BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	**Inspection No. 1141604**
BOY RACER INC dba BURNING ANGEL 11515 Amigo Avenue Porter Ranch, CA 91326	**ORDER DISMISSING APPEAL**
Employer	

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code issues the following order dismissing the appeal of Boy Racer Inc dba Burning Angel (Employer).

Jurisdiction:

Beginning April 20, 2016, the Division of Occupational Safety and Health (the Division) conducted an inspection at a place of employment maintained by Employer. On July 30, 2016, the Division cited Employer for four violations of California Code of Regulations, title 8: failure to implement and maintain an effective Injury and Illness Prevention Program (IIPP); failure to implement an effective Exposure Control Plan (ECP) for blood and other potentially infectious material (OPIM); failure to observe universal precautions for exposure to blood and OPIM; and failure to require the use of engineering controls and work practice controls to minimize exposure to blood and OPIM.

Employer filed timely appeals contesting the existence of the alleged violations, their classifications, the time allowed to abate, the changes required to abate, and the reasonableness of the proposed penalties. Employer asserted multiple affirmative defenses.

This matter came on regularly for hearing before Dale A. Raymond, Administrative Law Judge (ALJ) for the Appeals Board, at West Covina, California. Karen Tynan, Attorney, represented Employer. Kathryn Woods, Staff Counsel, represented the Division. The matter was submitted on August 9, 2017.

On September 6, 2017, the ALJ issued a Decision affirming three citations and vacating one. The ALJ affirmed the citations asserting a failure to implement and maintain an effective IIPP, failure to implement an effective ECP for blood and OPIM, and a failure to observe universal precautions for exposure to blood and OPIM. However, the ALJ vacated the citation asserting a failure to require use of engineering controls and work practice controls to minimize exposure to blood and OPIM.

Employer filed a timely petition for reconsideration challenging the ALJ's decision to the

extent it affirmed three citations and made other adverse findings. The Division filed also timely petition challenging the ALJ's Decision to the extent it vacated one citation. The Board took the petitions for reconsideration under submission.

On September 29, 2021, the Board transmitted to the parties a list of questions for further briefing. After an extension of time, the parties were directed to file their responsive briefs by December 15, 2021. The Division filed a responsive brief. However, Counsel for the Employer filed a declaration which stated that, "In April 2021, Boy Racer filed a Certificate of Surrender with the California Secretary of State and can no longer exercise corporate rights, powers, and privileges in the state of California." (Karen Tynan Decl. [Dec. 14, 2021], ¶ 2.) The declaration also stated, "I am not able to gain any authority to file a brief." (*Id*. at ¶ 3.)

On January 7, 2022, the parties were ordered to show cause why Employer's appeal should not be dismissed for failure to comply with the Board's request for further briefing. In response, Employer filed a two-page brief stating that "Boy Racer, a dissolved corporation, cannot pursue this appeal nor participate in this appellate process" and that "Employer cannot authorize pursuit of this appeal." (Employer's Brief [OSC], pp. 1-2.) Further, Employer's Counsel filed a declaration which again stated, "In April 2021, Boy Racer filed a Certificate of Surrender with the California Secretary of State and can no longer exercise corporate rights, powers, and privileges in the state of California." (Karen Tynan Decl. [OSC], ¶ 2.) The declaration stated, "I have been unable to find any authority for me to either pursue or defend this appeal for a dissolved corporation. I am not able to gain any authority to file a brief." (*Id.* at ¶ 3.) The declaration further stated, "I have concluded that any action taken by me, on behalf of a dissolved corporation, could be detrimental to a client's interests in maintaining the dissolution and following proper corporate formalities." (*Id*. at ¶ 4.)

On March 3, 2022, the Board issued an Order for Oral Argument. The Board ordered all parties and their counsel to appear for the argument. Oral argument was set for March 17, 2022 at 10 a.m. The order required counsel to address the following issues: 1) What is the legal effect of Employer's dissolution and certificate of surrender as it pertains to this administrative action? 2) Does New York or California law govern the effect of dissolution? 3) Does Employer, despite its dissolved status, continue to exist for the purpose of participating in, and defending, this administrative action? 4) Does Employer oppose dismissal of its appeal? The Board also ordered further briefing on these subjects. The briefing was to be submitted in advance of oral argument.

On March 17, 2022, Counsel for both the Division and Employer appeared for oral argument. Counsel additionally provided briefs in advance of argument. The brief prepared by Employer's Counsel stated, "Employer is dissolved and has completed winding up its affairs." (Employer's Brief [re Oral Argument], p. 1.) It stated, "As is transparent from prior declarations and pleadings, the corporation has provided no authority, direction, or permission to participate in any further briefing or oral argument." (*Id*. at p. 2.) The brief further stated, "Employer has provided no authority and has made no efforts to participate in or defense [sic] this administrative action." (*Ibid*.) Finally, the brief stated, "Simply put, there is no reason that an Employer can or should be required to participate in a previously filed appeal that has been sitting in the Appeals Board process since 2017 if that participation would jeopardize the status of the corporation as a dissolved corporation." (*Id*. at p. 3.) The statements by Employer's Counsel during argument were

largely in accord with Employer's briefing.

