

BEFORE THE  
STATE OF CALIFORNIA  
OCCUPATIONAL SAFETY AND HEALTH  
APPEALS BOARD

In the Matter of the Appeal of:

**PORNPROS dba SSC GROUP LLC**  
6345 Balboa Boulevard, Suite 165  
Encino, CA 91316,

Employer.

**DOCKETS 13-R6D2-1892  
through 1895**

**DECISION**

**Statement of the Case**

At all relevant times, PORNPROS dba SSC Group, LLC (hereinafter referred to as Employer or PORNPROS) was an employer in the adult pornographic film industry. Beginning December 7, 2012, the Division of Occupational Safety and Health (the Division) through associate safety engineers Kim Knudsen and Michael Mendoza, conducted an inspection at Employer's office located at 6345 Balboa Boulevard, Suite 165, Encino, California. On June 3, 2013, the Division cited Employer for one regulatory and three serious violations:

- Citation 1, Item 1, a Regulatory violation of Section 3400(c) (First aid supplies not approved by physician) with a proposed penalty of \$110;
- Citation 2, a Serious violation of Section 3203(a) (failure to establish and maintain IIPP) with a proposed penalty of \$4,725;
- Citation 3, a Serious violation of Section 5193(c)(1) (failure to use controls to minimize OPIM<sup>1</sup>) with a proposed penalty of \$4,725.
- Citation 4, a Serious violation of Section 5193(d) (failure to use controls to minimize exposure to blood borne pathogens) with a proposed penalty of \$4,725.

---

<sup>1</sup> Other Potentially Infectious Material.

Employer filed a timely appeal on all grounds and alleged multiple separate affirmative defenses.

This matter came on regularly for hearing before Sandra L. Hitt, Administrative Law Judge (ALJ) of the California Occupational Safety and Health Appeals Board, at Van Nuys, California on April 2, 3, and 4, 2014.<sup>2</sup> Karen Tynan, Attorney, represented Employer. Kathryn Woods, Staff Counsel, and Melissa Peters, Staff Counsel, represented the Division. The parties presented oral and documentary evidence on the hearing dates. The parties were given until May 19, 2014, to file written closing briefs. On her own motion, the ALJ extended submission of the matter to November 17, 2014.

The parties stipulated that, on the date of the citations, PORNPROS was an employer in the state of California, PORNPROS was making adult films, and that the citation penalties were calculated in accordance with the Division's policies and procedures. At the hearing, Employer moved to seal Exhibit 10 (Hepatitis B vaccine declinations) to protect Employee privacy. There being no objection, Employer's motion was GRANTED and Exhibit 10 was sealed.

### **Issues**

1. Did Employer provide the Division with physician approval for the first aid kit?
2. Were the actors and actresses in Employer's adult videos employees?
3. At the time of the inspection, was Employer's IIPP deficient?
4. Did the Division establish that Employer failed to protect its employees from OPIM and/or blood borne pathogens at a workplace within California during the six months preceding the citation date?

### **Findings of Fact**

1. Employer never provided the Division any physician authorization for its first aid kit.
2. There is no evidence that Employer's employees were engaged in activities that exposed them to sexually transmitted infection in California during the six months prior to the issuance of Citation 2.
3. There is no evidence that Employer's employees were engaged in activities that exposed them to blood or other potentially infectious materials in California during the six months statutory period.

---

<sup>2</sup> Exhibits received and testifying witnesses are listed in Appendix A. Certification of the Record is signed by the ALJ.

## Analysis

### **Issue 1: Did Employer provide the Division with physician approval for the first aid kit?**

Section 3400(c) provides, in pertinent part: “There shall be adequate first-aid materials, approved by the consulting physician, readily available for workmen on every job.”

The alleged violation description (AVD) states: “On or before 12-7-12 Employer provided employees with first aid supplies that were not approved by a consulting physician.”

