

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

*In the Matter of the Appeal of:*

**GEORGE E. MASKER INC.**  
**dba MASKER PAINTING**  
**887 71<sup>st</sup> Avenue**  
**Oakland, CA 94621**

Employer

**DOCKET 13-R2D1-0570**

**DECISION**

**Statement of the Case**

George E. Masker Inc. dba Masker Painting (Employer) is a painting contractor. Beginning September 19, 2012, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Nancy Mirza, conducted a safety inspection at a place of employment maintained by Employer at 9762 Kiefer Blvd, Sacramento, California. On January 24, 2013, the Division cited Employer for violations of Title 8, California Code of Regulations, §340, failure to post CAL/OSHA Notice; and §1509(c), failure to post, or make readily available, Employer's Code of Safe Practices at the job site.<sup>1</sup>

Employer filed a timely appeal of both items in the citation, contesting the existence of the violations, the classifications of the violations, the reasonableness of abatement requirements, and the reasonableness of the proposed penalties.

This matter was heard by Kevin J. Reedy, Administrative Law Judge for the California Occupational Safety and Health Appeals Board, at Sacramento, California on January 22, 2014. Dave K. Smith, safety consultant, represented Employer. Jon Weiss, District Manager, represented the Division. The parties presented oral and documentary evidence. The matter was submitted for decision on March 3, 2014. The submission date was extended to August 7, 2014 by the Administrative Law Judge.

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<sup>1</sup> Unless otherwise specified, all references are to Sections of Title 8, California Code of Regulations.

During the hearing Employer limited its appeals solely to the existence of the two alleged violations.

### **Issues**

1. Was Employer required to post and did it post a CAL/OSHA Notice at the location to which its employees reported?
2. Did Employer fail to post its Code of Safe Practices (CSP) at the job site, or, in the alternative, make its CSP readily available through a supervisor?

### **Findings of Fact**

1. Employer is a construction sub-contractor.
2. The Masker storage container is a location to which employees report each day.
3. No CAL/OSHA Notice was posted at the Masker container.
4. No CSP was posted at the Masker container.
5. On the day of the inspection the CSP was not in possession of the jobsite manager.

### **Analysis**

#### **1. Employer failed to post a CAL/OSHA Notice at the job site. The violation of §340 is established.**

Section 340, under “Contents and Posting Requirements of CAL/OSHA Notice,” in relevant parts, provides the following:

Every employer shall be required to post immediately upon receipt and to keep posted the CAL/OSHA Notice of Employee Protections and Obligations entitled "Safety and Health Protection on the Job," which is furnished pursuant to Labor Code Section 6328 by the Division of Occupational Safety and Health, Department of Industrial Relations, State of California, containing information on pertinent safety laws, regulations and certain rights of employees under the California Labor Code.

Each employer must post at least one Notice (CAL/OSHA Notice) in each establishment in a conspicuous place where notices to employees are customarily posted. "Establishment" as used in this regulation means a single physical location where business is conducted or where services or industrial operations are

performed. Where employers are engaged in activities which are physically dispersed such as construction or transportation, the notice required by this section shall be posted at each location to which employees report each day. Where employees do not usually work at, or report to, a single establishment, such notice or notices shall be posted at the location or locations from which the employees operate to carry out their activities. ... .

In the citation, the Division alleges the following:

On 9/19/12, George E. Masker Inc. dba Masker Painting, while painting the interior of the Fleet Maintenance Building located at 9762 Kiefer Blvd, Sacramento, CA, failed to post or make available to their employees, a copy of CAL/OSHA Notice at this construction work site.

The elements of the violation are: (1) Upon receipt of a copy of the CAL/OSHA Notice (2) Employer failed to immediately post and keep a copy of the CAL/OSHA Notice posted at (3) a location to which employees report each day. Section 340 provides that “every employer,” shall post the notice at each location to which employees report each day.

It is not disputed that Employer was in receipt of a CAL/OSHA Notice which was posted at Employer’s Oakland office. Joseph Garcia (Garcia), Employer’s onsite foreman, testified that such a notice was posted at the Oakland office. The Division offered no evidence to the contrary.

Employer did not post a CAL/OSHA Notice at the Masker container<sup>2</sup>, the location to which its employees reported each day. During the inspection Nancy Mirza (Mirza), Associate Safety Engineer, asked Garcia to see Employer’s Injury and Illness Prevention Program (IIPP), CSP, and the CAL/OSHA Notice posting. Garcia told Mirza that he had those three items in Employer’s painting storage container. Garcia told Mirza that the CAL/OSHA Notice was not posted anywhere at the Masker job site. Garcia told Mirza that the Masker employees were to go to the Masker storage container each day. Garcia testified that its workers are dispatched from the Oakland office whereupon its painters report to their various work assignments. In the instant matter, work crews reported to the Masker container each day, where they were then directed to other specific locations at the job site. A CAL/OSHA Notice was not posted at the Masker container.

