

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

HARRIS CONSTRUCTION COMPANY, INC.
5085 East McKinley Avenue
Fresno, CA 93727

Employer

Docket No. 03-R2D5-3914

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board) issues the following decision after reconsideration, pursuant to the authority vested in it by the California Labor Code. The Board elected to reconsider the referenced matter on its own motion.

JURISDICTION

Beginning on July 23, 2003, a representative of the Division of Occupational Safety and Health (Division) investigated an accident at a place of employment located at Avenue 12 and Road 30, Madera, California, where Harris Construction Company, Inc. (Employer) served as the general contractor. On September 19, 2003, the Division issued a citation to Employer alleging a general violation of section 3329(d) (failure to relieve internal pressure in a pressurized, closed piping system prior to opening) of the occupational safety and health standards and orders found in Title 8, California Code of Regulations¹. Employer was cited as a controlling employer under section 336.10 (multi-employer workplace standard).

Employer filed a timely appeal contending that the safety order was not violated.

On September 20, 2005, a hearing was held before an Administrative Law Judge (ALJ) of the Board in Fresno, California. Deborah Pedersdotter, Attorney, represented Employer and Katherine R. Wolff, Staff Counsel, represented the Division. On October 12, 2005, the ALJ issued a decision upholding the citation.

¹ Unless otherwise noted, all section references are to Title 8, California Code of Regulations.

On November 10, 2005, the Board ordered reconsideration on its own motion, and stayed the ALJ's decision pending the Board's decision after reconsideration. Employer and the Division filed responses to the Board's order and the Construction Employer's Association filed an amicus curiae brief in support of Employer.

EVIDENCE

Employer was the general contractor on a project to expand Madera Community College. Champion Industrial Construction (Champion) subcontracted with Employer to perform pipe-fitting work on the project.

Employer and Champion operated under a contract that, among other things, addressed responsibility for occupational safety and health issues.² Employer stipulated at the hearing that it played an active role in safety on the project.

One of Champion's employees, Jeff Gilkison, was injured on the jobsite while working for Champion. He suffered a significant injury to his right calf when a pressurized piece of pipe attached to a valve broke off and forced his leg against a bolt in a concrete thrust block that tore through the muscle and an artery.

Gilkison's testimony was the sole source of information provided regarding the events that led to the violation and the accident. He opined that his inexperience contributed significantly to the problem. Gilkison had worked for Champion since January 2003, and was a level three apprentice pipe fitter³ when the accident occurred on March 28, 2003. As an apprentice, Gilkison was to work under the direct supervision of a journeyman at all times. Despite his status, he was instructed by Champion's foreman, Scott Gambill, to repair a leak in a chill water line alone.

² Subsection 11(b) states: "The Subcontractor agrees that the prevention of accidents to workers and others engaged upon or in the vicinity of its Work is its responsibility. Subcontractor shall comply fully with all laws, orders, citations, rules, regulations, standards and statutes with respect to occupational health and safety, the handling and storage of hazardous materials, accident prevention, safety equipment and practices, including the accident prevention and safety program of Harris and such of same as may be established during the progress of the work by Harris, the Architect or the Owner. Subcontractor shall conduct inspections to determine that safe working conditions and equipment exist and accepts sole responsibility for providing a safe place to work for its employees and for employees of its subcontractors and suppliers of material and equipment for adequacy of and required use of all safety equipment and for full compliance with the aforesaid laws, orders, citations, rules, regulations, standards and statutes. When so ordered, the Subcontractor shall stop any part of the work, which Harris deems unsafe until corrective measures satisfactory to Harris have been taken, and the Subcontractor agrees that it shall not have nor make any claim for damages growing out of such stoppages. Should the Subcontractor neglect to take such corrective measures, Harris may do so at the cost and expense of the Subcontractor and may deduct the cost thereof from any payments due or to become due to the Subcontractor. Failure on the part of Harris to stop unsafe practices shall in no way relieve the Subcontractor of its responsibility therefore. Subcontractor shall report all accidents promptly and shall submit a written accident report and/or First Report of Injury form within twenty-four (24) hours of such incident."

