

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal
of:

TROLLEY SECURITY, INC. dba
UNIVERSAL PROTECTION SERVICE
1260 Morena Boulevard, #200
San Diego, California 92110

Appellant

DOCKETS 12-R3D2-2908
through 2910

DECISION

Statement of the Case

Trolley Security, Inc. dba Universal Protection Service (“Appellant”) is a company that provides security services. Beginning February 21, 2012, the Division of Occupational Safety and Health (the Division) through Associate Cal/OSHA Engineer Darcy Murphine conducted a complaint inspection at a place of employment maintained by an employer at 195 South Tremont Street, Oceanside, California (the site). On August 8, 2012, the Division cited Appellant for the following alleged violations of the occupational safety and health standards and orders found in California Code of Regulations, title 8¹:

- Flexible cords used as a substitute for fixed permanent wiring. (Citation 1, Item 1)
- Failure to provide portable lights. (Citation 1, Item 2)
- Failure to assess the workplace to determine if hazards present. (Citation 1, Item 3)
- Failure to provide heat illness training. (Citation 1, Item 4)
- Failure to develop written procedures for heat illness prevention. (Citation 1, Item 5)
- Written Exposure Control Plan deficient. (Citation 1, Item 6)
- Failure to inform and train employees on the hazards of bloodborne pathogens. (Citation 1, Item 7)
- Failure to implement and maintain the Written Hazard Communication Program. (Citation 1, Item 8)
- Failure to maintain copies of all Material Data Safety Sheets. (Citation 1, Item 9)

¹ Unless otherwise specified, all references are to Sections of California Code of Regulations title 8.

- Failure to train employees in all parts of the Hazard Communication standard. (Citation 1, Item 10)
- Failure to maintain records of scheduled and periodic inspections. (Citation 1, Item 11)
- Failure to make available the hepatitis B vaccine. (Citation 2, Item 1)
- Failure to provide a post exposure evaluation and follow-up. (Citation 3, Item 1)

At the hearing, Appellant and the Division jointly moved to bifurcate the hearing to have the Administrative Law Judge (ALJ) first determine whether the correct entity was cited. If the ALJ ruled that the correct employer was not cited, then there would be no need to hear the rest of the matter. If the ALJ ruled that the correct entity was cited then the parties would have an opportunity to engage in settlement negotiations. Good cause having been found, the ALJ granted the motion.

A formal evidentiary hearing was convened on July 24, 2014, at San Diego, California before Jacqueline Jones, ALJ. Kevin Bland, Esq. of the law firm Ogletree, Deakins, Nash, Smoak & Stewart, P.C. represented Employer. James Clark, Staff Counsel, represented the Division. The matter was argued, and oral and documentary evidence was received, on the hearing date. The record was left open until September 12, 2014, for briefs and reply briefs, which were submitted. The undersigned extended the submission date to September 30, 2015.

Issues

1. Whether Appellant Universal Protection Service is a separate corporate entity from Trolley Security, Inc. the employer that allegedly violated the safety orders?
2. Whether Appellant Universal Protection Service is liable for the debts and obligations of Trolley Security, Inc.?
3. Whether the Division cited the proper Employer?

Findings of Fact

1. No employees of Trolley Security Inc. worked for Universal Protection Services prior to May 1, 2012.
2. Universal Protection Services had no ownership interest in Trolley Security Inc. prior to May 1, 2012.
3. Appellant Universal Protection Services purchased Trolley Security, Inc. on May 1, 2012.
4. There is no evidence that Appellant Universal Protection Services assumed the liabilities and/or debts of Trolley Security, Inc.

Analysis

1. Universal Protection Service is a separate corporate entity from Trolley Security Inc. the employer that allegedly violated the safety orders.

Appellant, Universal Protection Services, contested the citations on the basis that the Division failed to name the proper employer.) A corporation is a separate legal entity. (*Alfred Annino/Alfredo Annino Construction, Inc. of Nevada*, Cal/OSHA App. 98-311, Decision After Reconsideration (Apr. 25, 2001).) Labor Code section 18 defines “person” as “any person, association, organization, partnership, business trust, limited liability company or corporation.” A corporation is a legal person or entity recognized as having an existence separate from that of its shareholders. (*Alfredo Annino/Alfredo Annino Construction, Inc. of Nevada*, Cal/OSHA App. 98-311, Decision After Reconsideration (Apr. 25, 2001) citing Witkin, Summary of Cal. Law, (9th ed. 1989) Section 1, page 511 (Corporations, *Erkenbrecher v. Grant*, (1921) 187 Cal. 7, p. 9.)