CAL/OSHA Notices were posted in both the Turner Construction (Turner) trailer and in Masker’s Oakland office. Mirza testified that a CAL/OSHA Notice was posted in the Turner trailer. Garcia testified that general contractor Turner requires all employees who work on site to go through its own

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<sup>2</sup> Mirza testified that she did not go inside the container, which appeared to be used for storage. Adjacent to the container was shade, water, and an employee break area.

orientation, which is conducted in the Turner Construction trailer. Exhibit A is a photograph taken from inside Turner's trailer, which shows various laminated postings<sup>3</sup> inside the trailer. Garcia testified that the same type of laminated notices are posted at Masker's Oakland location. Masker employees are dispatched from the Oakland office and go to where the work is. It is not disputed that CAL/OSHA Notices were posted in the Turner Construction trailer and in Masker's Oakland office.

Employer, in its post-hearing brief, argues that the work performed at the construction site was physically dispersed from its Oakland office, and that the following language in §340 excludes it from the posting requirement at the job site:

Where employers are engaged in activities which are physically dispersed such as construction or transportation, the notice required by this section shall be posted at each location to which employees report each day.

The physical dispersment of employees is not an excuse. Rather, this circumstance is accounted for by the rule. A notice must be posted at all such dispersed reporting locations. In the instant matter, Masker employees report to the Masker container each day where they receive their specific job assignments. Employer may not rely on a posting of a CAL/OSHA Notice approximately 90 miles away in its Oakland office to satisfy the requirements of the regulation. Employer failed to post the required CAL/OSHA Notice at the Masker container.

Employer, in the alternative, argues that general contractor Turner, as the controlling employer, posted a CAL/OSHA Notice in its construction trailer, and that Masker relied on Turner to satisfy any posting requirement at the job site. Employer presented no evidence that its employees reported to the Turner construction trailer each day. Furthermore, Employer provides no authority to establish that it can delegate its duty to post to a separate business entity at a multi-employer work site.

The Division presented sufficient evidence to demonstrate that Employer did not post a CAL/OSHA Notice at the job site. Therefore, the Division established a violation of §340 by a preponderance of the evidence. The parties stipulated that the penalty was calculated in accordance with the Division's policies and procedures (Exhibit 3). The \$375 penalty is therefore sustained.

**2. Employer failed to post its CSP at the job site, or, in the alternative, make its CSP readily available through a supervisor. The violation of §1509(c) is established.**

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<sup>3</sup> Garcia was unable to read Exhibit A to identify its contents, apparently due to the poor resolution of the copy of the photo. A close examination of Exhibit A presents what appears to be a photo of two laminated information panels posted side by side on a wall. The panel on the left is written in English, and the panel on the right is written in Spanish. On the bottom and in the middle of each laminated panel is what appears to be a CAL/OSHA Notice.

Section 1509(c), under “Injury and Illness Prevention Program,” provides the following:

The Code of Safe Practices shall be posted at a conspicuous location at each job site office or be provided to each supervisory employee who shall have it readily available.

In the citation, the Division alleges the following:

On 9/19/12, George E. Masker Inc. dba Masker Painting, while painting the interior of the Fleet Maintenance Building located at 9762 Kiefer Blvd, Sacramento, CA, failed to post or have readily available a copy of their Code of Safe Practices at this construction job site.

The elements of the violation are: (1) Employer was an employer in the construction industry; (2) Employer’s Code of Safe Practices was not posted in either a conspicuous location at the job site office nor was it made readily available by Employer’s supervisor.

In *Griffith Company*, Cal/OSHA App. 86-1202, Decision After Reconsideration (March 20, 1987), the Appeals Board agreed with the administrative law judge’s determination that the safety order (Section 1509(c)) can be satisfied only by posting the code at the site “or having a copy under the immediate control of the supervisor in charge who shall make it readily available to employees and, of course, to representatives of the Division.”

In *Griffith, supra*, the employer produced a copy of its CSP during its closing conference with the Division at the employer's main office. The Board found that when an employer fails to have a Code of Safe Practices at the jobsite or in the possession of the jobsite supervisor, the presence of the CSP at one of an employer’s other locations is insufficient to establish compliance with the requirement.

The Division presented sufficient evidence to demonstrate that Employer did not post its CSP at the job site, nor did its supervisory employee (foreman Garcia) have a copy of its CSP readily available to the Division's representative at the time of the inspection. Mirza testified that the CSP was not posted anywhere in the area of the Masker container. Garcia also testified that the CSP was not posted anywhere inside or outside the Masker container.

On the date of the inspection Mirza asked to see Employer’s IIPP and Code of Safe Practices. Mirza testified that Garcia provided a binder from the storage container which contained Employer’s IIPP. Neither Garcia nor Mirza could locate Employer’s CSP in the binder. Mirza testified that Garcia told her that he thought that the CSP was in the binder, although Garcia could not locate it in the binder. Garcia testified that the binder, entitled “Field

Package<sup>4</sup>,” was on site during the inspection (Exhibit B). Exhibit B, as presented at the hearing, does include a CSP. Employer’s CSP may have been contained in Employer’s Field Package at the time of the inspection, but foreman Garcia failed to make its CSP “readily available” to Mirza during that inspection.