³ Gilkison testified that apprentice pipe fitters complete 10 levels, each of which lasts six months, before they are eligible to become journeymen.

The leak occurred under a concrete thrust block located in a four-foot deep ditch at the end of the chill water line. Gambill instructed Gilkison to repair the leak by shortening the pipe return and burying the line in concrete. The concrete block served to hold the line in place.

Conceptually, Gilkison knew not to work on a pressurized line,⁴ but he was too inexperienced to realize that the line was pressurized at the time he was working on it. In hindsight, Gilkison realized that his approach to the repair created pressure in the line. Among the factors that contributed to the pressure were the sequence in which he closed the valves, the decision not to open the valve he was adjusting to release the water in the line prior to opening it, the fact that he was working on the lowest point in the system, and the fact that he separated the line from the concrete thrust block, which had been absorbing much of the line's pressure. Gilkison did not appreciate the impact of these factors until after the accident occurred.

Gilkison testified that he believes he mentioned to some of Employer's "foremen,"⁵ in a general, joking manner, what he was working on the day of the accident. He believes he stated that he was "cleaning up after some journeymen," but he did not discuss Champion's plans for repairing the leak with Employer.

Approximately four months after the accident occurred, Thomas Johnston, an Associate Industrial Hygienist with the Division, visited the job site to conduct an investigation. Johnston was the only other witness at the hearing.

Johnston's investigation consisted of interviewing Gilkison and Employer's site manager for the project, Bob McKnight, issuing a document request to Employer's Director of Risk Management, Jeffrey Gross, and reviewing the documents provided by Employer. These documents included the contract between Employer and Champion.⁶

Johnston cited Employer primarily based on language contained in the contract between Employer and Champion. A secondary, minor consideration was the presence of Employer's job trailer onsite, which was located approximately 600 feet from where the accident occurred. Johnston considered the trailer to be evidence that Employer was responsible, through actual practice, for safety and health conditions at the worksite.

⁴ Section 3329(d) states, "When dismantling or opening closed pressurized or gravity fed systems, internal pressure shall be relieved or other methods utilized to prevent sudden release of pressure or spraying of liquid."

⁵ Gilkison testified that Employer did not have a crew onsite and it was his impression that all but two of employer's personnel at the job site were "foremen types."

⁶ Although Johnston attempted to contact other Champion employees, including Gilkison's foreman, Scott Gambill, he was unsuccessful in doing so.

With respect to the contract between Employer and Champion, Johnston relied primarily on paragraph 11(b) to support citing Employer as a controlling employer. Specifically, Johnston referenced a sentence in the paragraph that reads,

When so ordered, the Subcontractor shall stop any part of the work, which Harris deems unsafe until corrective measures satisfactory to Harris have been taken, and the Subcontractor agrees that it shall not have nor make any claim for damages growing out of such stoppages.

He also relied on a second sentence that states,

Should the Subcontractor neglect to take such corrective measures, Harris may do so at the cost and expense of the Subcontractor and may deduct the cost thereof from any payments due or to become due to the Subcontractor.

Johnston read the paragraph to mean that both Employer and Champion were responsible for ensuring jobsite safety. Johnston testified that all employers are responsible for safety on a multi-employer jobsite.

Johnston opined that Employer should have been more involved in the work when a hazard such as a pressurized line was present. Johnston maintained that a pressurized line is more than a typical hazard, and stated that Employer could have supervised the activity. Johnston asserted that the general contractor is responsible for evaluating the degree of hazard and for addressing the hazard appropriately. Here, Johnston stated that Employer should have ensured that the pressure was released before Gilkison opened the line.

Johnston classified the violation as general, as opposed to serious, based on Employer's lack of knowledge of the violation. Because he issued a citation for a general violation, he did not investigate Employer's behavior because employer knowledge is not needed to support a general violation.

ISSUES

- 1) Was Employer the controlling employer pursuant to section 336.10 and thus responsible for the safety of the subcontractor's employees?
- 2) Is Employer liable if it exercised due diligence and relied on the expertise of the subcontractor?
- 3) Did the ALJ properly apply section 336.10 in this case?

