

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

In the Matter of the Appeal of:

JOHN M. FRANK CONSTRUCTION  
913 E. 4<sup>th</sup> Street  
Santa Ana, CA 92701-7448

Employer

Docket No. 06-R4D3-968

**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 John M. Frank Construction (Employer) under submission, renders the following decision after reconsideration.

**JURISDICTION**

On February 27, 2006, the Division of Occupational Safety and Health (Division) issued three citations to Employer after investigating an accident which occurred on August 31, 2005 at a place of employment maintained in California by Employer. Employer filed timely appeals contesting the violations, their classifications, the abatement measures, and the reasonableness of the proposed civil penalties. Subsequently, the parties reached settlement on the violations alleged in Citation 1. Citations 2 and 3 were litigated, and the parties narrowed the issues through a series of stipulations such that the only issues before the Administrative Law Judge (ALJ) were the existence of the violations.

The Decision affirmed the violation alleged in Citation 2, and assessed the proposed penalty of \$22,500.00. The Decision granted the appeal of Citation 3<sup>1</sup>. The Employer filed a petition for reconsideration of the denial of its appeal of Citation 2, which alleged a serious violation of California Code of Regulations, Title 8, section 3646(a) [employees shall not sit, stand or climb on

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<sup>1</sup> Citation 3 was not the subject of a petition for reconsideration and is not before us here. (Labor Code section 6618.)

the guardrails of an elevating work platform, or use planks, ladders or other devices to gain greater working height or reach.]<sup>2</sup>

Since the filing of the petition, the law governing the status of an employer as a controlling employer (336.10) has been affected by a decision of the Court of Appeal. (*United Association Local Union 246, AFL-CIO v. Occupational Safety and Health Appeals Bd.* (2011) 199 Cal.App.4<sup>th</sup> 273 (hereafter *Local Union 246*.) The Court of Appeal held that the Division can show an employer is a controlling employer without having to prove the employer was in a position to abate the violation. (*Id.*) Although the ALJ's Decision applied the then-applicable and since overturned (by *Local Union 246*) Board precedent, her conclusion was correct under either test. Such was the case because the record here provides both ample evidence that Employer could have abated the violation, and a stipulation that it knew or should have known about the violation, we affirm the Decision.

### **Evidence**

The Decision accurately recites the evidence in the record. In sum, Employer was the general contractor on a job remodeling a Von's Supermarket grocery store. The injured employee, Mr. Frame, was a temporary employee of Data Electric, the electrical sub-contractor. Mr. Frame's job was to remove can lights from behind the false ceiling. He used a scissor lift to raise himself up to the ceiling to reach the can lights. Because he needed to raise himself higher in order to clearly see his work, Mr. Frame stood on the bottom rail of the railing surrounding the work platform of the scissor lift. The railing was approximately waist-high, and the bottom rail was approximately one foot above the platform level. He stood on the rail to get a clear look at the light fixture, which was difficult to see when he stood on the platform. While doing so Mr. Frame fell from the scissor lift to the floor below and was seriously injured.

Employer's supervisor, Mr. Miles, knew Mr. Frame was in the scissor lift that day, and saw him in the lift ten minutes prior to the fall. He testified he did not see Mr. Frame standing on the lower rung. Mr. Miles testified it was not his job to "police" the employees of the sub-contractor. He had, more than once however, directed Employer's own employees to get down off the rail of a scissor lift. And, as the general contractor's supervisor, he had the authority to tell anyone at the jobsite what to do, and was specifically responsible for safety throughout the jobsite. The contract between Employer and Data Electric states in section 16 that the sub-contractor shall comply with Employer's safety program, and those warnings for safety violations issued by the Employer will result in additional fines to the sub-contractor. Mr. Miles

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<sup>2</sup> All references are to Title 8, California Code of Regulations unless otherwise indicated.

confirmed, in his testimony, that he had the authority to correct any safety violation at the site.

When questioned, Mr. Miles explained he thought workers stood on the lower rail of scissor lifts because removing the ceiling grid to open sufficient area in the ceiling to raise the lift into and beyond the false ceiling slowed the rate of the work. The injured worker testified it was common practice at this jobsite for workers to stand on the rail of the scissor lifts, and he did so daily.

The parties stipulated that the citation was properly classified as serious if the violation was proven, and that the penalty calculation was consistent with the Division's penalty-setting regulations. Employer stated it contested whether Mr. Frame was standing on the railing and suffered electric shock.

### **The ALJ Decision**

The ALJ concluded the violation occurred, and that the Division met its burden of proof under *Harris Construction Corporation*, Cal/OSHA App. 03-3914, Decision After Reconsideration (Mar. 30, 2007) (hereinafter *Harris*) to establish Employer was a controlling employer. (*Harris* was the Board decision after reconsideration overturned by *United 246*.) These conclusions were based on Mr. Frame's testimony that he was standing on the lower rung of the elevated platform railing, Mr. Miles' testimony that the same violation occurred other times at the work location, and a lack of evidence to rebut Mr. Frame's credible testimony that the violation occurred. As a supervisor with authority to correct any safety violation at the worksite, Mr. Miles could have abated the violation because he was aware this type of violation occurred, and the violation was in plain view, readily observable from his location in the store. He stated he actually saw Frame in the aerial lift, thus confirming his ability to observe how Frame was doing his job.

