

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

In the Matter of the Appeal of:

RAAM CONSTRUCTION, INC.
341 West First Street, Suite 100
Claremont, CA 91711

Employer.

Docket. 15-R1D4-0155

**DENIAL OF PETITION
FOR RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code hereby denies the petition for reconsideration filed in the above entitled matter by RAAM Construction, Inc. (Employer or “RAAM”).

JURISDICTION

The Division of Occupational Safety and Health (Division) conducted an inspection at 19020 MacArthur Boulevard, Oakland California beginning on June 23, 2014. RAAM Construction, Inc. is a general building contractor at the site at issue, and on December 22, 2014 was cited by the Division for one violation of California Code of Regulations, title 8, section 3276 subdivision (e)(15)(E) [allowing a worker to stand on the step below the top cap of a step ladder to perform work overhead].¹

RAAM timely filed an appeal of the single citation, contesting the existence of the violation, classification, and reasonableness of the proposed penalty. RAAM also asserted that the safety order was not violated by any employees or workers in its control and that the citation was wrongfully assigned to RAAM and unreasonable. A hearing was held before an Administrative Law Judge (ALJ) of the Board on October 1, 2015. The ALJ issued a Decision upholding the Citation and \$6750 penalty on December 17, 2015. RAAM timely filed a Petition for Reconsideration with the Appeals Board on January 25, 2016. The Division filed a response to the petition.

¹ Unless otherwise specified, all references are to sections of California Code of Regulations, title 8.

ISSUE

Was RAAM the controlling employer at the worksite?

REASON FOR DENIAL OF PETITION FOR RECONSIDERATION

Labor Code section 6617 sets forth five grounds upon which a petition for reconsideration may be based:

- (a) That by such order or decision made and filed by the appeals board or hearing officer, the appeals board acted without or in excess of its powers.
- (b) That the order or decision was procured by fraud.
- (c) That the evidence does not justify the findings of fact.
- (d) That the petitioner has discovered new evidence material to him, which he could not, with reasonable diligence, have discovered and produced at the hearing.
- (e) That the findings of fact do not support the order or decision.

Employer's petition argues that the evidence adduced at hearing does not justify the findings of fact in the Decision. (Labor Code section 6617 subdivision (c).) Specifically, Employer is concerned with findings of fact numbers 3, 5, 7, and 8, and other findings of fact which state or imply that RAAM was a controlling employer at the date and time of the inspection at issue. (Petition for Reconsideration, p. 3.)

While Employer properly provides the Board with the specific grounds upon which it files its Petition for Reconsideration, Employer fails to adequately describe how the ALJ's findings of fact are in error. The Board has fully reviewed the record in this case, and based upon that independent review of the record, we find that the ALJ's Decision was based on a preponderance of the evidence in the record as a whole.

The ALJ's finding of fact number three concludes that on the date of the inspection, June 23, 2014, RAAM had not yet completed the process of transferring control of the construction site to the owner or the third-party agent, as it had not yet completed all punch-list work that needed correction, and still had several of its own employees, as well as subcontractors working on site. RAAM argues in its petition that this finding is in error because the punch list work consisted only of minor repairs, and that its performance of the construction project was essentially complete. RAAM specifically argues that the ALJ's finding is incorrect because the building's management company had been given keys to the site and was beginning the leasing process on the day of the inspection. RAAM also notes that a Temporary Certificate of Occupancy had been obtained from the City of Oakland, allowing tenants to begin moving into the building.

It is undisputed that this was RAAM's last day on the job, and that RAAM was only on site to complete final touch-up work, pack up, and hand over keys to the leasing agent of the owner. While it may have been the last day of work, RAAM was still responsible for the safety and health on the worksite of the few employees and subcontractors that remained at work on the job, engaged in construction work.² Furthermore, the evidence in the record supports a finding that the employee at work on the ladder in the garage, as mentioned in findings of fact number five, seven, and eight was either an employee of RAAM or an employee of a RAAM subcontractor. Two Division witnesses testified to the worker giving his name and stating that he was employed by RAAM, and pointing the inspectors to RAAM's construction trailer.³ The ALJ found this testimony to be credible, and we will not disturb that finding absent substantial evidence to the contrary. (Decision, p. 6; *River Ranch Fresh Foods – Salinas, Inc.*, Cal/OSHA App. 01-1977, Decision After Reconsideration (Jul. 21, 2003) citing *Lamb v. Workmen's Compensation Appeals Board* (1974) 11 Cal.3d 274, *Garza v. Workmen's Compensation Appeals Board* (1970) 3 Cal.3d 312, 318; *Metro-Young Construction Company*, Cal/OSHA App. 80-315, Decision After Reconsideration (Apr. 23, 1981); see also, *California Youth Authority v. State Personnel Board* (Dec. 18, 2002) 104 Cal.App.4th 575.) As the ALJ noted, RAAM failed to rebut this testimony with evidence that the worker was engaged by the building owner, the property management company, or some other entity not connected with RAAM. (Decision, pp. 6-7.)

The Decision, contrary to RAAM's contention, does not make a contractor responsible for the safety of 'every person' at a worksite. Had RAAM demonstrated that the worker on the ladder was an independent contractor unconnected to RAAM, a tenant, invitee, or some other stranger, the citation would properly have been vacated. However, the preponderance of the evidence shows that the worker was an employee in the service of an employer

² See, Labor Code section 6400: 6400. (a) Every employer shall furnish employment and a place of employment that is safe and healthful for the employees therein.

(b) On multiemployer worksites, both construction and nonconstruction, citations may be issued only to the following categories of employers when the division has evidence that an employee was exposed to a hazard in violation of any requirement enforceable by the division:

- (1) The employer whose employees were exposed to the hazard (the exposing employer).
- (2) The employer who actually created the hazard (the creating employer).
- (3) The employer who was responsible, by contract or through actual practice, for safety and health conditions on the worksite, which is the employer who had the authority for ensuring that the hazardous condition is corrected (the controlling employer).
- (4) The employer who had the responsibility for actually correcting the hazard (the correcting employer).

The employers listed in paragraphs (2) to (4), inclusive, of this subdivision may be cited regardless of whether their own employees were exposed to the hazard.

³ The Board's hearsay rule is found at section 376.2, and states in part that "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions."

at the RAAM worksite; whether he was directly an employee of RAAM or an employee of a RAAM subcontractor is irrelevant. The ALJ correctly found, and the Board agrees, that at the time of the incident, RAAM, as the controlling employer at the worksite, was responsible for the safety of this employee engaged in construction work on the RAAM construction project, whether as a RAAM employee, or as an employee of a RAAM subcontractor.

DECISION

For the reasons stated above, the petition for reconsideration is denied.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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