**FINDINGS AND REASONS
FOR
DECISION AFTER RECONSIDERATION**

In 1997, the Director of the Department of Industrial Relations promulgated the multi-employer worksite (MEW) standard, section 336.10, in response to the Federal Occupational Safety and Health Administration's determination that, in the absence of such a standard, the California program was not at least as effective as the federal program.⁷

Section 336.10 states as follows:

On multi-employer worksites, both construction and non-construction, 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:

- (a) The employer whose employees were exposed to the hazard (the exposing employer);
- (b) The employer who actually created the hazard (the creating employer);
- (c) The employer who was responsible, by contract or through actual practice, for safety and health conditions on the worksite; i.e., the employer who had the authority for ensuring that the hazardous condition is corrected (the controlling employer); or
- (d) The employer who had the responsibility for actually correcting the hazard (the correcting employer).

Note: The employers listed in subsections (b) through (d) may be cited regardless of whether their own employees were exposed to the hazard.

In 1999, the California Legislature codified section 336.10 by enacting Labor Code section 6400(b).⁸

We begin our analysis by noting that the MEW standard and Labor Code section 6400(b) state that citations on a multi-employer worksite *may* be issued to the categories of employers specified.⁹ Labor Code section 15 states that "may" is a permissive term. "When construing the words of a statute, we give meaning to each word if possible and avoid a construction that would

⁷ Federal OSHA has not suggested that California's approach to MEWs is less effective than the federal policy since the implementation of section 336.10.

⁸ The regulatory note in section 336.10 is stated as statutory text in Labor Code section 6400(b). In addition, Labor Code section 6400(c) states that section 6400(b) is "declaratory of existing law" and is not intended to be "construed or interpreted as creating a new law or as modifying or changing an existing law."

⁹ Although the Board is not bound by the Director's regulations, the language of section 336.10 is the foundation on which section 6400(b) is based, so is included in the discussion here. See, *Limberg Construction*, Cal/OSHA App. 78-433, Decision After Reconsideration (Feb. 21, 1980); *Bill Callaway & Greg Lay dba Williams Redi Mix*, Cal/OSHA App. 03-2400, Decision After Reconsideration (July 14, 2006).

render a term surplusage.” *Sully-Miller Contracting Company v. California Occupational Safety and Health Appeals Board* (3d Dist. 2006) 138 Cal. App. 4th 684, 695. Because the Legislature is presumed to be aware of existing laws when it enacts a new statute, we must assume that the use of the term “may” in section 6400(b) was intentional and included with knowledge of section 15. See, *Bill Callaway & Greg Lay dba Williams Redi Mix*, Cal/OSHA App. 03-2400 Decision After Reconsideration (July 14, 2006).

By including the term “may” in section 6400(b), the Legislature stated its intent to consider more than whether an employer meets the definition of “controlling employer” in deciding to impose liability. Accordingly, section 6400(b) affords discretion regarding when an employer that meets the statutory definition should be held liable and we must determine the circumstances under which a citation against a controlling employer should be sustained.

Our belief that discretion must be used in determining when to cite a controlling employer is bolstered by the Division’s citation policy governing MEWs contained in its Policy & Procedure Manual. The citation policy references Labor Code section 6400(b) and Title 8, section 336.10, as the basis for its authority to cite controlling, creating, and correcting employers in addition to exposing employers.

The Division’s MEW policy outlines a two-step approach for determining when to cite a controlling employer. Specifically, the policy states the statutory and regulatory definitions of the terms and then specifies factors¹⁰ an inspector is to consider before issuing a citation to MEW employers. The policy instructs Division inspectors to cite an employer when the employer’s degree of responsibility for the violative condition warrants issuance of a citation based on the factors discussed in the policy.¹¹

We next note that section 6400(b) defines a “controlling employer” to be “the employer who had the authority for ensuring that *the hazardous condition is corrected.*” (emphasis added.) Although the first part of the definition refers to safety and health “conditions,” using the plural form of the word, the second half of the sentence unambiguously clarifies the first part.¹² From this, we conclude that a determination regarding an employer’s status as the “controlling employer” must consider the specific hazard in question and may not be based on a general responsibility for safety and health.