The wording of the AVD is a little troublesome as it is stated in the disjunctive, and the time before December 3, 2012, is outside of the six month’s statutory limit. However, Michael Mendoza testified that On January 31, 2013, the Division requested a copy of the physician approval of Employer’s first aid kit. In response, he received an invoice from First Global LLC that contained a description of a first aid cabinet and its cost; however, he never received a copy of any physician’s approval. Thus it may reasonably be inferred that such approval did not exist. Employer did not rebut Mr. Mendoza’s testimony. Therefore, the appeal of Citation 1, Item 1 is denied.

The Division enjoys a rebuttable presumption that its proposed penalties are reasonable once it established that they were calculated in accordance with the Division’s policies, procedures and regulations (*Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).) The parties stipulated that the penalties were calculated in accordance with the Division’s policies and procedures. Employer did not present any evidence to rebut the presumption. Therefore, the proposed penalty for Citation 1, Item 1, is found reasonable.

### **Issue 2: Were the actors in Employer’s adult videos employees?**

The burden of proving that a worker is an independent contractor falls on the putative employer. It is not the burden of the Division to prove that the actors were employees, rather, it is the burden of the Employer to prove that the actors were independent contractors. *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal. 3d 341, 354-355 (1989). PORNPROS did not produce any evidence to demonstrate that the actors and actresses involved in Employer’s adult videos were independent contractors. What is more, two important factors in determining employee versus

independent contractor status are (1) the right to control and direct the work and (2) whether the service rendered is an integral part of the alleged employer's business. *Borello, supra*. Clearly, actors are an integral part of adult of film production, and PORNPROS employed directors to direct the actors in the films (testimony of Mendoza). However, as we have determined that the Division did not establish any violations regarding exposure to the actors within the statutory time period, this issue is moot.

**Issue 3: At the time of the inspection, was Employer's IIPP deficient?**

Labor Code section 6317 provides, in relevant part: "No citation...shall be issued by the Division for a given violation or violations after six months have elapsed since occurrence of the violation." Therefore, it must be shown that during the six months immediately preceding the June 3, 2013 issuance of the citation, PORNPROS' employees were exposed to the hazard of sexually transmitted disease, and Employer's IIPP failed to adequately address the potential exposure to such hazards.

Section 3203(a) requires, in pertinent part, that employers implement and maintain an effective Illness and Injury Prevention Program.

The alleged violation description states that:

On or before 12/7/12, the employer failed to establish, implement and maintain an Injury and Illness prevention program (IIPP) that met the requirement of this standard for their employees who were exposed to hazards, which hazards included, but were not limited to, sexually transmitted infection in the course of producing adult videos.

DOSH did not present any direct evidence that Employer made any adult films/videos in California during the statutory time period; this would have to be established by inference. ALJs may draw reasonable inferences from the evidence. (*Mechanical Asbestos Removal, Inc.*, Cal/OSHA App. 86-362, Decision After Reconsideration (Oct. 13, 1987). The Appeals Board has held that reasonable inferences can be drawn from evidence introduced at hearing. (*ARB, Inc.*, Cal/OSHA App. 93-2984, Decision After Reconsideration (Dec. 22, 1997).) "An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or established in the action." (Evidence Code § 600(b).) The Board considers all evidence and reasonable inferences from the evidence. (*SMUD*, Cal/OSHA App. 08-4887, Denial of Petition for Reconsideration October 28, 2010).

The Division has the burden of proving every element of its case, including the applicability of the cited safety orders, by a preponderance of the evidence. (*Howard J. White, Inc.*, Cal/OSHA App. 78-741, DAR (June 16, 1983).) A violation can be established only upon a showing that employees were exposed to the cited hazard. *Rudolph & Sletten, Inc.*, Cal/OSHA App. 80-602, Decision After Reconsideration (March 5, 1981). In order for any exposure to have occurred within the statutory time period, the exposure must have taken place between December 3, 2012 and June 3, 2013, the date of the citation. The Division must issue a citation within six months of exposure to a hazard unless the hazard is not abated and employees continue to be exposed to it--a continuing violation that tolls the statute of limitations on citing an employer. *Pacific Telephone Co. dba AT&T*, CAL/OSHA App. 06-5052, Denial of Decision After Reconsideration (August 11, 2011); California Labor Code § 6317.

