BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

THIS DECISION DESIGNATES FORMER TAX DECISION NO. T-2352 AS A PRECEDENT DECISION PURSUANT TO SECTION 409 OF THE UNEMPLOYMENT INSURANCE CODE.

In the Matter of:

JAMES C. ARMSTRONG, C.P.A.
(Petitioner-Appellant)

DEPARTMENT OF EMPLOYMENT
(Respondent)

PRECEDENT
TAX DECISION
No. P-T-404

FORMERLY
TAX DECISION
No. T- 2352

The petitioner has appealed from Referee's Decisions Nos. SF-T-888 and SF-T-897 which denied in major part his petition for reassessment of two assessments made by the Department of Employment. The first assessment was made on April 24, 1961 under the provisions of Unemployment Insurance Code section 1127 with respect to the period extending from January 1, 1958 through March 31, 1958 and in the amount of $33.60 contributions, together with interest as provided by law. The second assessment was made on May 23, 1961 partly under the provisions of Unemployment Insurance Code section 1127 and partly under the provisions of Unemployment Insurance Code section 3803. With respect to section 1127, this assessment is for the period from April 1, 1958 through June 30, 1960 and is in the amount of $351.38 contributions, together with interest as provided by law. With respect to section 3803, this assessment is for the calendar years 1959 and 1960 and in the amount of $13.41 additional contributions together with interest as provided by law.

STATEMENT OF FACTS

The petitioner has been a certified public accountant since 1946. He is engaged in the private practice of his profession in Berkeley. In issue in this proceeding is the status, for unemployment insurance tax purposes, of nine persons who performed services for him during the period in question. The facts, with respect to each working relationship, are individual.

GILBERT ARMSTRONG

Gilbert Armstrong has been a licensed public accountant since about 1950. He has his own independent office and clientele. Since about 1957 he has performed certain accounting services for the petitioner in connection with the latter's practice under what the petitioner describes as a "subrogation" arrangement.

Under this arrangement, Gilbert Armstrong regularly takes care of such work as the monthly write-ups, payroll determinations, quarterly summaries, and quarterly payroll and sales tax returns of certain specific clients of the petitioner. The petitioner assumes the professional responsibility to the client for this work, and submits the results to the client under his own name. The individual clients are aware of the fact that this work is actually done by Gilbert Armstrong, but they have no direct professional relationship with him.

The arrangement does not contemplate that the petitioner will exercise any supervision over Gilbert Armstrong in connection with the performance of the details of the work. The petitioner may and does review the results of the work before assuming professional responsibility for it. The practicality of the arrangement, however, rests upon the petitioner's confidence in Gilbert Armstrong's professional skill upon which he relies in so doing.

This confidence may rest in part upon the fact that the parties are related. Gilbert Armstrong is a nephew of the petitioner. There is no indication, however, that their kinship has any unusual bearing on the working conditions of their business relationship.

The time which Gilbert Armstrong has devoted to this work has varied widely from month to month, the indications being that this variation has been between 8-1/2 and 28 hours per month. For his work Gilbert Armstrong is remunerated by the petitioner at a rate of $3 per hour. This remuneration is unrelated to the petitioner's charge to his client.

In the main, the work is done on the client's premises where the necessary accounting records are kept. None of Gilbert Armstrong's work is done at the petitioner's office nor does the petitioner provide Gilbert Armstrong with his office or with any part of its overhead.

For a portion of the period involved, Gilbert Armstrong's office has been located on another floor of the same building as that in which the petitioner's office is located. During this time they have shared the services of a secretary whose salary the petitioner pays. He then bills Gilbert Armstrong for his share of this payment.

No issue arises in regard to the independent status of Gilbert Armstrong with respect to the services rendered to his own clients. In issue only is his status in connection with the services rendered under the "subrogation" working arrangement.

WALTER ARMSTRONG

Walter Armstrong has been a public accountant since 1934. Until about 1960 he was also engaged in the business of manufacturing costume jewelry under the name of Arm-Bee Company. He, too, is related to the petitioner. He is his uncle.