The Division began its investigation on February 21, 2012. Universal Protection Services purchased Trolley Security Inc. on May 1, 2012. Universal Protection Services had no ownership interest in Trolley Security Inc. prior to May 1, 2012. Prior to May 1, 2012, no employees working for Trolley Security Inc. worked for Universal Protection Services. Universal Protection Services and Trolley Security Inc. are legally separate entities.

2. Universal Protection Service is not liable for the debts and obligations of another separate entity because there is no evidence that it assumed the liabilities and or debts of the former entity it purchased.

Here, the question must be answered whether Universal Protection Services agreed to assume the debts of Trolley Security Inc. In order for the citations issued to a company and its “successors” to stand, there must be evidence that either orally or in writing, the corporate entity had agreed to assume the debts of the former entity it purchased.

Effective May 1, 2012, Appellant entered into an asset purchase agreement with four different business entities. Appellant, Universal Protection Services, purchased Richman Management Corporation d/b/a Heritage Security Services, and Trolley Security, Inc. Specifically, the agreement did not hold Universal Protective Services liable for any potential or pending legal claims, actions, or lawsuits of the seller entities. (Exhibit A, pp. 9-10, section 2.03 and 2.04).

It is the general rule in most American jurisdictions, that “a corporation which acquires the assets of another is not liable for the torts of its predecessor” *Ortiz v. South Bend Lathe* (1975) 46 Cal. App. 3d 842 [120 Cal. Rptr. 556]. There are four “well recognized exceptions” to that rule, however whereby liability may be imposed on a successor corporation.

In *Louisiana-Pacific Corp. v. Asarco, Inc.*, 909 F.2d 1260 (9th Cir. 1990) the Court recognized asset purchasers are not liable as successor corporations unless:

- (1) The purchasing corporation expressly or impliedly agrees to assume liability;
- (2) The transaction amounts to a “de facto” consolidation or merger;
- (3) The purchasing corporation is merely a continuation of the selling corporation; or
- (4) The transaction was fraudulently entered into in order to escape liability.

The crucial factor in determining whether a corporate acquisition constitutes either a de facto merger or a mere continuation, as a basis for corporate successor liability is the same; whether adequate cash consideration was paid for the predecessor corporation’s assets. (*Franklin v. USX Corp.* (2001) 87 Cal. Ap. 4th 615, 105 Cal. Rptr. 2d 11) In reaching its conclusion that the sale of Con Cal’s assets to USX constituted a de facto merger, the trial court relied on *Marks v. Minnesota Mining & Manufacturing Co.*, 187 Cal. App. 3d 1429, 232 Cal. Rptr. 594, wherein the Court held that the corporate successor’s acquisition of the predecessor’s assets in exchange for stock constituted a de facto merger, rendering the successor liable for the plaintiff’s product liability claim.

The California Supreme Court stated in *Ray v. Alad Corp.* (1977) 19 Ca. 3d 22 at pg. 34, 136 Cal. Rptr. 574, 560 P.2d 3, the de facto merger exception to the general rule of non-liability “has been invoked where one corporation takes all of another’s assets without providing any consideration that could be made available to meet claims of the other creditors...” In discussing the mere continuation exception to the general rule of successor non-liability, the court in *Ray v. Alad* stated that liability has been imposed on a successor corporation “only upon a showing of one or both of the following factual elements:

- (1) No adequate consideration was given for the predecessor corporation’s assets and made available for meeting the claims of its unsecured creditors;
- (2) One or more persons were officers, directors, or stockholders of both corporations.

And, in *Maloney v American Pharmaceutical Co.* (1988) 207 Cal. App. 3d 282, 255 Cal. Rptr. 1, the court held, in the context of the “mere continuation” exception to the rule of successor non-liability, that “before one corporation can be said to be a mere continuation or reincarnation of another, it is required that there be insufficient consideration running from the new company to the old.”

A review of the cases cited by the *Ray v. Alad* (supra) reveals that all of the cases involved the payment of inadequate cash consideration, and some also involved nearly identical ownership, management or directorship after the transfer. (*Stanford Hotel Co. v. M. Schwind Co.* (1919) 180 Cal. 348, 181 P.780 [inadequate consideration and 96 per cent same ownership]; *Higgins v. Cal. Petroleum etc. Co.* (1898) 122 Cal. 373, 55 P. 155 [inadequate consideration and substantially same ownership]; *Economy Refining & Service Co., v. Royal Nat. Bank of New York* (1971) 20 Cal. App. 3d 434, 97 Cal. Rptr. 706 [inadequate consideration and substantially same ownership]; *Bland v. Olcovich Shoe Corp.* (1937) 20 Cal. App. 2d 456, 67 P.2d 376 [inadequate consideration and full identity of directorate]; *Malone v. Red Top Cab Co.* (1935) 16 Cal. App. 2d 268, 60 P.2d 543 [inadequate consideration].)