Therefore, the Division established a violation of §1509(c) by a preponderance of the evidence. The parties stipulated that the penalty was calculated in accordance with the Division’s policies and procedures (Exhibit 3). The \$375 penalty is therefore sustained.

### **Conclusions**

In Citation 1, Item 1, the evidence supports a finding that Employer violated §340 by failing to post a CAL/OSHA Notice at the job site. A penalty of \$375 is assessed for Citation 1, Item 1.

In Citation 1, Item 2 the evidence supports a finding that Employer violated §1509(c) by failing to post its CSP at the job site and, in the alternative, by failing to make its CSP readily available to the Division through a supervisor. A penalty of \$375 is assessed for Citation 1, Item 2.

### **ORDER**

Citation 1, Item 1, is sustained and a penalty of \$375 is assessed for that violation. Citation 1, Item 2, is also sustained and a penalty of \$375 is assessed for that violation. Therefore, total penalties of \$750 are assessed for the reasons described herein, and as set forth in the attached Summary Table.

Dated: August 27, 2014

KR:kav

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**KEVIN J. REEDY**  
Administrative Law Judge

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<sup>4</sup> A “Field Package” may contain documents and data specific to a construction jobsite, which may include, but is not limited to, contract information, job specifications, schedules, safety and IIPP information, and any other documentation which an employer may be required to maintain at a jobsite.

**APPENDIX A**

**SUMMARY OF EVIDENTIARY RECORD**

**GEORGE E. MASKER INC. dba MASKER PAINTING**

**DOCKET 13-R2D1-0570**

**Date of Hearing – January 22, 2014**

**Division’s Exhibits – Admitted**

| <b>Exhibit Number</b> | <b>Exhibit Description</b>    |
|-----------------------|-------------------------------|
| 1.                    | Jurisdictional documents      |
| 2.                    | Penalty Calculation Worksheet |
| 3.                    | Stipulations of Parties       |

**Employer’s Exhibits – Admitted**

|    |  |
|----|--|
| A. | Photo of Posting of Cal/OSHA Notice in Turner Construction Company trailer |
| B. | Employer’s “Field Package”   |

**Witnesses Testifying at Hearing**

1. Nancy Mirza
2. Joseph S. Garcia

CERTIFICATION OF RECORDING

*I, Kevin J. Reedy, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hearing the above-entitled matter, hereby certify the proceedings therein were electronically recorded. The recording was monitored by the undersigned and constitutes the official record of said proceedings. To the best of my knowledge the electronic recording equipment was functioning normally.*

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

## SUMMARY TABLE

### DECISION

| <i>In the Matter of the Appeal of:</i><br><br><b>GEORGE E. MASKER INC. dba MASKER PAINTING</b><br><b>DOCKET 13-R2D1-0570</b> |          |          |             |      | ABBREVIATION KEY:<br><br>Reg=Regulatory<br>G=General<br>S=Serious<br>ER=Employer <span style="float: right; margin-left: 100px;">                     DOSH=Division<br/>                     W=Willful<br/>                     R=Repeat                 </span> |   |   |                                      |                                     |                                 |
|--|----------|----------|-------------|------|--|---|---|--------------------------------------|-------------------------------------|---------------------------------|
| IMIS No. 316518752   |          |          |             |      |  |   |   |                                      |                                     |                                 |
| DOCKET NO.   | CIT. NO. | ITEM NO. | SECTION NO. | TYPE | MODIFICATION OR WITHDRAWAL   | A | V | PENALTY PROPOSED BY DOSH IN CITATION | PENALTY PROPOSED BY DOSH AT HEARING | FINAL PENALTY ASSESSED BY BOARD |
| 13-R2D1-0570   | 1        | 1        | 340         | Reg  | ALJ affirmed violation.  | X |   | \$375                                | \$375                               | \$375                           |
|  |          | 2        | 1509(c)     | Reg  | ALJ affirmed violation.  | X |   | \$375                                | \$375                               | \$375                           |
| <b>Sub-Total</b>   |          |          |             |      |  |   |   | \$750                                | \$750                               | \$750                           |
| <b>Total Due</b>   |          |          |             |      |  |   |   |                                      |                                     | <b>\$750</b>                    |
| NOTE: <i>Please do NOT send payments to the Appeals Board.</i><br><b>All penalty payments must be made to:</b>               |          |          |             |      | (INCLUDES APPEALD CITATIONS ONLY)  |   |   |                                      |                                     |                                 |
| Accounting Office (OSH)<br>Department of Industrial Relations<br>P.O. Box 420603<br>San Francisco, CA 94142                  |          |          |             |      | *You will owe more than this amount if you did not appeal one or more citations or items containing penalties. Please call (415) 703-4291 if you have questions  |   |   |                                      |                                     |                                 |

**ALJ: KR**  
**POS: 08/27/14**