Walter Armstrong is now 69 years of age, and is no longer striving either to build or to maintain an independent professional practice. However, he still continues to serve a few of his old clients and friends in a professional capacity and to derive about 15% of his income from accounting work from this source. The petitioner has no interest in this activity nor any share in this income.

Since about 1956, Walter Armstrong has performed the same kind of services for the petitioner as those performed by Gilbert Armstrong, under similar working conditions . This "subrogation" work produces about 85% of his income from accounting work and occupies a substantial portion of his working time, estimated by Walter Armstrong as averaging about 80 hours per month, and by the petitioner as somewhat more.

The petitioner exercises no control over the details of this work. Rather, in carrying out his tasks, Walter Armstrong comes and goes as he pleases without respect to any set work schedule. His engagement in each instance is to do a specified job, generally at the place of business of the client where the necessary records are kept. Walter Armstrong keeps a day book record of the time which he spends upon the petitioner's work and reports this time to the petitioner for the purpose of computing his remuneration.

The petitioner regularly reviews the results of Walter Armstrong's work before assuming the professional responsibility of a certified public accountant with respect to it. At times he also discusses these results with him before doing so and occasionally the petitioner makes changes in the vocabulary used in the various reports prepared for submission to his clients. Sometimes, before Walter Armstrong undertakes work on a specific job, the petitioner will discuss with him the particular accounting objectives that are sought to be achieved.

Walter Armstrong is remunerated by the petitioner for the work that he does for him at the gross rate of $3.50 per hour, from which, however, the petitioner deducts fifty cents per hour as a charge for Walter Armstrong's use of office space in the petitioner's suite and for secretarial services, phone answering services, stationery and other supplies which the petitioner furnishes to him. This offset arrangement is not evidenced by any written agreement or any practice of making formal bookkeeping entries or specific billings. For federal income tax purposes, Walter Armstrong has reported the remuneration which he has received from the petitioner as income from self-employment.

Walter Armstrong is not compensated by the petitioner for any expenses that he incurs in carrying on his work. In this connection, he regularly operates his own automobile at his own expense to go to various clients' places of business as far away from Berkeley as San Jose. He is not compensated by the petitioner for his travel time, but only for time devoted to accounting work.

Some years ago, Walter Armstrong did maintain an independent accounting office in connection with his professional practice. After he became engaged in the costume jewelry manufacturing business, he did not continue to do so, but serviced his own accounting clients from this business location. He now services his own clients from the office space that he has in the petitioner's suite. His agreement with the petitioner places no restriction upon his handling of other business or upon the use of his office space for this purpose.

It appears to be the understanding of both the parties that their relationship is terminable at will, but not without responsibility for the completion of work in progress. The relationship has worked out satisfactorily for both and there is no indication of any desire upon the part of either party to terminate it.

No issue arises in regard to the independent status of Walter Armstrong with respect to services rendered to his own clients. In issue only is his status, like that of Gilbert Armstrong, in connection with the services rendered under the "subrogation" working arrangement.

MARY ANDRADA

Mary Andrada was engaged by the petitioner to prepare and mail confirmations of share and loan accounts of a credit union client of his, and also to record the fact of this mailing on the client's ledger books. It was her specific assignment in this respect to cover one-half of the credit union's accounts on an annual basis. Her accomplishment of this task was not related to any more specific work schedule.

The nature of Mary Andrada's work was such that it had to be done at the office of the credit union, where its ledgers were kept, and also that it had to be done at times when her use of the ledgers would not interfere with the credit union's business operations. For these reasons, her work was done entirely on (not necessarily consecutive) Mondays of her own choice, because the credit union was regularly closed on that day of the week. The work itself was very routine in character and presented little problem aside from that of illegibility of addresses penciled on the ledger book records.

Initially, Mary Andrada was instructed as to how to do the work by the petitioner's secretary, and most of her subsequent dealings were with this individual. Once a month she reported (by telephone) to the petitioner's office as to the number of hours she had worked and the number of confirmations which she had sent out. She had no other occasion to communicate with the petitioner.