In rendering this order, the Board has engaged in an independent review of the entire record. The Board considered the pleadings and arguments filed and made by the parties.

Analysis:

At this point, after careful consideration, and repeated outreach, we reach the conclusion that Employer has failed to appear, and effectively abandoned this matter.

Preliminarily, we address the dissolution allegations. Employer cites no authority for the proposition that a dissolved corporation cannot participate in the immediate action. On the other hand, the laws of both California and New York support the proposition that Employer, notwithstanding its status as a dissolved corporation, still exists as a corporation, and may participate in this matter, for the purpose of appearing in and defending this action.

In California, a dissolved domestic corporation continues to exist for the purpose of winding up its affairs, prosecuting and defending actions by or against it, and enabling it to collect and discharge obligations, dispose of and convey its property, and collect and divide its assets, but not for the purpose of continuing business except so far as necessary for the winding up thereof. (Corp. Code § 2010(a).) As Employer's brief conceded, "[a] dissolved corporation maintains considerable corporate powers to conduct whatever business is required to wind up its affairs--including prosecuting actions and enforcing judgments." (Employer's Brief [re Oral Argument], p. 3, citing Corp. Code, § 2010, *Pensaquitos, Inc. v. Superior Court* (1991) 53 Cal.3d 1180, 1185.) "Under [California's] statutory scheme, the effect of dissolution is not so much a change in the corporation's status as a change in its permitted scope of activity. Thus, a corporation's dissolution is best understood not as its death, but merely as its retirement from active business." (*Greb v. Diamond Internat. Corp.* (2013) 56 Cal.4th 243, 247 [other citations omitted].) If California law were to apply, it is clear that Employer may still participate in this action, and Employer has cited no authority suggesting that doing so would jeopardize Employer's dissolved status.

However, Employer is a foreign corporation; therefore, the law of the state of domicile is likely to apply, which in this instance is New York. "It appears to be settled law that the effect of the dissolution of a corporation, or its expiration otherwise, depends upon the law of its domicile…and that a defunct foreign corporation has no greater capacity or higher standing to commence or maintain an action in the state of the forum than it would have in the state of its domicile (citations)." (*Thatcher v. City Terrace Cultural Center* (1960) 181 Cal.App.2d 433, 440; see also *Greb v. Diamond Internat. Corp*., *supra*, 56 Cal.4th at 247, 250-251; *Riley v. Fitzgerald* (1986) 178 Cal.App.3d 871, 876-877.)

New York has a survival statute, equivalent in substance to California's survival statute. Business Corporation Law section 1006 provides,

> (a) A dissolved corporation, its directors, officers and shareholders may continue to function for the purpose of winding up the affairs of the corporation in the same manner as if the dissolution had not

> taken place, except as otherwise provided in this chapter or by court order. In particular, and without limiting the generality of the foregoing:
> ….
> (4) The corporation may sue or be sued in all courts and participate in actions and proceedings, whether judicial, administrative, arbitrative or otherwise, in its corporate name, and process may be served by or upon it.
> (b) The dissolution of a corporation shall not affect any remedy available to or against such corporation, its directors, officers or shareholders for any right or claim existing or any liability incurred before such dissolution, except as provided in sections 1007 (Notice to creditors; filing or barring claims) or 1008 (Jurisdiction of supreme court to supervise dissolution and liquidation). (N.Y. Bus. Corp. Law § 1006 (Consol., Lexis Advance through 2022 released Chapters 1-12).)

Under New York's survival statute, a corporation continues to exist after dissolution for the purpose of winding up of its affairs, and a dissolved corporation may sue or be sued on its obligations, including contractual obligations and contingent claims, until its affairs are fully adjusted (*MMI Trading, Inc. v Nathan H. Kelman, Inc.* (App.Div.) 2014 NY Slip Op 05632, ¶ 2 [120 A.D.3d 478, 479-480, 989 N.Y.S.2d 911, 912] [citations omitted].) Based on the language of New York's survival statute, Employer still has the capacity to participate in the immediate administrative action, since this matter arose prior to dissolution. (*Harris v. Stony Clove Lake Acres* (App.Div. 1995) 221 A.D.2d 833, 833 [633 N.Y.S.2d 691, 692]—["Most importantly, a corporation continues to exist as a legal entity after dissolution for purposes of appearing in legal actions and proceedings…."]; *Independent Investor Protective League v. Time, Inc*. (1980) 50 N.Y.2d 259, 262-263 [428 N.Y.S.2d 671, 673, 406 N.E.2d 486, 488].) No statute of limitation has been identified that limits how long a corporation need participate in an action or proceeding.

