

**BEFORE THE**  
**STATE OF CALIFORNIA**  
**OCCUPATIONAL SAFETY AND HEALTH**  
**APPEALS BOARD**

In the Matter of the Appeal of:

GONZALO OLASCOAGA dba GONZALO  
OLASCOAGA  
7674 South Edison Road  
Bakersfield, CA 93307

Employer

Docket No. 13-R6D5-2097  
and 2098

**DECISION AFTER  
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken the petition for reconsideration filed by the Division of Occupational Safety and Health (Division) matter under submission, renders the following decision after reconsideration.

**JURISDICTION**

Beginning on May 23, 2013, the Division of Occupational Safety and Health (Division) conducted a programmed Labor Enforcement Task Force inspection in an agricultural field located at 46566 Taylor Street, Coachella, California maintained by Gonzalo Olascoaga, dba Gonzalo Olascoaga. On June 24, 2013, the Division issued two citations to Employer alleging violations of workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.<sup>1</sup>

Citation 1, Item 1 alleges a General violation of section 1509(a) [Illness and Injury Prevention Program]; Item 2 alleges a General violation of section 3395(f)(3) [Heat Illness Prevention Program]; Item 3 alleges a General violation of section 3457(c)(3)(G)(2) [Field Sanitation, handwashing facilities]. Citation 2 alleges a Serious violation of section 3457(c)(1)(A) [Field Sanitation, access to potable drinking water].

Gonzalo Olascoaga filed timely appeals of the citations.

Administrative proceedings were held, including a contested evidentiary hearing before an Administrative Law Judge (ALJ) of the Board. After taking

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<sup>1</sup> Unless otherwise specified, all references are to California Code of Regulations, Title 8.

testimony and considering the evidence and arguments of counsel, the ALJ issued an Decision on January 29, 2015. The Decision denied Gonzalo Olascoaga's appeal but reclassified Citation 2 from Serious to General, imposing a civil penalty of \$750 for the Citation and total penalties of \$1,850.

The Division timely filed a petition for reconsideration of the ALJ's Decision on the basis of Labor Code sections 6617(c) and (e). In its petition, the Division argues that there was sufficient evidence for the ALJ to conclude that a reasonable possibility of serious injury existed from the actual hazard of deprivation of water to the workers at the worksite. Gonzalo Olascoaga did not file an answer to the petition.

### **ISSUE**

Did the Division establish by a preponderance of the evidence that Gonzalo Olascoaga dba Gonzalo Olascoaga was an employer of the two individuals working in the field in Coachella, California on May 23, 2013?

### **EVIDENCE**

The Board has independently reviewed the entire record in this matter, and makes the following findings of fact:

1. On May 23, 2013, Daysi Alcantar of the Division of Labor Enforcement and Donald Jackson, Associate Safety Engineer (ASE) with the Division of Occupational Safety and Health, conducted an inspection at a farm field in Coachella, California.
2. There were initially two individuals present at the field during the time of the inspection: Gonzalo Olascoaga Jr., and an individual identified only as Mr. Perez. Gonzalo Olascoaga, the owner of the field and father of Gonzalo Olascoaga Jr., arrived at the field 20 minutes into the inspection.
3. The Division's inspection lasted less than half an hour, including observation from off-site.
4. ASE Jackson did not speak with Mr. Perez.

### **DECISION AFTER RECONSIDERATION**

In making this decision, the Board relies upon its independent review of the entire evidentiary record in the proceeding. The Board has taken no new evidence. The Board has also reviewed and considered the Division's petition for reconsideration.<sup>2</sup>

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<sup>2</sup> The Division also filed an "Answer to Petition for Reconsideration" in response to a Petition for Reconsideration it presumably received from Gonzalo Olascoaga. Olascoaga did not serve the Board with a petition for reconsideration. After receiving the Division's Answer, the Board informed Employer that it was required to file any Petition with the Board. Employer did not respond to the Board's requests, therefore, we do not consider the Division's Answer.

Gonzalo Olascoaga argued at hearing that the Division lacked jurisdiction to issue the contested citations, as Gonzalo Olascoaga was not an employer as defined by the Labor Code on the day of the inspection. (Labor Code sections 3300, 6303, 6304, 6304.1; *Strategic Outsourcing Inc.*, Cal/OSHA App. 10-0914, Denial of Petition for Reconsideration (Sep. 16, 2011).) The ALJ found the Division's testimony regarding employee status more credible than that of Gonzalo Olascoaga Jr.'s, and found an employer-employee relationship existed. (Decision, p. 3.) Upon an independent review of the record, the Board is not persuaded that any employer-employee relationship exists in this case, and declines to uphold the ALJ's Decision.

An entity's status as an employer is a jurisdictional question, and may be addressed by the Board at any time. (*Strategic Outsourcing Inc.*, Cal/OSHA App. 10-0905, Denial of Petition for Reconsideration (Sep. 16, 2011), *Sierra Wes Drywall*, Cal/OSHA App. 94-1071 Decision After Reconsideration (Nov. 18, 1998) [Jurisdictional issues cannot be waived and may be raised at any time, including by the Board itself].) Where there is an actual question as to the status of an entity as an employer, the Board has reviewed the record for indices of control over the manner and means of work. (*Treasure Island Media, Inc.*, Cal/OSHA App. 10-1095, Decision After Reconsideration (Aug. 13, 2015).) While not dispositive, "the principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired." (*S.G. Borello & Sons, Inc. v. Dep't of Industrial Relations* (1989) 48 Cal.3d 341, 351.)

Here, the putative employer disputes having control over the work performed by Perez, and argues that Perez was present on the land as a subtenant or lessee. Gonzalo Olascoaga Jr. (Olascoaga Jr.) testified that he and his father were co-owners of the business, and leased the land where the inspection occurred. According to the unrebutted and credible testimony of Olascoaga Jr., Perez was not working for Gonzalo Olascoaga, but instead had an agreement to use Gonzalo Olascoaga's land. Gonzalo Olascoaga had been ill since early 2013 and had been unable to plant on either all or part of the plot. Olascoaga Jr. and his father were present at the field on the day of the Division's inspection assisting Perez with a booster pump so that Perez could water his crops. Olascoaga Jr. testified that they met Perez that day to assist him with the irrigation pump, to ensure that Perez did not use the irrigation system incorrectly and damage a main water line.<sup>3</sup>

The Division did not rebut this testimony from Olascoaga Jr., which presents credible evidence of Gonzalo Olascoaga and his son as small farmers who have leased their farm field for the season to another small farmer. During the course of the inspection, the Division's inspector did not interview Perez, and the Division did not call Perez to testify. Nor did the Division's inspector testify to witnessing acts during the inspection that would lead to a finding that the elder Gonzalo Olascoaga possessed or exercised powers of

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<sup>3</sup> The Division's testimony also suggests that at the time of the inspection, Perez and Olascoaga Jr. were setting up irrigation.

control associated with an employer-employee relationship over his son and/or Perez. (See, *Nash Construction Co., Inc.*, Cal/OSHA App. 80-973, Decision After Reconsideration (Feb. 8, 1985), *Commercial Diving*, Cal/OSHA App. 91-951, Decision After Reconsideration (Apr. 14, 1994).)

The Board therefore concludes that the Division failed to demonstrate that an employer-employee relationship existed in this instance. The Decision of the Administrative Law Judge is set aside and the citations are vacated.

ART CARTER, Chairman  
ED LOWRY, Board Member  
JUDITH S. FREYMAN, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
FILED ON: November 24, 2015