On average, Mary Andrada worked about 5-1/2 hours per week. She was remunerated on a time basis, initially at the rate of $1.75 per hour. This rate was subsequently raised to $2.30 per hour by the petitioner (without request). The petitioner exercised no actual supervision over her hours of work and, in fact, she did not even see him personally until about nine months after she had commenced working for him.

Mary Andrada is a widow with three children. She has other income aside from that which she receives from the petitioner and does not feel that it is absolutely necessary that she work. She is not an accountant, has never had an office and has never advertised for work. The only other working activity in which she engages is that of keeping a small set of books for her brother who operates a service station. She does not receive any pay for this but he helps her in various ways in return. She does this work for her brother at her home.

All of the facilities which Mary Andrada uses in connection with her work for the petitioner are supplied by the client credit union. These include their ledger books, their typewriter, their forms and their work space. They provide the post cards she uses and they pay the postage upon them. None of her work is done at the petitioner's office nor does Mary Andrada furnish anything but her labor.

The relationship between the parties was apparently terminable at any time without cause or notice. Mary Andrada understood when she was engaged by the petitioner that there would be no deductions from her pay and that she would report her own income for tax purposes. She did not, however, appear to clearly contemplate that she would not be an employee of the petitioner.

In issue is Mary Andrada's status as an employee or independent contractor under this working relationship.

PHILIP MITCHELL

Philip Mitchell was engaged by the petitioner to construct a drainage ditch on certain rental property owned by the petitioner adjacent to his home and also to lay some tile on this property for him. Mitchell does not appear to have been a contractor engaged in business, but, rather, a handyman doing odd jobs. He was engaged merely for these specific jobs which were completed in less than a month's time.

The arrangement with Mitchell was oral. The petitioner went upon the property with him and showed him where the trench was to be dug, outlining its path. He supplied Mitchell with material to be used for fill. The only tools which Mitchell used in doing the work were a shovel and pickax.

The arrangement did not provide for a specific work schedule. Mitchell worked when he pleased and the petitioner did not supervise his performance. Mitchell accounted to the petitioner for the number of hours which he worked and was remunerated by the petitioner on a time basis at the rate of $2.35 per hour.

The petitioner argues that Mitchell was a casual employee within the meaning of Labor Code section 3352. The issue presented is whether Mitchell is an employee under the provisions of the Unemployment Insurance Code.

CAROLYN KELLOGG

Carolyn Kellogg was a student who worked in the petitioner's office helping his secretary with general office work. She worked a total of 24-3/4 hours in 1958 and received remuneration aggregating $37.90.

MISS HUDSON

Miss Hudson was a typist who worked for the petitioner for two days in 1958 in the petitioner's office typing tax returns. She brought and used her own typewriter. She received a total remuneration of $28.

LUCIA LEWIS

Lucia Lewis performed eleven hours of work in 1959 in the office of the petitioner's credit union client. She assisted in running quarterly tapes of members' share and loan accounts. She was remunerated by the petitioner in the amount of $21.01.

ROGER CHRISTIANSEN

Roger Christiansen is a practicing public accountant in Berkeley, who maintains his own independent office. During 1959 these facilities were used by the petitioner for some typing work for which the petitioner paid Christiansen $8.50.

GLADYS D. MILLER

Petitioner's records show that on December 29, 1959 he paid $3 to one Gladys D. Miller. Neither the petitioner nor the department are able to identify the purpose of this payment and, particularly, whether or not it was a payment for personal services rendered.

REASONS FOR DECISION

The principal issue raised by the petitioner relates to the status of all of the individuals except Philip Mitchell. It involves the question as to whether their services during the period under review were rendered as employees or independent contractors. In the case of each individual, this determination of the question rests upon the overall picture of his working relationship which arises out of a proper appraisal and evaluation of a group of factors pertaining to the rendition of his services.