The Division argues that the following facts give rise to the inference that, during the statutory period, Employer was producing adult films in California in which actors were performing sex scenes without the use of condoms or other barriers: (1) A PORNPROS director and a screenwriter declined to be interviewed due to the possibility of criminal sanctions for violations of Measure B<sup>3</sup>, and (2) a statement by PORNPROS' counsel, Karen Tynan, of "Well, if I turn over the information to you, it will show that we're in violation of Measure B," (3) during the statutory time period, PORNPROS uploaded adult videos to its website in which actors engaged in sexual intercourse without the use of condoms.

The ALJ took official notice of Measure B, which was enacted on November 6, 2012. Any sex scenes which could expose the actors to sexually transmitted infection without the use of condoms filmed in Los Angeles County after that date, would be in violation of Measure B. However, the Division did not begin its investigation of Employer until one month *after* the enactment of Measure B. That Employer may have been filming sex scenes without condoms in Los Angeles after the enactment of Measure B is not the same as saying that Employer was engaged in such filming during the statutory period. We may draw no inferences from a person's assertion of a Fifth amendment right. California Evidence Code § 913; *People v. Holloway* (2004) 33 Cal. 4<sup>th</sup> 96.

Also, while Karen Tynan's statement was phrased in the present tense, it still does not establish that Employer was then making adult films in Los Angeles County in which sexual intercourse took place without the use of condoms. Without more, we do not know whether her statement meant that

---

<sup>3</sup> Measure B was an ordinance passed by the County of Los Angeles on November 6, 2012 which carries criminal sanctions and requires, *inter alia*, the use of condoms in the filming of sex scenes.

Employer was in violation for previous films or was violating Measure B on the date of the inspection (December 7, 2012).

That PORNPROS uploaded videos during the statutory period showing actors having unprotected sex, tells us nothing about when or where the videos were produced. Mendoza inspected Employer's office in Encino, but did not observe any films being made there. Mendoza obtained videos from Employer's website which he viewed. These videos showed men and women engaged in sexual activities that exposed them to the risk of sexually transmitted infection without the use of condoms or other barriers. The Division introduced no evidence, however, that would establish where or when any of the video clips viewed by Mendoza or posted on the website were made. In the absence of such evidence, the Division did not establish that PORNPROS employees were engaged in work that exposed them to sexually transmitted infections during the statutory time period. Therefore, the Division could not establish that during the same time period, Employer's IIPP was deficient for failure to include provisions such as condom usage to protect against sexually transmitted infections.

The Division argued, however, that it may be inferred that Employer was producing films in California in which actors were performing sex scenes without condoms or other barriers which exposed the actors to the risk of sexually transmitted infection. Mendoza speculated that because PORNPROS boasted on its website that it uploaded new videos every day, that meant that PORNPROS must be filming new videos every day, as opposed to buying the films and distributing them. Also, Mendoza speculated that PORNPROS was filming in California because PORNPROS had its office in Encino, California. None of this was sufficient to meet the Division's burden of proof to establish exposure during the statutory time period.

The Division also argued that because the exposure of PORNPROS employees to OPIM and blood borne pathogens was a continuing violation, the statute is tolled and the exposure of a PORNPROS employee to potentially infectious material on a California film set in July of 2012 may serve as a basis for establishing a violation. The six-month statute of limitations has been held by the Board to be jurisdictional. *Kiewitt/FCI/Manson (KFM) A Joint Venture*, Cal/OSHA App. 06-2452, Denial of Petition for Reconsideration (April 2, 2009). In order to reach back beyond the six-months limitations period, the Division must prove that the violation continued into the statutory period. Under the "continuing violation" doctrine, a violation within the statute of limitations period may "revive" an earlier violation of the same type that occurred outside of the limitations period. See, e.g. *Sacramento City Teachers Association (Franz) (2008) PERB Decision No. 1959 (Franz)*.

The Division did not establish a violation within the statutory period in order to “revive” an earlier violation of the same type. Therefore, the appeal of Citation 2 is granted.