Also, the parties stipulated that the serious classification was correct. In doing so, Employer waived its opportunity to show it acted with due diligence and yet was unable to detect the violation. (*Bakersfield Central Metal, Inc.*, Cal/OSHA App. 2010-2140, Denial of Petition for Reconsideration (Mar. 21, 2011) citing *Jack Barcewski dba Sunshine Construction*, Cal/OSHA App. 06-1257, Denial of Petition for Reconsideration (Apr. 16, 2007) [parties are bound by their stipulations absent fraud or misrepresentation leading to the agreement.]

### **DECISION AFTER RECONSIDERATION**

The Court of Appeal's decision in *Local Union 246*, *supra*, changed the prima facie evidence required to show an employer is a controlling employer, but does not require reversal of the ALJ decision here. The rule of *Local Union*

246 is that the Division does not have to prove an employer was in a position to abate the violation in order to show an employer is a controlling employer for a general violation. (*Local Union 246, supra*, 199 Cal. App. 4<sup>th</sup> at 282-283.) Prior to *Local Union 246* the Board considered an employer's lack of due diligence and an employer's ability to abate a condition to be two different factual determinations. (Labor Code section 6432; *John Laing Homes*, Cal/OSHA App. 04-0195, Decision After Reconsideration (Jan. 20, 2011).) However, *United 246* held these two standards are similar, and that the Division does not have to show an employer lacked due diligence, or was in a position to abate the violation, as part of a prima facie case of controlling employer status. (336.10; Labor Code § 6400(B)(3).)

In addition, *United Local 246* allows for a controlling employer to defend against a general violation by showing it acted with due diligence regarding the violation. (*Id.* at p. 284-5). In the case of a serious violation, a controlling employer retains the ability to defend against the classification by showing it acted with due diligence yet was unaware of the violation. (Labor Code § 6432)<sup>3</sup>. Such evidence would also overcome the controlling employer allegation, and thus defeat the citation entirely (*Local Union 246, supra*, p. 284.)

Placing the burden of proof regarding Employer's due diligence on the Employer rather than the Division does not affect the outcome in this case for two reasons. First, Employer stipulated that the serious classification was correct. It thus agreed it did not act with due diligence and yet remained unaware of the violation. Second, the ALJ considered evidence relevant to Employer's due diligence, and the record supports the conclusion that Employer knew or could have known of the violation.

Here, the evidence was that standing on rails was common practice at the jobsite. The conclusion that the violation was readily apparent was based on Frame's testimony of the widespread nature of the practice, and Mr. Miles's statement that he was aware of the practice, and had reprimanded his own employees for the same type of violation in the past.<sup>4</sup> Also, Mr. Miles actually saw Mr. Frame in the aerial lift device that day, confirming his ability to detect the violation.<sup>5</sup> In the absence of compelling evidence to the contrary, we will

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<sup>3</sup> Labor Code 6432 was amended effective January 1, 2011, and the changes alter the due diligence definition from the one considered in *Local Union 246*. Since the violation here is governed by the same version of Labor Code section 6432 as was considered in *Local Union 246*, it controls.

<sup>4</sup> Mr. Miles's statement that it was not his job to "police the subs" is the same conduct we rejected in *John Laing Homes*, as being relevant to a defense to a citation issued to a controlling employer. Thus, we continue to reject, as a defense to a controlling employer allegation, that responsibility for correcting safety violations rested only with the sub-contractor.

<sup>5</sup> When the violation is visible to observers from a public street, an employer's failure to observe it will normally preclude a finding that an employer acted reasonably to identify hazards. (*XL Construction*, Cal/OSHA App. 08-1191, Denial of Petition for Reconsideration (Aug. 11, 2009); *Davis Brothers Framing*, Cal/OSHA App. 03-0114 Decision After Reconsideration (Jun. 10, 2010); *Rex Moore Electrical Contractors*

not disturb factual findings of an ALJ. (*Watson Roofing, Inc.*, Cal/OSHA App. 07-0491 Denial of Petition for Reconsideration (Jul. 11, 2008).)

Since the record supports a finding that the Employer was a controlling employer, even under the rule placing the burden of proof on this issue (improperly) with the Division, the *Local Union 246, supra*, opinion does not require reversal here. The issue of Employer's due diligence was waived, but due to a previous understanding of the controlling employer rule, both parties went ahead and put on evidence of Employer's conduct and knowledge of the violation.<sup>6</sup> (See *Overaa Construction v. Occupational Safety and Health Appeals Board* (2007) 147 Cal. App. 4<sup>th</sup> 235, 237-238.)

Employer need not be afforded additional opportunity to show it acted with due diligence regarding the railing violation since it litigated the issue in regard to the railing violation at the hearing.<sup>7</sup>

In any event, the stipulation that the serious classification was correct removes from consideration the question of due diligence on the part of Employer.