The factors to be considered are set forth in the Restatement of the Law of Agency, and have been held to govern the determination of status for unemployment insurance purposes in Empire Star Mines Company, Ltd. v. California Employment Commission (1946), 28 Cal. 2d 33 at page 43,168 P. 2d 686 at page 692, and in a number of other cases. By far the most important factor in this evaluation is the one that is usually referred to as the "right of control." Not to be overlooked, however, are the additional indications of the eight satellite factors.

The right of control factor involves an appraisal of the extent to which the principal has a right to exercise control over the workman's manner, mode, methods and means of doing his work. The inquiry is addressed to the right and not to the actualities of the exercise of control, although, of course, the latter generally have important inferential value in determining the former. An employment relationship exists where the principal's right of control is "complete" and "authoritative" as described in our Tax Decision No. 2346.

The various satellite factors are primarily areas of evidentiary interest to be explored in search of sensible indications of the true character of the relationship. They vary considerably in importance from situation to situation in respect to the effectiveness of their contribution to the overall picture. They are of value not so much in and of themselves, as in terms of the clarification and support which they give to the resolution of the primary test as to where and to what extent the right of control has really been vested.

With these various principles in mind, let us now proceed to consider the specific working relationships that we have before us.

GILBERT ARMSTRONG

Gilbert Armstrong rendered services to the petitioner as an accountant. As far as we have been able to determine, the status of an accountant as an employee or an independent contractor has been the subject of judicial determination in only one appellate court case in this state. In Coleng v. Ramsdell (1937), 19 Cal. App. 2d 376, 65 P. 2d 365, the trial court had rendered its judgment upon the basis that an employment relationship existed between an accountant and an automobile dealer to whom he rendered professional services. The appellate court in reversing this judgment found that the accountant was an independent contractor under the working relationship shown.

The essential facts of the working relationship in the Ramsdell case were not in conflict. Ramsdell was engaged by the automobile dealer to make certain monthly test audits or checks, both at the dealer's local office and at an out-of-town branch. In addition, Ramsdell posted certain reports from the out-of-town branch in a set of books which he kept at his home. Occasionally he made reports, compiled lists of accounts receivable, and "took off this or that" as requested by the client.

All of this work was done by Ramsdell at such times as he chose, either at his home, at the dealer's local office, or at the out-of-town branch; and sometimes on evenings, Sundays or holidays. Ramsdell agreed to devote as much time to the work as necessary to give satisfactory results. However, there was no stated time when he was required to do the work other than that of providing a monthly accounting report to the client between about the 10th and 15th of each month. While preparing this report, he gave precedence to the dealer's work over other work.

Ramsdell's remuneration was in the form of a fixed monthly fee. The dealer paid his gasoline and hotel expenses whenever he made trips to the out-of-town branch. Ramsdell ordinarily made the decisions as to when these trips were necessary, but at times the automobile dealer would call him to come in from the branch to the local office or vice versa to report on something.

In support of the judgment of the trial court, the respondent in the Ramsdell case urged before the appellate court that the evidence was sufficient to show not only a right of control in the automobile dealer, but also the actual exercise of such a right. In support of its contention it argued that the automobile dealer had the power to discharge Ramsdell since the contract was not for a definite time; that Ramsdell's employment had been continuous for about ten years; that the dealer paid Ramsdell's expenses on trips to the out-of-town branch; that at times the dealer directed Ramsdell to go to the branch or return from it; that Ramsdell made special reports not called for by his contract; that at times he worked in the dealer's office and used his equipment at both places; that Ramsdell's compensation was by the time and not by the job and was paid irrespective of whether there was any particular work to be done or not; that the automobile dealer's work had preference during the early part of the month; that Ramsdell carried certain of the dealer's books in his own car; and that Ramsdell was required to do his work to the automobile dealer's satisfaction.