¹⁰ The factors include the degree of responsibility on the part of the employer for the violative condition, as evidenced by the: employer’s awareness of the violative condition; how foreseeable the occurrence of the violative condition was; and reasonable steps taken to protect the employees. Inspectors are also to consider any other evidence which supports or weighs against citing the employer for the violation.

¹¹ We note that Federal OSHA’s definition of controlling employer resembles that contained in section 336.10 and Labor Code section 6400(b). Federal OSHA’s citation policy is also similar to the policy adopted by the Division. See, Field Inspection Manual, Chapter III, section C-6, which incorporates OSHA Instruction CPL 2-0.124. Under the federal policy, a controlling employer must exercise reasonable care to prevent and detect violations on the site.

¹² Although the language in section 6400(b) and section 336.10 is slightly different, the effect of the language is the same.

This interpretation is consistent with this Board's longstanding assertion that an employer involved in a multi-employer situation may not be found liable if the employer is unable to abate the violation. See, *The Office Professionals*, Cal/OSHA App. 92-604, Decision After Reconsideration (June 19, 1995); *Petroleum Maintenance Company*, Cal/OSHA App. 81-594, Decision After Reconsideration (May 1, 1985). These precedents recognize that employers involved in a multi-employer setting have different roles and responsibilities and we conclude that section 336.10 must be applied with the same reasoning in mind. *Id.* We further conclude that the relative roles and responsibilities of the different employers do not remain static throughout the course of a project. A general contractor may be in a position to correct a given violative condition on a jobsite, but not be in a position to correct a different condition at the same site. It is worth noting that our determination that different employers on a multi-employer worksite have different roles and responsibilities is consistent with both Federal OSHA's and the Division's MEW citation policies.¹³

We believe responsibility for safety requirements should be placed on those who have the greatest practical opportunity and ability to insure compliance with the applicable safety standards. See, *Alber v. Owens*, (1961) 66 C.2d 790, at 796-97 (worker's compensation liability in a multi-employer setting). In some instances this may be, or may include, a general contractor. In other situations, the general contractor may be legitimately and sufficiently removed from the work that it should not be held liable.

We hold that an employer's status as a controlling employer subject to citation under section 336.10 is dependent on whether the employer was in a position to abate the specific violative condition at issue. This determination must be made on a case by case basis and consider the totality of the circumstances involved.¹⁴

The Division bears the burden of proving each element of a violation by a preponderance of the evidence. *C.C. Myers*, Cal/OSHA App. 00-008, Decision After Reconsideration (April 13, 2001); *Cambro Manufacturing Co.* Cal/OSHA App. 84-923 Decision After Reconsideration (Dec. 31, 1986). Accordingly, the Division must present a prima facie case demonstrating that the employer was in a position to abate the specific violative condition at issue. In order to meet

¹³ Federal OSHA's MEW citation policy asserts that a controlling employer should not be held to the same standard of care for a second employer's employees as the second employer itself. "This means that the controlling employer is not normally required to inspect for hazards as frequently or to have the same level of knowledge of the applicable standards or of the trade expertise as the employer it has hired." (FIRM, Chapter III, Section C(6), incorporating CPL 2-0.124, section X(C)(6)). The Division's MEW policy states that an employer should be cited when the employer's degree of responsibility for the violative condition warrants issuance of the citation.

¹⁴ *C. Overaa & Company*, Cal/OSHA App. 01-3560 Decision After Reconsideration (April 1, 2004) and *DeSilva Gates Construction*, Cal/OSHA App. 01-2742 Decision After Reconsideration (Dec. 10, 2004) are factually distinct from the present case and are distinguished from the present holding. *Whitaker Engineering Contractors*, Cal/OSHA App. 01-3769 Decision After Reconsideration (November 17, 2003) addressed the issue of controlling-employer liability, but the appeal was sustained because the Division failed to establish the underlying violation. Accordingly, that matter is also distinguished from the present holding.

its burden, the Division must show a nexus between the employer's role and responsibilities and the violation in question.

