BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: GUARDSMARK 22 South Second Street Memphis, TN 38103-2965 Employer	Docket No. 10-R3D1-2675 **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 Guardsmark (Employer).

JURISDICTION

Commencing on July 26, 2010, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On August 4, 2010 the Division issued one citation to Employer alleging three general violations of occupational safety and health standards codified in California Code of Regulations, Title 8.[1]

Employer timely appealed.

Administrative proceedings were held, including a duly-noticed evidentiary hearing before an Administrative Law Judge (ALJ) of the Board on July 5, 2011. After that hearing, the ALJ issued her Decision (Decision) on July 19, 2011. The Decision sustained one of the alleged violations, which alleged that toilet facilities were not accessible as required by section 3364(b), and granted Employer's appeals as to the other two allegations.

Employer timely filed a petition for reconsideration of the Decision with respect to the section 3364(b) violation.

[1] References are to California Code of Regulations, title 8 unless specified otherwise.

The Division filed an answer to the petition.

ISSUE

Whether the record established there was a violation of section 3364(b).

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 ALJ acted in excess of her powers in sustaining the section 3364(b) violation, and that 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 Order was based on substantial evidence in the record as a whole and appropriate under the circumstances.

Employer provides security personnel for others' facilities. In the instant matter, it was alleged that Employer was in violation of section 3364(b) because one of its employees was assigned to be in a guard "shack" or booth which was estimated to be 500 feet from the nearest toilet facility, and because the person so assigned had to wait from 5 to 15 minutes for another guard to take his place before he could leave the booth to use the toilet facilities. Section 3364(b) states: "Toilet facilities shall be kept clean, maintained in good working order and be accessible to the employees at all times. Where practicable, toilet facilities should be within 200 feet of locations at which workers are regularly employed and should not be more than one floor-to-floor flight of stairs from working areas. (Title 24, part 5, section 5-910(a)(1))"[2]

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[2] Title 24 is the California Building Code; part 5 addressing plumbing.

Employer argues that it did not have responsibility to provide "compliant" toilet facilities, and further contends such facilities must be "permanent." (Petition, p. 2.)

As to responsibility to provide compliant facilities, the Labor Code and our precedents make employers responsible for the working conditions to which their employees are exposed.

The California Occupational Safety and Health Act (Labor Code section 6300 and following) was "enacted for the purpose of assuring safe and healthful working conditions for all California working men and women[.]" (Lab. Code § 6300.) The Act also states that, "Every employer shall furnish employment and a place of employment that is safe and healthful for the employees therein." (Lab. Code § 6400(a).) Moreover, "No employer shall require, or permit any employee to go or be in any employment or place of employment which is not safe and healthful." (Lab. Code § 6402.)

The Board has rejected the argument that an employer who does not own the facility at which its employees are working is not responsible for the working conditions of that facility; the statutory duty to "furnish . . . a place of employment that is safe and healthful" is non-delegable. (*Id.*; *Labor Ready, Inc.*, Cal/OSHA App. 99-3350, Decision After Reconsideration (May 11, 2001).) As the Decision succinctly put it, "An employer is responsible for hazards to which its employees are exposed, even when the hazard is created by another employer [citation], even when work is performed at another employer's work site, and even when the employer does not retain ultimate control over its employees at all times. [Citation.]" (Decision, p. 9.) Similarly, the Court of Appeal has recognized, an employer is responsible for working conditions its employees are exposed to even if does not own or control the workplace, as was the circumstance in this case. (See *Sully-Miller Contracting Co.* v. *California Occupational Safety and Health Appeals Board* (2006) 138 Cal.App.4th 684.) Ultimately, Employer could have declined to put its employees in the workplace, rather than expose them to it. (See *Manpower*, Cal/OSHA App. 98-4158, Decision After Reconsideration (May 14, 2001) [only way to comply may be not to permit employees to go or be in an unsafe workplace].)

Employer further argues that it is the "place of employment" which must be in compliance with section 3364(b), and "not each individual employer[.]" As noted, we have held that an employer's duty to provide a safe and healthful workplace is non-delegable. (*Labor Ready, supra.*) Since an employer may not delegate its responsibility to another employer, it also may not delegate responsibility to a "place of employment," which, being inanimate, can do nothing to protect employees from workplace hazards. Alternatively, this argument may be construed as an indirect way of saying it should be the facility owner's responsibility to comply with section 3364(b), an argument we

have rejected. (*e.g., Labor Ready, supra.*) By requiring its employees to work in a place of employment which was not in compliance with section 3364(b), Employer was in violation of that section.

Employer contends that only permanent toilet facilities satisfy section 3364(b). We disagree. We do not so interpret the Safety Order, and have not held that toilet facilities must be permanent to be compliant. Section 3364(b) does not use the word *permanent* to modify or describe "toilet facilities," and we may not read the term into it. (*E. L. Yeager Construction Company, Inc.*, Cal/OSHA App. 01-3261, Decision After Reconsideration (Nov. 2, 2007).) Further, section 3364(c) addresses sewage disposal, and does so in terms that does not require only permanent facilities or foreclose use of portable toilets. Finally, interpreting section 3364(b) to require all toilet facilities to be permanent would lead to absurd results, which are to be avoided. (*Webcor Builders, Inc.*, Cal/OSHA App. 06-3031, Denial of Petition for Reconsideration (Jan. 11, 2010) citing *Barnes* v. *Chamberlain* (1983) 147 Cal.App.3d 762.) For example, a high-rise building under construction would have to have permanent toilet facilities in place on at least every other floor even though the structure is in the steel skeleton stage.

Employer next contends the ALJ erred by improperly shifting to it the burden of proving it was not practical to have toilet facilities within 200 feet of the guard shack. The Decision states, however, that "Employer argued that it fell within the exception to the requirement that the toilet be within 200 feet because it was not practicable." (Decision, p. 9.) "The Appeals Board has long regarded exceptions to the application of a safety order as affirmative defenses, not within the Division's burden of proof." (*Chacon Steel Company, Inc.*, Cal/OSHA App. 85-1430, Decision After Reconsideration (Aug. 13, 1987).) The employer is required to show it satisfied the terms of the exception to prevail. (*A C Transit*, Cal/OSHA App. 08-4611, Denial of Petition for Reconsideration (June 10, 2011).)

In this proceeding Employer itself argued section 3364(b) had an exception and it fell within it. The ALJ disagreed, finding Employer offered conclusions and speculations, not evidence, about whether it was "practicable" to have a toilet facility within 200 feet of the guard shack.

Even if Employer had not so argued, we construe "[w]here practicable" in section 3364(b) as an exception in the nature of an affirmative defense. Section 3364(b) begins by stating that "Toilet facilities shall be . . . accessible to the employees at all times." The next sentence further provides, "Where practicable, toilet facilities should be within 200 feet [of workers' locations.]" Thus, the facilities should be 200 feet or less from the work location unless it is impracticable to locate them there, a circumstance an employer must show to justify having the facilities at a greater distance.

Employer argues that the facts do not show the nearest toilet facilities were more than 200 feet from the guard shack. The record belies this claim. First, Employer's witness speculated about how far the shack and facilities were from each other, while the Division's witness was more precise. Second, contrary to Employer's contention, both its witness and the Division's witness were referring to the same building ("building C-2") where the facilities were located, not different buildings. The record supports the conclusion that the toilet facility in question was the one in building C-2, and that it was about 500 feet from the guard shack.

DECISION

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

ART R. CARTER, Chairman

CANDICE A. TRAEGER, Member

ED LOWRY, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: SEP 22 2011