Upon these facts, and in the face of these contentions, the appellate court held that Ramsdell was an independent contractor. By its reversal of the trial court's decision, the appellate court imports that the essential facts of the Ramsdell case were not legally sufficient to support an inference or conclusion that an employment relationship existed. Baugh v. Rogers (1944), 24 Cal. 2d 200 at page 206, 148 P. 2d 633 at page 637; 152 A.L.R. 1043 at page 1048; Isenberg v. California Employment Stabilization Commission (1947), 30 Cal. 2d 34 at pages 40 and 41, 180 P. 2d 11 at pages 15 and 16; Bemis v. People (1952), 109 Cal. App. 2d 253 at page 264, 240 P. 2d 638 at page 644. After citing certain cases, the appellate court went on to say:

> "In our opinion any right of control which was retained or exercised by the appellant falls within the rules laid down in the cases just cited. Ramsdell was employed as an auditor under a contract for his services as such, and the appellant was interested only in the results and not in the details of his work or the means used. While he was keeping certain books relating to the business conducted at Barstow, although another bookkeeper was employed there, this was closely related to his work as an auditor and was performed under the same contract, which was for an independent service rather than being one between an employer and employee. Ramsdell was free to do his work at times and places to suit his own convenience, the appellant had no right to control the manner in which the work was to be done, and was interested only in the results obtained.

> Ramsdell was as much engaged in business for himself, in performing the work called for in his contract with the appellant, as is a lawyer who engages to do certain work for a client upon a regular monthly retainer."

Like Ramsdell, Gilbert Armstrong (in the matter now before us) was engaged by his principal to render professional accounting services. He was free to do the work at his own convenience and in his own way. The petitioner asserts that he was only interested in the results of the work and not in the means used, and disclaims any right upon his part to control Gilbert Armstrong's working methods.

Throughout the period involved, Gilbert Armstrong was engaged in the professional practice of accounting as an independent occupation. He maintained his own office, serviced his own clients, and devoted only a minor fraction of his time to the services which he rendered to the petitioner. All of these things, it must be admitted, tend to support the overall picture of a man engaged in independent working relationships.

The primary challenge to this picture is presented by one essential difference between the facts of this case and those of the Ramsdell case. Ramsdell was engaged by and rendered his services to a non-professional client for whom he did work which was of a different type from that of the business in which his principal was engaged. Gilbert Armstrong on the other hand was engaged by a member of his profession to do work that was of the same type as that which his principal did in carrying on his business. How, then, does this alter the overall picture of the working relationship between the parties.

Presumably it would have been more difficult for Ramsdell's principal to supervise the doing of work involving a professional skill that he apparently did not possess himself, than it would have been for the petitioner to undertake a similar supervision of the work of Gilbert Armstrong. Moody v. Industrial Accident Commission (1928), 204 Cal. 668 at page 671, 269 P. 542 at page 543, 60 A.L.R. 299 at page 302; Malloy v. Fong (1951), 37 Cal. 2d 356 at page 371, 232 P. 2d 241 at page 250. This greater difficulty is indicative of a greater probability of independence in Ramsdell's type of working relationship than in Gilbert Armstrong's. Viewed at close range, however, it appears from the evidence before us that the working relationship contemplated reliance on the skill of the workman rather than upon supervision of his work. It would appear, therefore, that for somewhat different reasons, the factor of skill enters the overall picture in support of an independent working relationship.

Most of the other factors likewise give similar support, or at least fail to give any substantial indication of an employment relationship. The most troubling is the method of payment. We realize, of course, that professional people are often engaged as independent contractors on a time basis, but generally not that inexpensively. Also, the continuing nature of the relationship would concern us more if it were not for the presence of a similar situation as a part of the picture in the Ramsdell case.

We recognize that it was apparently the intent of the parties to establish an independent relationship and their belief that they had done so. The place of work and the furnishing of instrumentalities add little to the picture of the working relationship, but what little they do add is definitely not in support of an employment status. We conclude, therefore, that Gilbert Armstrong was an independent contractor with respect to the services which he rendered to this petitioner in this manner.

WALTER ARMSTRONG

The work done by Walter Armstrong for the petitioner is of the same type as that done for him by Gilbert Armstrong. The working conditions as well are similar. There are, however, three differences between them which deserve to be mentioned and their significance appraised.