**Issue 4: Did the Division establish that Employer failed to protect its employees from OPIM and/or blood borne pathogens at a workplace within California during the six months preceding the citation date?**

For the reasons stated above, the Division did not establish that, *during the statutory period*, PORNPROS employees were exposed to blood borne pathogens or other potentially infectious materials while filming on sets in California. The appeals of Citations 3 and 4 are granted.

**Conclusion**

Citation 1 is upheld. Citations 2, 3 and 4 are dismissed.

**Order**

Total penalties of \$110 are assessed for the reasons described herein, and as set forth in the attached Summary Table.

Dated: December 17, 2014

---

**SANDRA L. HITT**  
Administrative Law Judge

SLH:ml

**APPENDIX A**  
**SUMMARY OF EVIDENTIARY RECORD**

**Dates of Hearing: April 2-4, 2014**

**Division Exhibits – Admitted**

**Exhibit   Number**

- 1   Jurisdictional Package**
- 2   Document request**
- 3   Email from Tynan re: job titles**
- 4   Email from Tynan 2/20/13**
- 5   Employer's IIPP**
- 6   BBP Program SSC Group**
- 7   Resume of Dr. Papanek**
- 8   PORNPROS Website screen shots**  
**8A parts 1 and --DVD of videos**
- 9   BBP training sign up**
- 10   Hepatitis B vaccine declination**
- 11   Printout of PORNPROS website cover page**
- 12   1BY Letter**
- 13   Employer ID documentation**
- 14   Knudsen's investigation notes**
- 15   Subpoena Duces Tecum 2/26/13**
- 16   Email from Tynan date 2/6/13**

**Employers' Exhibits--Admitted**

**Letter**

**A Mendoza's Adame interview notes**

**B Mendoza's Perry interview notes**

**C Mendoza's Caina interview notes**

**D Mendoza's Lau interview notes**

**E Email 5/31/13 produced by DOSH in discovery**

**F Email to Mendoza copied to Knudsen re: extension**

**G SSC Group 4/1/13 letter re: 2/26/13 SDT**

**WITNESSES APPEARING AT HEARING**

**Michael Mendoza, associate safety engineer**

**Dr. Paul Joseph Papanek**

**Kim Knudsen, associate safety engineer**

**CERTIFICATION OF RECORDING**

*I, Sandra L. Hitt, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hear the above 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.*

---

**SANDRA L. HITT**

---

December 17, 2014

**SUMMARY TABLE  
DECISION**

In the Matter of the Appeal of:

**PORNPROS dba SSC GROUP LLC  
Dockets 13-R6D2-1892 through 1895**

Abbreviation Key: Reg=Regulatory	
G=General	W=Willful
S=Serious	R=Repeat
ER=Employer	DOSH=Division

IMIS No. 314761149
--------------------

DOCKET	CITATION	SECTION	TYPE	MODIFICATION OR WITHDRAWAL	AVFIRTED	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT HEARING	FINAL PENALTY ASSESSED BY BOARD
13-R6D2-1892	1	3400(c)	Reg	ALJ affirmed citation.	X	\$110	\$110	<b>\$110</b>
13-R6D2-1893	2	3203(a)	S	ALJ dismissed citation.		4,725	4,725	<b>0</b>
13-R6D2-1894	3	5193(c)(1)	S	ALJ dismissed citation.		\$4,725	4,725	<b>0</b>
13-R6D2-1895	4	5193(d)	S	ALJ dismissed citation.		\$4,725	4,725	<b>0</b>
<b>Sub-Total</b>						\$14,285	14,285	<b>\$110</b>
<b>Total Amount Due*</b>								<b>\$110</b>

**Total Amount Due\***  
(INCLUDES APPEALED CITATIONS ONLY)

<p>NOTE: <i>Please do not send payments to the Appeals Board.</i></p> <p><b>All penalty payments must be made to:</b>  Accounting Office (OSH)  Department of Industrial Relations  P.O. Box 420603  San Francisco, CA 94142</p>
--

\*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 or (415) 703-4308 (payment plans) if you have any questions.

ALJ: SLH/ml  
POS: 12/17/2014