We also observe that Employer's filing of a certificate of surrender does not prohibit Employer from participating in this matter. The filing of such a document surrenders the right of the corporation to "transact intrastate business" within this state, among several other changes, including changes with regard to service. (Corp. Code § 2112.) The participation in this legal action is not the transaction of intrastate business. (*O'Connell Gold Mines, Ltd. v. Baker* (1944) 63 Cal.App.2d 384, 387 ["We are of the opinion the plaintiff may not be deemed to have transacted intrastate business in California …. by commencing or maintaining this suit to quiet title to the land."].) Corporations Code section 191, subdivision (c), states,

> (c) Without excluding other activities that may not constitute transacting intrastate business, a foreign corporation shall not be considered to be transacting intrastate business within the meaning of subdivision (a) solely by reason of carrying on in this state any one or more of the following activities:

> (1) Maintaining or defending any action or suit or any administrative or arbitration proceeding, or effecting the settlement thereof or the settlement of claims or disputes.

Having reached the conclusion, under either California or New York law (or both), that Employer continues to exist as a legal entity for the purposes of appearing in the immediate action, we now turn to the question of whether Employer has participated in the proceeding. The answer is a resounding no.

The Board has issued three relevant directives to the parties: (1) a September 29, 2021 request for further briefing; (2) a January 7, 2022 order to show cause; and (3) an order for oral argument and briefing. In response to the Board's directives and orders, Employer has repeatedly failed to meaningfully participate. For example, in response to Board's request for further briefing dated September 29, 2021, Counsel Tynan, in addition to noting that Employer had filed a Certificate of Surrender, stated, "I am not able to gain any authority to file a brief." (Karen Tynan Decl. [Dec. 14, 2021], ¶¶ 2, 3.) Similar statements were made in response to the order to show cause. (Karen Tynan Decl. [OSC], ¶¶ 2-4.) Finally, and most tellingly, in response to the order for oral argument, Employer's brief stated, "the corporation has provided no authority, direction, or permission to participate in any further briefing or oral argument." (Employer's Brief, p. 2.) The brief further stated, "Employer has provided no authority and has made no efforts to participate in or defense [sic] this administrative action." (*Ibid*.) The brief finally stated, "Simply put, there is no reason that an Employer can or should be required to participate in a previously filed appeal that has been sitting in the Appeals Board process since 2017 if that participation would jeopardize the status of the corporation as a dissolved corporation." (Employer's Brief, p. 3.) Further, despite the Board's order requiring Counsel **and** parties to appear for oral argument, no officer, director, or manager of Employer otherwise appeared.

Based on the various responses received from Employer's Counsel, we reach the unavoidable conclusion that Employer has repeatedly failed to appear, and has abandoned this matter.

When an employer fails to appear, the Board possesses authority to dismiss the employer's appeal. Labor Code section 6611, subdivision (a), states, "If the employer fails to appear, the appeals board may dismiss the appeal…" California Code of Regulations, title 8, section 383, subdivision (a), similarly provides:

> If after service of a notice of hearing, prehearing conference, settlement conference, status conference, or another event scheduled and duly noticed by the Appeals Board, a party fails to appear at the noticed event, either personally or by representative, the Appeals Board may take the proceeding off calendar; may, after notice, dismiss the proceeding; or may receive evidence from any party that appears.

Here, we are persuaded that Employer has failed to appear, and otherwise abandoned this matter, meriting dismissal of Employer's appeal under the aforementioned authority.

The Board also has authority to dismiss the appeal for a separate and independent reason. It has become clear that Employer has not updated its contact and service information. The brief filed by Employer's Counsel states, "the Employer has wound up their business and dissolved leaving not even a trace of property or their identity in California." (Employer's Brief [re Oral Argument], p. 2.) California Code of Regulations, title 8, section 355.1, subdivision (c), states, "Failure to communicate changes….promptly in writing by the employer may result in dismissal of the appeal… if the Appeals Board is unable to effectively communicate with the employer, party, or intervenor." It is clear that changes have occurred, which were not timely communicated (e.g. Corp. Code, § 2112), and that there has been an absence of effective communication between Employer and the Board.

IT IS ORDERED, that the above-entitled matter is dismissed with prejudice. All citations and penalties are affirmed as originally issued in the citations.

This order is stayed for a period of 40 calendar days from filing. This stay period runs from the filing of this order and is not extended for service.

Employer has ten calendar days to file a request for reinstatement of its appeal. The ten calendar days runs from the filing of this Order and is not extended for service. The request must be filed with the California Occupational Safety and Health Appeals Board at 2520 Venture Oaks Way, Suite 300, Sacramento, CA 95833. The request must state good cause for Employer's failure to appear and failure to participate in this action, accompanied by declarations. The Division may file a response within ten calendar days from service of Employer's timely request for reinstatement.

This order will become a final ruling of the Board, after the expiration of the stay period, if either of two events occur: (1) Employer fails to file a timely request for reinstatement; or (2) in the event Employer files a timely request for reinstatement, the Board takes no action on the request within 40 calendar days from filing of this order. If the Board takes no action on a timely request, it may be viewed as a denial of the request.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

/s/ Ed Lowry, Chair
/s/ Judith Freyman, Board Member
/s/ Marvin Kropke, Board Member

FILED ON: 05/11/2022