One might be called a difference in viewpoint created by Walter Armstrong's advanced years. Absent is any striving to develop the type of indpendent business that is characteristic of the private professional practitioner. It makes for a thinner picture of his activity being conducted as a distinct business or occupation.

Another is the closer relationship which the location of his office and use of instrumentalities has to the petitioner's business than it does in the case of Gilbert Armstrong. This also makes for a thinner picture of independent activity. Finally, there is the much more substantial proportion of time which Walter Armstrong devotes to the petitioner's work in comparison with Gilbert Armstrong, and the proportion of his income from accounting work that stems from the petitioner.

In spite of these differences, the picture of the working relationship of Walter Armstrong with the petitioner is just about the same. A man with many years of experience in the practice of his profession, independently licensed, serving some clients of his own and subject to no restriction in handling such other business, working without supervision over his manner, methods and means of work, not reimbursed for travel time or expenses even when traveling a substantial distance, and believing that he is rendering his services in an independent capacity. Admittedly, Walter Armstrong has been an independent contractor in the practice of accounting over most of his life, and we can find no event that seems to justify a conclusion that at such point his status changed.

We conclude, therefore, that Walter Armstrong also rendered his services to the petitioner as an independent contractor.

MARY ANDRADA

Mary Andrada rendered services to the petitioner of a very routine nature. She was not engaged in the rendition of this type (or of any type) of service to the general public as an independent business, nor is it customary to find an individual doing so. Her work was not of a type that required any skill, she did not supply any of the instrumentalities that she used, or even the place where the work was done; her work was on a continuous basis; it was part of the regular business of the petitioner; and she was paid in accordance with the time that she devoted to it.

None of these indications, standing alone, is too significant, but in combination they present a rather strong picture of an employment relationship. It is reasonable to conclude that an individual, such as Mary Andrada, who initially received and followed instructions from one of the petitioner's employees as to how to do the work, would expect and would be expected to follow any necessary further directions in regard to how to carry it on. In this type of setting, the absence of exercise of control by the petitioner over the details of her work is not particularly significant in evaluating his right of control, since there do not appear to have been any occasions which would have prompted him to exercise such a right if he had it, and to proceed otherwise if he did not. Cameron v. Pillsbury (1916), 173 Cal. 83 at page 86, 159 P. 149 at page 150; York Junction Transfer & Storage Company v. Industrial Accident Commission (1927), 202 Cal. 517 at page 520, 261 P. 704 at page 705.

A very minor factor in the determination of status is the belief of the parties. To be significant, this belief should be shown to be mutual and it should relate in some way to the principal's conduct in assuming or not assuming control, and the worker's conduct in submitting or not submitting to it. Isenberg v. California Employment Stabilization Commission (1947), 30 Cal. 2d 34 at page 40, 180 P. 2d 11 at page 15. It appears that Mary Andrada understood that there would be no deduction from her pay, but the evidence certainly does not indicate either that she believed she was not an employee or that she related this fact in any way to the questions of assumption and submission to control.

From all of the foregoing, we believe that the status of Mary Andrada was that of an employee of the petitioner, and we so hold.

CAROLYN KELLOGG AND LUCIA LEWIS

The evidence with respect to the working relationship of these two individuals is exceedingly meager, but it is sufficient to establish that they rendered personal services to the petitioner in connection with his business for which he paid them remuneration. This is sufficient in the absence of other evidence to raise a presumption that these individuals were engaged as employees. Hillen v. Industrial Accident Commission (1926), 199 Cal. 577 at page 580, 250 P. 2d 570 at page 571; Robinson v. George (1940), 16 Cal. 2d 238 at page 242, 105 P. 2d 914 at page 916; Garrison v. State of California (1944), 64 Cal. App. 2d 820 at page 826, 149 P. 2d 711 at page 714. Upon the basis of this presumption and in the absence of other evidence, we so hold.

MISS HUDSON

The evidence with respect to Miss Hudson is similarly meager, but also sufficient to establish the rendition of personal services to the petitioner in connection with his business and his payment of remuneration to her. The services were rendered at the petitioner's office; however, Miss Hudson furnished her own typewriter. We consider this isolated fact, not shown in any way to have influenced the situation in regard to control over the work, to be of too little significance to overcome the presumption of employment. Accordingly, we find that Miss Hudson was engaged as an employee.

