

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

In the Matter of the Appeal of:

REALTIME STAFFING SERVICES, INC.  
dba SELECT STAFFING  
5127 Laurel Canyon Boulevard  
North Hollywood, CA 91607

Employer

Dockets. 12-R4D3-3687  
through 3689

**ERRATUM**

On November 19, 2015, the Occupational Safety and Health Appeals Board (Board) issued a Denial of Petition for Reconsideration (Denial) in the above-entitled matter. A clerical Error has been noted in the Denial. By this Erratum the Board corrects the Denial as follows:

In the second paragraph of the Jurisdiction, page 1, the section of Citation 1 is incorrectly listed as **3202**.

The section number should read as: **3203**.

This Erratum to the above Denial relates back to the original date of issuance: November 19, 2015, and is effective as of that date.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
FILED ON: DEC 04, 2015

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**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 Realtime Staffing Services, Inc., doing business as Select Staffing (Employer).

**JURISDICTION**

Commencing on June 28, 2012, the Division of Occupational Safety and Health (Division) conducted an investigation of a place of employment in California maintained by Employer following an injury accident at that location.

On November 30, 2012 the Division issued three citations to Employer alleging violations of occupational safety and health standards codified in California Code of Regulations, title 8.<sup>1</sup> Citation 1 alleged two general violations, one of section 3202, subdivision (a) for failure to maintain an injury and illness prevention program, and the other of section 3314, subdivision (j)(1), for failure to train employees on "lockout/tagout" procedures. Citation 2 alleged a serious violation of section 4184, subdivision (b), for failure to guard machinery. Citation 3 alleged a serious, accident-related violation of section 3314, subdivision (c), for failure to de-energize or lock out machinery.

Employer timely appealed.

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

Thereafter administrative proceedings were held before an administrative law judge (ALJ) of the Board, including a duly-noticed contested evidentiary hearing.<sup>2</sup>

On August 6, 2015, the ALJ issued a Decision (Decision) which upheld the citations and imposed civil penalties.

Employer timely filed a petition for reconsideration.

The Division did not answer the petition.

### **ISSUES**

Did the ALJ's reliance on Board decisions issued after the hearing in this matter was held deny Employer due process of law?

Does the record show that the alleged violations were committed by Employer?

### **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 Decision was issued in excess of the ALJ's authority and the evidence in the record does not justify the findings of fact.

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<sup>2</sup> The ALJ who presided at the hearing left the Board before issuing a decision. The parties stipulated that a new ALJ could issue a decision based on the record, rather than holding a *de novo* hearing. (See Board regulation § 375.1, subd. (c).)

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 is a staffing company which sends its employees to work for other employers. It did so in this instance, thereby creating a dual employment relationship. (See *Sully-Miller Contracting Company v. California Occupational Safety and Health Appeals Bd.* (2006) 138 Cal.App,4th 684.) Employer was the “primary” employer; the individuals it assigned to work at another or “host” employer’s location or facility remained Employer’s employees.

Here the host or “secondary” employer was Global Bakery Company. In April 2012, prior to the accident giving rise to the citations at issue, Employer and Global entered into a contract under which Employer hired Global’s supervisory and line employees, in fact all but four of Global’s employees, and assigned them to work at Global’s facility in Pacoima, California doing the same jobs they had done there for Global before they were hired by Employer.

On June 1, 2012 one of the line employees suffered a partial thumb amputation, a serious injury as the term is defined in Labor Code section 6302, subdivision (h), while trying to clean a “dough divider,” a machine which cuts dough into pieces of desired size. The injured employee had been helping clean the dough divider immediately before the accident, and had his hand in the mechanism at the time. The dough divider was not locked out or tagged out.<sup>3</sup> Also, although the two doors to the part of the machine which housed the dough blades were equipped with interlocks which were to immediately stop operation if opened, at least one of the interlocks was not functioning or had been intentionally bypassed at the time of the accident.

The evidence established that the supervisor who was on duty at the time directed the injured employee’s work, exercised safety responsibility, and had the authority to stop work for safety reasons. Despite having those responsibilities, he caused the dough divider to start up while the victim’s hand was in the mechanism, which resulted in the injury.

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<sup>3</sup> “Locked out” is defined in section 3314, subdivision (b) as: “The use of devices, positive methods and procedures, which will result in the effective isolation or securing of prime movers, machinery and equipment from mechanical, hydraulic, pneumatic, chemical, electrical, thermal or other hazardous energy sources.” In essence, this means the machine in question must be turned off and the means to turn it on secured (locked) so that it cannot be turned on until it is safe to do so. The term “tag out,” while not defined in section 3314, means that in addition to securing the machine, the lock or other means used to do so must also be marked or “tagged” to identify the person who has isolated the machine and who is authorized to unlock and restart when appropriate to do so. (See § 3314, subd. (c); *MK Auto, Inc.*, Cal/OSHA App. 12-2893, Denial of Petition for Reconsideration (Jul. 23, 2014).)

