

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

In the Matter of the Appeal of:

ROBERT ONWELLER dba  
PACIFIC HAULING & DEMOLITION  
1605 Dupree Way  
Brentwood, CA 94513

Employer

Dockets. 14-R1D4-1087 and 1088

**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 Robert Onweller dba Pacific Hauling & Demolition (Employer).

**JURISDICTION**

Commencing on September 9, 2013 the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On February 27, 2014, the Division issued two citations to Employer alleging violations of occupational safety and health standards codified in California Code of Regulations, title 8.<sup>1</sup>

Employer timely appealed.

Thereafter administrative proceedings were held before an Administrative Law Judge (ALJ) of the Board, including a duly-noticed contested evidentiary hearing.

On March 25, 2015, the ALJ issued a Decision (Decision) which sustained the citations and denied Employer a penalty reduction.

Employer timely filed a petition for reconsideration.

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<sup>1</sup> References are to California Code of Regulations, title 8 unless specified otherwise.

The Division answered the petition.

### **ISSUES**

Were there extenuating circumstances excusing Employer's failure to report a serious injury as required by section 342, subdivision (a)?

Did Employer violate section 1735, subdivision (d)(4) by failing to inspect a demolition project for hazards associated with the work?

Did Employer provide sufficient evidence of financial hardship to justify a penalty reduction?

Did the Decision improperly rely on hearsay evidence?

### **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 contends the evidence does not justify the findings of fact made by the ALJ and the findings of fact do not support the Decision.

The Board has fully reviewed the record in this case, including the arguments presented in the petition for reconsideration. Based on our independent review of the record, we find that the Decision was based on a preponderance of the evidence in the record as a whole and appropriate under the circumstances.

Employer was a subcontractor engaged to demolish the roof of a building. Both Employer and the general contractor on the job were aware that a roof beam was at risk of falling as the demolition proceeded. When the demolition had proceeded to the point at which the joists had been removed to a certain extent, air ducts were removed as well and Employer left the site.

Employer's foreman remained on site and the general contractor instructed him to continue the work. As the work continued the beam fell and seriously injured one of Employer's employees. No one inspected or evaluated the stability of the beam before it fell or took steps to keep the injured employee out of harm's way.

We now address the issues raised in Employer's petition in turn.

Section 342, subdivision (a).

Section 342, subdivision (a) requires employers to report serious injuries occurring at places of employment to the Division within eight hours of when the injury occurs. (Also, Labor Code § 6409.1, subd. (b).) Failure to comply can result in a \$5,000 penalty. It is not disputed that the injury which occurred was "serious" as defined in Labor Code section 6302, subdivision (h), or that the report was not made. Employer argues that he delegated the reporting obligation to the on-site representative of the general contractor, who accepted the delegation but failed to report. Although section 342, subdivision (d) allows delegation of the reporting responsibility to another, Board precedent holds that if the delegate fails to report that failure is attributable to the delegating employer. (*OC Turf and Putting Greens*, Cal/OSHA App. 2013-1751, Denial of Petition for Reconsideration (Jun. 9, 2014).) That reasoning applies here, and Employer failed to comply with the section 342, subdivision (a) reporting requirement when the person he had charged with making the report failed to do so.

Employer also argues that there were extenuating circumstances in that he went to the hospital to see to the care of his injured employee and stayed there until after the 24-hour reporting time had expired, and further that his own condition as a post-traumatic stress disorder (PTSD) victim prevented him from focusing on the reporting requirement. As to that argument there is nothing in the record showing that Employer, as a person suffering from PTSD, would be unable to fulfill the reporting requirement. Although section 342, subdivision (a), extends the 8-hour reporting period when "exigent" circumstances exist to a 24 hour period, we do not construe that provision to mean that an employer's pre-existing medical condition relieves that employer of his responsibility to report. Moreover, the extension of the time period for reporting is from 8 to 24 hours, and since the accident here was never reported the question is academic. Further, the PTSD claim is inconsistent with Employer having attempted to make arrangements to have another person make the required report. His condition did not prevent him from recalling he had the reporting obligation, and we think it more likely he relied on the word of the general contractor that the report would be made.

Section 1735, subdivision (d)(4).

Section 1735, subdivision (d)(4) provides, “During demolition, continuing inspections shall be made as the work progresses to detect hazards resulting from weakened or deteriorating floors or walls, or loosened material. [¶] Employees shall not be permitted to work where such hazards exist until they are corrected by shoring, bracing, or other effective means.” The Decision finds that continuing inspections were not made during the demolition to ascertain the hazard posed by the beam as the portions of the structure supporting it were progressively removed.

Employer’s petition quotes the Decision that “Employer succeeded in removing all joists until a point 10 to 15 feet from the air ducts” on the roof, which were then brought to the ground. (Decision, p. 5.) Employer argues that “10-15 feet of joists along with the added bracings are more than adequate to support the beam that fell.” Even assuming for discussion that statement was correct at that stage of the demolition, it ignores the consequences of later removal of those remaining joists. The accident itself shows that “the added bracings” were not adequate to support the beam.

Employer goes on to argue that after he left, the general contractor’s supervisor at the site instructed Employer’s foreman to continue the demolition “without [Onweller’s] knowledge or permission.” He states that before he left he directed his employees to remove the demolition debris and clean up the site and implies they were to do no more demolition. Then when the general contractor directed the foreman to proceed the foreman continued with the work, even after warning the general contractor that the beam was unstable. (See Decision, p. 6.)

Foremen and supervisors are employers’ representatives and their knowledge is attributable to the employers. (*Dick Miller, Inc.*, Cal/OSHA App. 13-0578, Denial of Petition for Reconsideration (Mar. 5, 2014).) Employer’s foreman knew the beam was unstable but continued the work when directed to do so “with caution” by the general contractor. Under the multiemployer worksite provisions of the Labor Code and the Director’s regulations, Employer was citable as the “exposing employer” and/or the “creating employer.” (See Labor Code § 6400, subds. (b)(1) and (b)(2); Cal. Code Regs., title 8, section § 336.10, subds. (a) and (b).) That the general contractor may also have been citable and cited does not relieve Employer of its responsibility here.

There is no evidence that continuing inspection(s) took place after Employer left the site and his foreman was directed to continue the demolition by the general contractor. Moreover, the second sentence of section 1735, subdivision (d)(4) requires employees to be prevented from working in the area of the hazard until it is “corrected,” which did not occur in this instance.

### Evidence of Financial Hardship

Employer provided financial statements to support his claim of inadequate resources to pay the civil penalty assessed in the Decision. He is out of business as a consequence of the accident at issue, and relies on his wife's income to support the family. It is not claimed, however, that he cannot do other work or find other employment instead of having his own company. And the Board has recently held that going out of business is not a rationale for penalty reduction because it does nothing to encourage employee protection or continue the deterrent effect of penalties on at least other employees. (*Delta Transportation, Inc.*, Cal/OSHA App. 08-4999, Decision After Reconsideration (Aug. 15, 2012).) We apply that reasoning here and deny penalty relief.

### Hearsay Evidence

It is unclear from the petition what evidence Employer claims was hearsay. He points to none specifically. Instead he seems to rest his argument on the inability of the Division to obtain testimony from the general contractor's on-site representative, the person who directed Employer's foreman to "proceed with caution." That does not render the testimony given by the witnesses who did appear hearsay. The record contains more than sufficient evidence to support the findings of fact and the result. Accordingly we are not persuaded by Employer's argument on this point.

## **DECISION**

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

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
FILED ON: JUN 15, 2015