GLADYS D. MILLER

Neither the petitioner nor the department are able to account for the purpose of a $3 payment to Gladys D. Miller. In the absence of any indication that the payment was for personal services, no presumption of employment arises. Upon this basis we hold that Gladys D. Miller was not the petitioner's employee.

ROGER CHRISTIANSEN

The evidence indicates that Roger Christiansen is a practicing public accountant who maintains his own independent office. It appears that the small amount in issue was paid for use of his office facilities. We hold, therefore, that it was not wages paid for employment.

PHILIP MITCHELL

The issue with respect to Philip Mitchell is a little different. The petitioner seeks exemption of his services from unemployment insurance taxes as a casual laborer under the provisions of Labor Code section 3352, which provides that the term "employee" excludes:

> "Any person whose employment is both casual and not in the course of the trade, business, profession, or occupation of his employer."

The evidence clearly indicates that the employment of Philip Mitchell was of this character. But Labor Code section 3352 must be read in conjunction with Labor Code section 3350, which states that:

> "Unless the context otherwise requires, the definitions set forth in this article shall govern the construction and meaning of the terms and phrases used in this division."

The term "this division" pertains to Division 4 of the Labor Code relating to Workmen's Compensation and Insurance. It has no direct application to unemployment insurance. The term "this article" pertains to article 2 of chapter 2 of part 1 of Division 4 relating to the definition of "employees" for purposes of workmen's compensation, and includes Labor Code section 3352.

The provision of law which governs the petitioner's claim for exemption for unemployment insurance tax purposes is Unemployment Insurance Code section 640, which states that:

> " 'Employment' does not include service not in the course of the employing unit's trade or business performed in any calendar quarter by an employee, unless the cash remuneration paid for such service is fifty dollars ($50) or more and such service is performed by an individual who is regularly employed by such employing unit to perform such service. For the purposes of this subdivision, an individual shall be deemed to be regularly employed by an employing unit during a calendar quarter only if on each of some 24 days during that quarter or the preceding calendar quarter such individual performs for such employing unit for some portion of the day service not in the course of the employing unit's trade or business."

Labor Code section 3352 and the adjudications in connection with it are sometimes helpful in connection with a claim of exemption under Unemployment Insurance Code section 640 in resolving whether the service rendered was in the course of the employer's trade or business. Wheeler v. California Department of Employment (1960), 193 Cal. App. 2d 829 at page 832, 14 Cal. Rptr. 589 at page 591. We agree with the petitioner that Mitchell's service was not so rendered, but was casual employment. But this fact alone is not sufficient to establish a claim of exemption under Unemployment Insurance Code section 640.

The evidence establishes only that the job was completed in less than a month. It does not establish the precise fact essential to the claim of exemption that Mitchell did not render some service to the petitioner on 24 or more days during a specific half-year period. In the absence of such evidence, the claim of exemption must be denied.

DECISION

The decision of the referee is modified. The petition is granted with respect to that portion of the assessment based upon payments made to Gilbert Armstrong, Walter Armstrong, Roger Christiansen and Gladys D. Miller. It is denied in all other respects. The matter is returned to the Department of Employment for adjustment of the assessment

in accordance with the decision, preserving to the petitioner the right of further review by a referee of the adjustments made, and to both parties the right of further appellate review of any adverse referee's decision in regard thereto.

Sacramento, California, March 8, 1963.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

GERALD F. MAHER, Chairman

ARNOLD L. MORSE

LOWELL NELSON (Not Voting)

Pursuant to section 409 of the Unemployment Insurance Code, the above Tax Decision No. T-2352 is hereby designated as Precedent Decision No. P-T-404.

Sacramento, California, February 27, 1979.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

DON BLEWETT, Chairperson

MARILYN H. GRACE

HARRY K. GRAFE

RICHARD H. MARRIOTT

HERBERT RHODES