Here, no claim has been made that consideration was inadequate, or that there were insufficient assets available at the time to meet claims of the other creditors. There was no de facto merger.

Universal Protection Services did not expressly or impliedly agree to assume liability. Appellant purchased only the assets, not the liabilities of the seller. See Exhibit A, pp. 9-10. Page 10 of the agreement provides that:

The parties hereto acknowledge that [UPS] is not agreeing to assume any liability of any seller, whether related to the purchased assets or business or otherwise, other than the assumed liabilities, and that nothing in this agreement shall be construed as an agreement otherwise.

No mention is made of any liabilities for pending or potential legal or regulatory claims, actions, or lawsuits.

This purchase was not a “de facto” consolidation or merger. The crucial factor in determining whether a corporate acquisition constitutes either a de facto merger or a mere continuation, is whether adequate cash consideration was paid for the predecessor corporation’s assets. Here, no claim has been made that consideration was inadequate, or that there were insufficient assets available at the time to meet claims of the other creditors.

DOSH started its investigation on February 21, 2012. Universal Protection Services purchased Trolley Security, Inc. on May 1, 2012. The citations were issued on August 8, 2012. All of the alleged violations occurred before May 1, 2012. Appellant is not merely a continuation of the selling corporation. Prior to May 1, 2012, Universal Protection Services had no ownership interest in any of the Seller entities. Additionally, prior to May 1, 2012, no employees working for any of the seller entities were employed by Universal Protection Services. The Boards of Directors of the seller and the purchaser are distinct, as are the shareholders. Therefore, Universal Protection Services is not a mere continuation of Trolley Security Inc. Additionally, Universal Protection Services did not agree to assume the liabilities of Trolley Security Inc.

3. The Division did not cite the proper employer.

The Division has the burden of proof that Universal Protection Services is a successor of Trolley Security Inc. and thereby subject to the citations at issue. Whether the cited entity is the employer which is responsible for the alleged violations is an essential threshold issue that the Division must establish before liability can be imposed for violation of a citation. (Baker Construction Company, Inc., Cal/OSHA App. 94-2712, Decision After Reconsideration (April 2, 1997). The Appeals Board has consistently held that the Division has the burden of proving all elements of a violation by a preponderance of the evidence. (See e.g. Howard J. White, Inc., Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983)). Prosecuting the proper entity is an element of a violation that comes within the Division's burden of proof. (C.C. Myers, Inc., Cal/OSHA App. 00-008, Decision After Reconsideration (April 13, 2001).)

The citation involved here named Employer as Trolley Security Inc. dba Universal Protection Srvc. The appeal form submitted by Appellant lists the employer name as "Trolley Security, Inc." and the legal name as "dba Universal Protection Service". Darcy Murphine (Murphine) opened the complaint investigation by speaking to Supervisor Clyde Clinton Frazier (Frazier), Project Manager/Captain at the site on February 21, 2012. Murphine testified that there were a number of names that were discussed on February 21, 2012. Initially, Murphine was told the company was Heritage Security Services. Later in the same conversation, Frazier told Murphine that the company was Trolley Security. Frazier also said the company name was Transit Systems Security. Frazier told Murphine that Trolley Security Services and Transit Systems Security were the same company. Human Resources Manager Dana Froehlich (Froehlich) was identified as the responsible person for safety. Froehlich sent various documents via email identifying the employer as follows: 1) Transit Systems Security; 2) Transit Systems; 3) Universal Protection Service; 4) North County Transit District (NCTD) Security Department; and, 7) Heritage Security Services.

On August 7, 2012, during the closing conference with Froehlich, Murphine asked, "What is your company name"? Froehlich responded, "Yes, we've changed our name. Our name is now Universal Protection Services". Murphine searched the Secretary of State's website and it still said Trolley Security. Murphine asked Froehlich, "What is Trolley Security, Inc. and the relationship to Universal Protection Services so I can be sure that I have the correct name. Murphine asked Froehlich, "Are you Trolley Security Services, Inc. doing business as Universal Protection Services"? Froehlich said, "That sounds about right". Murphine used that name for the inspection reports and for the citations. Murphine did not use that name for the Division's 1BY. The Division issued the 1BY to "Trolley Security, Inc. dba Transit Systems Security. The Division has failed to prove, with competent evidence that it cited the correct employer.

Conclusion

The Division did not present sufficient evidence that Universal Protection Services expressly or impliedly agreed to assume liability for Trolley Security Inc. The Division did not present sufficient evidence that Universal Protection Services met the mere continuation test as described in the cases above. There is no evidence that inadequate consideration was given for the predecessor corporation's assets (Trolley Security) nor is there evidence that one or more persons were officers, directors, or stock holders of both corporations. Based on the foregoing, The Division did not establish that it cited the correct employer entity. Consequently, the citations must be dismissed and the penalties set aside.

