is not gratuitous.")

cases SCIF cites are inapplicable to this case: *Anaheim General Hospital* involved a student nurse who performed services for a hospital in return for practical training. Her tuition costs for her vocational nursing school were paid for by the federal government and supplemented by payments from the hospital to the school to further offset her tuition. (*Id*, at 473.) The Court's analysis was premised on determining whether the injured worker's status as a student-employee receiving on the job training was an employee of a third party. (*Id.*, at 472-473.) Simply put, unlike the facts in this case, there was an economic exchange in return for the student nurse's service.

Similarly, *Laeng*, *Barragan* and *Arriaga* are inapposite. In *Laeng,* a job applicant was injured while performing in a physical "tryout" test given to applicants administered by the City of Covina.[87] The court reasoned that under Labor Code section 3351, the job applicant could be considered an "employee" because he was performing "arduous and potentially hazardous tasks prescribed by the employer [while] in the service of the employer." (*Laeng, supra*, 6 Cal.3d at 783.) The service was for the benefit of the employer in that it allowed the employer to evaluate the performance of the job applicants and it was performed to the employer's assignment and under its direction and control. (*Id.)* SCIF relies on *Laeng* for the proposition that Labor Code section 3351 "does not require that an applicant be receiving actual 'compensation' for his 'services' in order to fall within the workmen's compensation scheme."[88] While it is certainly true that the applicant in *Laeng* did not receive compensation for his services, the court's finding of employment in that case hinged upon the *inducement* by the employer to compel the job applicant to engage in a tryout test, which included certain risky activity in return for potential employment. In other words, the court concluded an employer-employee relationship existed

[87] 6 Cal.3d at 774.
[88] SCIF's Supplemental Brief, at 8, citing *Laeng, supra*, 6 Cal.3d at 777.

because the tryout test created an "inchoate and viable" trade-off of risk for potential reward between the employer and the applicant. (*Id.)*.

The *Laeng* court described that the workers' compensation system:

> [F]undamentally proposes to protect individuals from any 'special risks' of employment; thus when an employer, as part of a 'tryout' for an employment position, exposes an applicant *under his control and direction* to such risks, any resulting injury becomes properly compensable..."[89]

* * *

The applicant in *Laeng* did not have any control over the conditions of the tryout, which was conducted for the benefit of the employer to evaluate the job applicants, and for which the applicant was compelled to perform in exchange for the hope of being hired and earning pay. Unlike the uneven negotiating strength of the employer versus the job applicant that led the *Laeng* court to find an employment relationship, Garamendi's status as corporate officer and director empowered her with considerable control over the conditions of her work with Connolly Ranch. Garamendi also had no economic reason compelling her to remain in her position as an unpaid officer and member of the board of directors. For these reasons, the *Laeng* decision is distinguishable and of little value when considering a corporate officer's, as opposed to a job applicant's, employment status.

In *Barragan*, again the exchange of consideration was a critical element in the employment relationship analysis. In the *Barragan* case, a student extern was injured at the hospital where she was performing services. While the student extern received no compensation from the hospital for her services, the Court found "the employment agreement between Barragan and the hospital is supported by consideration. While Barragan would receive no monetary compensation from the hospital for her services, she was receiving instruction from the

[89] *Laeng, supra,* 6 Cal.3d at 774 (emphasis added.)

hospital staff designed to train her as a physical therapist. This situation is indistinguishable from a situation in which the consideration takes the form of instruction designed to train a student as a butcher or services provided by one farmer to another." (*Barragan, supra*, 195 Cal.App.3d at 648.) In contrast to Garamendi, the student extern was compelled to subject herself to the working conditions at the hospital, which she had no control over, in order to receive training to further her chosen profession.

In *Arriaga*, an individual performing services for the California Department of Transportation by assignment to work off a four-year-old speeding ticket, was deemed to be an employee. (*Arriaga, supra*, 9 Cal.4th at 1062-1063.) The court considered that, at the time of her injury, she was performing services for the Department of Transportation and the County, both entities received the benefit of her service, and that she was under the control of both entities. The Court also found that Arriaga was not a volunteer: "Here, in exchange for her work, Arriaga received credit against the court-imposed fine. She thus received remuneration sufficient to render section 3352, subdivision (i), inapplicable."[90] Again, Garamendi received no economic benefit in exchange for her service, while the worker in *Arriaga* received an economic benefit, the discharge of her fine, in exchange for her service.

As stated above, because subdivision (c) specifically singles out officers and members of the board of directors, it narrows the employee-status analysis of such individuals to its enumerated factors, including "actual service" when that service is "for pay." SCIF's cited cases are simply immaterial to the specific question of whether under Labor Code section 3351, subdivision (c), Garamendi was an "employee." They discuss whether, under the broader umbrella of Labor Code section 3351, certain non-officer/director individuals are "in the service

[90] 9 Cal.4th at 1065.

of an employer under any appointment or contract of hire..." However, because the parties agree that Garamendi was an officer and member of the board of directors during the Policy Period, the relevant inquiry is whether she is an employee under subdivision (c), not the broader umbrella of Labor Code section 3351.

Since Appellant has provided uncontroverted evidence that Garamendi received no pay for her services as an officer or director of the corporation, Appellant has met its burden in demonstrating that Garamendi was not an "employee" as defined in subdivision (c). SCIF has not provided any evidence or persuasive argument to rebut this. Additionally, while Garamendi was an officer for only the first five months of the Policy Period, it is uncontroverted that she was a member of the board of directors for the entire Policy Period. Having received no pay for either position, Garamendi cannot be an "employee."

Since Garamendi is not an "employee" for workers' compensation insurance purposes, the Commissioner need not decide if SCIF charged the appropriate premium for Garamendi, or if she was properly assigned to Classification Code 0038(1) "Stock Farms-beef cattle and horses."

VII. Conclusions of Law

Based on the foregoing facts and analysis, the Commissioner concludes as follows:

1. Insurance Code section 11737, subdivision (f) confers jurisdiction to the Insurance Commissioner to determine a person's employee status in a rate application appeal.

2 Appellant has met its burden in demonstrating that Garamendi was not its "employee" during the Policy Period, and SCIF's counterarguments are not persuasive. As such, SCIF may not charge Appellant any workers' compensation insurance premium associated with Garamendi for the Policy Period.

3. Since Garamendi is not an employee, the Commissioner does not reach the issues of SCIF's calculated premium or Garamendi's classification assignment.

ORDER

IT IS ORDERED:

1. SCIF shall recalculate Appellant's premium for the 2017-2018 Policy Period in accordance with this decision and submit a revised premium calculation and statement of account of those periods to Appellant within 30 days after the date this Decision is issued.

2. It is further ordered that the entirety of this Decision is designated precedential pursuant to Government Code section 11425.60, subdivision (b).

Dated: November 29, 2018

DAVE JONES
Insurance Commissioner