Employer first argues that the Decision retroactively applied recent Board decisions, which were issued after the alleged violations occurred, and in so doing violated its due process rights. (See *Labor Ready*, Cal/OSHA App. 13-0164, Decision After Reconsideration (Aug. 28, 2014), and *Staffchex*, Cal/OSHA App. 10-2456, Decision After Reconsideration (Aug. 28, 2014).)

That contention is without merit. First, the Decision relied on older, well-established authority in addition to the two new Decisions After Reconsideration cited above, including *Sully-Miller Contracting Company v. California Occupational Safety and Health Appeals Bd.* (2006) 138 Cal.App.4th 684 (hereafter, *Sully-Miller*). *Sully-Miller* held that a primary employer is responsible for the safety of its employees even if they are loaned or assigned to work for another. Second, decisional law is retroactive in effect. “Indeed, a legal system based on precedent has a built-in presumption of retroactivity. [Citation.] (*McManigal v. City of Seal Beach* (1985) 166 Cal.App.3d 975, 981).” (*In re Retirement Cases* (2003) 110 Cal.App.4th 426, 442.) (See also *Christine Corporation*, Cal/OSHA App. 79-712, Decision After Reconsideration (Aug. 20, 1984).)

Employer’s reliance on *Newman v. Emerson Radio Corporation* (1989) 48 Cal.3d 973, and *Torrey Hills Community Coalition v. City of San Diego* (2010) 186 Cal.App.4th 429 is misplaced. In *Newman*, *supra*, the California Supreme Court made it clear that in a few cases “circumscribed retroactivity has been imposed because of unique burdens that would otherwise arise.” (*Newman*, *supra*, 48 Cal.3d at p. 983.) Given the historical underpinnings of the rule that a primary employer is responsible for the safety of its employees, we find there are no “unique burdens” imposed here, for they are indeed well-established ones. (*Id.*) In *Torrey Hills*, *supra*, the Court of Appeal rejected the argument that a then-recent appellate court decision should not be applied retroactively, stating, “But where ‘we are merely deciding a legal question, not changing a previously settled rule,’ no reason exists to apply the exception [to the general rule of retroactivity.]” (*Torrey Hills*, *supra*, 186 Cal.App.4th at 438 [citation and internal quotations omitted].) Our recent decisions in *Labor Ready*, Cal/OSHA App. 13-0164, Decision After Reconsideration (Aug. 28, 2014), and *Staffchex*, Cal/OSHA App. 10-2456, Decision After Reconsideration (Aug. 28, 2014) were two recent applications of existing law to the particular circumstances presented in those matters.

Employer also argues that the Board’s decision in *Petroleum Maintenance Company*, Cal/OSHA App. 81-594, Decision After Reconsideration (May 1, 1985) (*PEMCO II*), would relieve it of responsibility. That argument is not correct. Employer quotes a portion of *PEMCO II* which articulates a four-element affirmative defense a primary employer may advance to be relieved of responsibility for a safety violation on a secondary employer’s premises. At least three of the four elements of that defense are not satisfied in the current

circumstances. First, Employer's employees were not supervised "solely" by Global's management personnel, but rather by their own supervising employees. Second, Employer was not barred from Global's premises, it had authority or permission to be on Global's premises and exercised that authority or permission. And, third, the evidence showed that Employer's employees were not properly trained in lockout/tagout procedures. (See *PEMCO II*, and Petition, p. 8.) Thus, the *PEMCO II* defense would fail.

Another argument Employer advances is that it was the "contractual" employer, and, under its contract with Global, the latter retained responsibility for workplace safety. There are at least two flaws in that position. First, *Sully-Miller, supra*, established the principle that the primary employer is responsible for the safety of its employees, even when they are assigned or loaned to another employer. Second, the Board has recognized for decades that the California Occupational Safety and Health Act, Labor Code section 6300 et seq., does not countenance an employer's "contract[ing] away its safety responsibilities[.]" (*Moran Constructors, Inc.*, Cal/OSHA App. 74-381, Decision After Reconsideration (Jan. 28, 1975).) Therefore, Employer's contention that Global, and not it, was responsible for Employer's employees' safety is untenable.

Employer's other line of argument is that the evidence does not support the Decision. We disagree. The evidence was clear that Employer was the primary employer of both the supervisory and line personnel on duty at the time of the accident, and had been their employer for several weeks. It was also clear that the Employer's supervisory or managerial personnel did not inspect the dough divider as required by section 3203, subdivision (a); and its employees were not trained in how to lockout and tagout the dough divider. It was also shown that Employer's employees did not follow a lockout/tagout procedure before the accident and that failure resulted in the accident. Finally, the evidence showed that the dough divider was effectively not guarded. Although it had an "interlock" on each of the two doors which allowed access into the mechanism, which was supposed to immediately stop operation of the machine when either door was opened, the injury occurred because the dough divider did operate while one of those doors was open and the victim's hand was in the mechanism. Thus the evidence showed that either the interlock was defective or had been deliberately bypassed. Whichever was the case, the safety device which should have prevented the accident was not functioning. We find, therefore, that the Decision was correct in holding that Employer committed the violations alleged in the three citations.

**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: NOV 19, 2015