Order

The Appellant's appeals are granted. All citations are vacated as set forth in the attached summary table.

Dated: October 30, 2015

JJ:ml

JACQUELINE JONES
Administrative Law Judge

SUMMARY TABLE DECISION

In the Matter of the Appeal of:

**TROLLEY SECURITY, INC. dba UNIVERSAL PROTECTION SERVICE
DOCKETS 12-R3D2-2908 through 2910**

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

IMIS No. 315343590

DOCKET	CITATION	ITEM	SECTION	TYPE	MODIFICATION OR WITHDRAWAL (ALJ DISMISSED ALL CITATIONS/FAILURE TO CITE THE CORRECT EMPLOYER)	A F F I R M E D	V A C A T E D	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT HEARING	FINAL PENALTY ASSESSED BY BOARD
12-R3D2-2908	1	1	2500.8(a)	G	Flexible cords used as a substitute for fixed permanent wiring.		X	\$280	\$280	\$0
		2	3317(b)	G	Failure to provide portable lights.		X	\$465	\$465	\$0
		3	3380(f)(1)	G	Failure to assess the workplace to determine if hazards present.		X	\$560	\$560	\$0
		4	3395(f)(1)	G	Failure to provide heat illness training.		X	\$185	\$185	\$0
		5	3395(f)(3)	G	Failure to develop written procedures for heat illness prevention.		X	\$185	\$185	\$0
		6	5193(c)(1)(B)	G	Written Exposure Control Plan deficient.		X	\$560	\$560	\$0
		7	5193(g)(2)(G)	G	Failure to inform and train employees on the hazards of bloodborne pathogens.		X	\$560	\$560	\$0
		8	5194(e)(1)	G	Failure to implement and maintain the Written Hazard Communication Program.		X	\$280	\$280	\$0
		9	5194(g)(8)	G	Failure to maintain copies of all Material Data Safety Sheets.		X	\$375	\$375	\$0
		10	5194(h)(2)	G	Failure to train employees in all parts of the Hazard Communication standard.		X	\$185	\$185	\$0
		11	3203(b)(1)	Reg	Failure to maintain records of scheduled and periodic inspections.		X	\$325	\$325	\$0

PAGE 2 OF 2									
12-R3D2-2909	2	1	5193(f)(1)(A)	S	Failure to make available the hepatitis B vaccine.	X	\$5,060	\$5,060	\$0
12-R3D2-2910	3	1	5193(f)(3)	S	Failure to provide a post exposure evaluation and follow-up.	X	\$11,250	\$11,250	\$0
							\$20,270	\$20,270	\$0

Total Amount Due*

(INCLUDES APPEALED CITATIONS ONLY)

\$0

NOTE: Payment of final penalty amount should be made to:
 Accounting Office (OSH)
 Department of Industrial Relations
 P.O. Box 420603
 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 any questions.

ALJ: JJ/ml
 POS: 10/30/2015

APPENDIX A

SUMMARY OF EVIDENTIARY RECORD

**TROLLEY SECURITY, INC. dba
UNIVERSAL PROTECTION SERVICES**

Dockets 12-R3D2-2908 through 2910

DATE OF HEARING: July 24, 2014

DIVISION'S EXHIBITS- Admitted

<u>Exhibit Number</u>	<u>Exhibit Description</u>
1.	Jurisdictional documents
2.	CAL OSHA FORM 1 BY
3.	Letter received stamped Aug 3, 2012 on Universal Protection Service letterhead
4.	Letter received by DOSH 7/10/12
5.	Email to Darcy Murphine dated 2-29-12
6.	Email from Dana Froehlich dated 7-13-12
7.	Job description form
8.	Heat Illness Prevention Plan-2012 on Universal Protection Service
9.	Transit Systems Security Instruction
10.	Transit Systems Officer's narrative
11.	Heritage Security Officer training documents
12.	Heritage Security Officer training documents
13.	NCTD Security Department
14.	Employee safety

EMPLOYER'S EXHIBITS² – Admitted

<u>Exhibit Letter</u>	<u>Exhibit Description</u>
A.	Asset Purchase Agreement
C.	Print out California Secretary of State
E.	DOSH Notes
F.	Transit Systems Securities

² The Exhibits for Employer are A, C, E, F, G and H. (There is no exhibit B or D.)

G.
H.

DOSH Field Documentation Worksheet
Transits Systems Security

WITNESSES TESTIFYING AT HEARING

1. Michael Jones
2. Darcy Murphine

CERTIFICATION OF RECORDING

I, Jacqueline Jones, 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.

Dated: October 30, 2015

JACQUELINE JONES
Administrative Law Judge