California courts have long held that a stipulation agreed to by the parties is binding on the court unless contrary to law, court rule, or policy. *Salazar v. Upland Police Dept.* 116 Cal. App. 4<sup>th</sup> 934, 11 Cal. Rptr. 3d 22 (4<sup>th</sup> Dist 2004), review denied, (June 23, 2004), citing *Leonard v. City of Los Angeles*, 31 Cal. App. 3d 473, 107 Cal. Rptr. 378 (2d. Dist. 1973); Cal Jur. 3d Agreed Case and Stipulations, § 41. In considering the effect of an agreed statement of facts, "the court is conclusively bound by the facts stated and

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*And Engineers*, Cal/OSHA App. 07-4314, Denial of Petition for Reconsideration (Nov. 4 2009).) (*Tutor-Saliba-Perini*, Cal/OSHA App. 94-2279, Decision After Reconsideration (Aug. 20, 2001) [Violations in plain view are conditions that an employer should discover with the exercise of reasonable diligence].

<sup>6</sup> In granting Employer's appeal of citation 3, item 1 [lockout-tagout /de-energize electrical components prior to work], the ALJ determined Employer undertook due diligence by enquiring of the sub-contractor as to whether the electricity was off and secured prior to the injured worker removing the can light. Although the sub-contractor's supervisor's information was incorrect, the ALJ concluded the controlling employer citation would not be sustained because of the due diligence shown in the record by the Employer asking about the hazard. This citation is not before us as the petition for reconsideration only raised the correctness of the ruling regarding citation 2, item 1. The Decision shows the ALJ applied the correct legal standard throughout, but with different results based on different actions of the Employer in relation to different hazards.

<sup>7</sup> Employer argues it needs to be afforded an opportunity to show facts relevant to the controlling employer determination, including the size of the facility, the layout of the facility, including items that may have obstructed Mr. Miles's view of Mr. Frame, the number of trades on the site, the number of workers on the site, the scope of work being conducted at the site, Mr. Miles's responsibility at the worksite, the specific activity undertaken by Mr. Frame at the time of the accident and whether this required special supervision. The record is replete with details relevant to many of these items, as both Mr. Frame and Mr. Miles testified regarding the work being done at the site on and around the time of the accident, what each was doing, what each saw, including testimony by Mr. Frame that he was responsible for safety on the site and could and did correct safety violation of any type. Thus, Employer has been afforded a full opportunity to litigate this issue of its due diligence/ability to abate the violation.

must render judgment according as the facts agreed upon require.”  
*Capital National Bank v. Smith*, 62 Cal App. 2d 328, 343 (Cal. App. 3d Dist. 1944).

(*Safeway # 951*, Cal/OSHA App. 05-1410, Decision After Reconsideration (Jul. 6, 2007).) Also, the stipulations here show the parties were not disputing the serious classification with an increased penalty for likelihood rated as “high”. The first stipulation states “We agree the classification of serious is proper if the violations can be proven.” The parties also stipulated: “The penalties are calculated in accordance with the regulations.” The parties stated that the exact cause of the fall was in dispute, that is, they disputed whether it occurred because of electric shock causing a loss of balance, or whether it resulted from some other cause. This was a statement of Employer’s representative, Kathy Day, with which the Division representative, James Clark, agreed was the factual dispute.<sup>8</sup> Employer waived the issues of the classification and penalty.

Later, the Division’s attorney, while examining the injured worker, restated the stipulation to be that the parties agreed that “if the violation was shown that it resulted in the injury.” The ALJ noted her understanding that this was indeed the earlier stipulation, and the Employer’s representative did not dispute this statement by the ALJ. Thus, these stipulations show the parties agreed that if the violation was shown, the serious classification and penalty, including the enhancement for “likelihood,” was correct.<sup>9</sup>

The stipulations effectively remove from the ALJs consideration the challenge to the proposed penalty.<sup>10</sup> The parties agreed that the only issue was whether or not the violations occurred. There is no error on the part of the ALJ in following this stipulation and affirming the penalty upon finding the violation occurred, and that Employer was the controlling employer.

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<sup>8</sup> The parties agreed, at the beginning of the recital of their stipulations, that each would agree to the other’s statements unless specifically stated otherwise on the record.

<sup>9</sup> “Likelihood” is defined in section 335 as “the probability that injury, illness or disease will occur as a result of the violation. Thus, Likelihood is based on (i) the number of employees exposed to the hazard created by the violation, and (ii) the extent to which the violation has in the past resulted in injury, illness or disease to the employees of the firm and/or industry in general, as shown by experience, available statistics, or records.”

<sup>10</sup> Petitioner challenges the “accident-related” finding by the ALJ. There was no “accident-related” finding. The violation was only classified as “serious.”

## **DECISION AFTER RECONSIDERATION**

For the foregoing reasons, the decision of the ALJ is affirmed, and the penalty of \$22,500.00 is hereby imposed.

| ART R. CARTER, Chairman  
ED LOWRY, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
| FILED ON: [MARCH 26, 2012](#)