If the Division states a prima facie case, the employer may assert that the violation occurred at a time and under circumstances which deprived it of a reasonable opportunity to detect and prevent it. See, *Vance Brown, Inc.*, Cal/OSHA App. 00-3318, Decision After Reconsideration (Apr. 1, 2003) (employer burden as it applies to defending against a serious violation). The employer bears the burden of proving this affirmative defense by a preponderance of the evidence.¹⁵

This affirmative defense is available for both serious and general violation citations issued to controlling employers. Although employer knowledge of a violative condition typically is not an element of a general violation, for the foregoing reasons, we find that a citation issued to an alleged controlling employer on a multi-employer worksite presents a unique situation that requires greater analysis than the issuance of general violation citations in other contexts.

We are cognizant that this Board has previously cautioned against basing an employer's obligations on the knowledge available to it at the time of the violation. See, *Airco Mechanical, Inc.* Cal/OSHA App. 99-3140, Decision After Reconsideration (April, 25, 2002). We concur with this sentiment and emphasize that an employer will not be rewarded for remaining ignorant of the circumstances present at a job site or for its inaction. See, *Roof Structures, Inc.* Cal/OSHA App. 91-316, Decision After Reconsideration (Oct. 29, 1992)(serious violation).

We now apply our holding to the instant case. Johnston testified that he based his decision to cite Employer on the referenced contract language and, to a minor degree, on the presence of Employer's on-site job trailer.

While we agree that contractual language can be relevant to determining if an employer meets the definition of "controlling employer," additional analysis is required. To find otherwise would suggest that a general contractor's liability turns on the artfulness with which it drafts its contract. Such an approach both elevates form over substance and fails to further the objectives of the Act and Labor Code section 6400(b).

Similarly, to conclude that a general contractor necessarily incurs liability as a controlling employer by acting to correct or address unsafe work practices would create incentives that are antithetical to the Act's goals of providing a safe work environment for employees and of "encouraging employers to maintain safe and healthful working conditions." (California Labor Code § 6300.) An interpretation of section 6400(b) that in any way dissuades an employer from actively seeking to correct and prevent workplace

¹⁵ Our position is consistent with the recent decision issued by the California Court of Appeal, Third Appellate District in *C. Overaa & Company*, supra (Jan. 31, 2007).

hazards, irrespective of who creates them, cannot be reconciled with the Act's overriding principles.

Moreover, upholding a citation based strictly on contractual language or on whether the employer acted to address occupational safety and health matters at the job site, would be inconsistent with Labor Code section 6400(b)'s instruction that a citation "may" be issued to a controlling employer. To rely on these factors alone would render the term "may" surplusage and impermissibly limit the statutory intent. See, *Sully-Miller, supra*.

Given that this is a case of first impression, it is understandable that the Division did not present more evidence.¹⁶ Nonetheless, the referenced contract provisions merely show that Employer had the authority to address safety and health hazards generally and do not speak to the specific violation at issue here. Similarly, the presence of Employer's trailer in no way demonstrates a nexus between Employer and the violation in question.

We note that Johnston also testified that, in his opinion, a pressurized pipe presents more than a typical hazard, and is the type of hazard that warrants general contractor involvement. Had Champion intended to work on a pressurized line, we might agree with the Division that Employer should have been involved in the work, but such was not the case in this instance. Here, the record amply demonstrates that neither Gilkison nor Champion had any intent to do so. Indeed, Gilkison did not know that the line was pressurized until after the accident occurred.

While a general contractor should ensure that it is apprised of subcontractor work that presents a significant hazard, Gilkison was charged with shortening a return on a chill water line to correct a leak. There is nothing in the record to suggest that is the sort of endeavor that presents an atypical hazard that would require the general contractor's involvement and expertise.

Consistent with our view that different employers in a multi-employer worksite have differing roles and responsibilities, we find that general contractors are not charged with staying abreast of their subcontractors' every activity. We do not believe general contractors are required to consult with their subcontractors about each step they plan to undertake in their work as well as the manner in which they plan to undertake it. A general contractor is not charged with that level of oversight. See, *Moran Constructors, Inc., Cal/OSHA App. 74-381, Decision After Reconsideration (Jan. 28, 1975)*.¹⁷ While some work performed by subcontractors is of a nature or scope that

¹⁶ We believe that the general rule favoring retroactive application of decisions is appropriate here. We do not believe that applying our holding to the present case imposes undue hardships on the parties nor do we believe that the circumstances of this case draw it apart from the usual run of cases sufficient to warrant a deviation from the general rule. See, *Sierra Club v. San Joaquin Local Agency Formation Com.*, 21 Cal. 4th 489 (1999).

¹⁷ The same is true with respect to Employer's onsite job trailer. Employer's mere presence on the jobsite does not render it liable for everything that transpires on the premises.

warrants, and indeed may require, general contractor involvement, there is nothing to suggest that this was true here.

If this were a situation in which Gilkison's work involved other trades, if other employees were working near or with him, or if other employees were affected by his work, involvement by the general contractor might be warranted. Such facts, however, are not present in this case. Rather, it appears that Employer retained Champion for its specialized skills so that Employer's involvement with tasks specific to Champion would be unnecessary unless special circumstances warranting its involvement existed. We find no such circumstances in this record.

Similarly, if the Division showed that the hazard was one that Employer should have anticipated, it might have met its burden of proof. No evidence was presented, however, to suggest that opening a pressurized pipe is a violation that occurs with regularity and should have been expected. Nor was there evidence to suggest that Employer had reason to believe Champion would attempt to open a pressurized line. Again, neither Gilkison nor Champion had any intent to do so.

A hazard that is readily apparent also might fall within a general contractor's role and responsibilities. A general contractor may not ignore an apparent hazardous condition simply because it falls within a subcontractor's specific purview. Once a general contractor becomes aware of a violative condition that it is authorized to correct, it must take some action irrespective of who created the hazard. Because the hazard here was not readily apparent,¹⁸ and was not brought to Employer's attention, we cannot find Employer liable.

We acknowledge Gilkison's testimony that he jokingly told Employer's personnel, who he believed to be "foremen types," that he was, in a general sense, "cleaning up after some journeymen," but find nothing in Gilkison's passing comment that served to put Employer on notice that a hazard was present. In addition, although Employer's personnel might have deduced that Gilkison was an apprentice based on his comment, and might have observed that he was working alone (although the record fails to state when the comment was made and the circumstances existing when it was made), we do not believe this information alone was sufficient to require Employer to attend to the situation that precipitated the accident.

Based on the foregoing, we find that the Division failed to demonstrate that Employer was in a position to abate the specific violation in question. As a

¹⁸ The chill water line was largely buried, and was otherwise located in a four-foot ditch, from which we infer that the line itself was fairly obscured from view. Similarly, given that Gilkison was in the ditch while he was working, we infer that his actions were also somewhat obscured. Moreover, no evidence was presented to demonstrate that an observer near the line could have detected that it was pressurized. Indeed, Gilkison, himself, did not realize it was pressurized. The record also provides no evidence to indicate that the violative condition existed for an extended period of time.

result, we have no need to evaluate whether Employer demonstrated that the violation occurred at a time and under circumstances which deprived it of a reasonable opportunity to detect and prevent it. Similarly, in light of these findings, we do not reach the question of whether Employer is liable if it relied on Champion's expertise.

DECISION AFTER RECONSIDERATION

We conclude that the Division failed to demonstrate by a preponderance of the evidence that Employer was in a position to abate the violative condition cited here. As a result, Employer cannot be found liable under section 336.10.

The Board, therefore, reverses the ALJ decision and dismisses the citation for a violation of section 3329(d).

CANDICE A. TRAEGER, Chairwoman
ROBERT PACHECO, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: March 30, 2007