

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

In the Matter of the Appeal of:

SILVERADO CONTRACTORS, INC.
2855 Mandela Pkwy., 2nd Floor
Oakland, CA 94608-4011

Employer

Docket. 14-R4D7-3044

**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 Silverado Contractors, Inc. (Employer).

JURISDICTION

Commencing on July 22, 2014 the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On September 9, 2014 the Division issued a citation to Employer alleging a violation of occupational safety and health standards codified in California Code of Regulations, title 8.¹

Employer timely appealed.

Thereafter administrative proceedings were held before an Administrative Law Judge (ALJ) of the Board, including a duly-noticed contested evidentiary hearing.

On February 3, 2016 the ALJ issued a Decision (Decision) which sustained the alleged violation and imposed a civil penalty.

Employer timely filed a petition for reconsideration.

The Division answered the petition.

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

ISSUES

Was Employer required to obtain a project permit for the demolition work at issue?

Was demolition work being conducted on the date of the alleged violation?

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 Decision was issued in excess of the ALJ's powers, the evidence does not support the findings of fact, and 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 Decision was based on a preponderance of the evidence in the record as a whole and appropriate under the circumstances.

The Division alleged a regulatory violation of section 341, subdivision (d)(3), failure to obtain a project permit before starting demolition. The nature of the work required that a project permit be obtained before the work started. Employer's two main arguments are that it was not required to obtain the permit, and that work requiring a permit had not started at the time in question.

The project at issue involved demolition of a decommissioned PG&E power plant in Kern County. PG&E had retained a different contractor to demolish the boilers using controlled implosion. That other contractor's attempt was not entirely successful; people were injured in the attempt, and

PG&E dismissed the firm and four months later retained Employer to complete the work.

Employer was in possession of an “annual permit” to conduct demolitions at the time of the alleged violation. Section 341 requires that there be a project permit issued as well, although different entities may hold the annual and project permits. A project permit “authorizes an employer to conduct permit-required activity at the specific location(s) named in the permit.” (Sect. 341, subd. (b)(9)). The purpose of requiring the employer conducting permit-required work to obtain a project permit is to provide the Division with the opportunity to review the employer’s proposed work plan and processes in order to make it more likely that the plan is appropriate under the circumstances and that, therefore, the work is likely to be safely accomplished. It was undisputed that the demolition work involved required a project permit, and that Employer did not have such permit when the work was alleged to have begun.

1. Was Employer the Project Administrator?

The Decision frames the first issue as whether Employer was the “project administrator” for the work being done, and, after answering in the affirmative, holds Employer was required to obtain a project permit. In its petition Employer contends that PG&E was the de facto project administrator because of its extensive control and oversight of the work. The contract between Employer and PG&E may be read to support this contention. (See, e.g., Ex. 3, p. 6, sects. 1.4.2, 1.4.3.) It may also be read to make Employer the project administrator.

Even if, for sake of argument, we construe the contract as making PG&E the project administrator, it still states that Employer was to obtain approvals and permits from the Division as required by section 341.

The contract, Exhibit 3, pages 6 through 8, includes provisions which indicate Employer was to obtain not only PG&E’s approval of its work plan but also the Division’s. Section 1.5 states “[Employer] shall not begin any physical work until PG&E or any other required jurisdiction have accepted the detailed Work Plan and the Approval Date has occurred.” Sect. 1.5.6 states: “This Work Plan will require approval or acceptance by CPUC and Cal-OSHA, which PG&E will obtain prior to [Employer] submitting Work Plan for its permits.” (Emphases added.) Sect. 1.5.13 states, “[Employer] shall provide PG&E with a detailed Safety Work Plan for the dismantling and removal of the boilers and also with respect to the entire site cleanup work. The Safety Work Plan shall be submitted for PG&E’s review and approval as well as by the CPUC and Cal-OSHA.” The quoted contract provisions form a reasonable basis for finding that the parties to the contract intended Employer to obtain the project permit.

Although the language of section 1.5.6 quoted above (Employer to “submit[. . .] for its permits[,]”) may initially seem ambiguous, a pronoun refers to the closest antecedent, which here is Employer. (See *Lockhart v. U.S.* (2016) 577 U.S. ____ (slip op., p. 3: “[W]e have typically applied an interpretive strategy called the ‘rule of the last antecedent.’ See *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003). The rule provides that ‘a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows.’”.)

Thus, while the language of contract section 1.5.6 may initially be confusing, a careful reading makes it clear. That section begins by stating that the project work plan requires both CPUC and Cal-OSHA approval, “which PG&E will obtain,” and then continues to say that after those approvals are received Employer will “submit [the] Work Plan for its permits.” Thus, the initial confusion may arise because the contract requires both PG&E and Employer to submit the Work Plan to Cal-OSHA. The section requires PG&E to submit the Work Plan to get it approved, and then Employer to submit the Plan to get “its permit” to conduct the work. And, since Employer already held an annual permit, the “permit” which is the subject of section 1.5.6 must be the project permit.

Even if the totality of the circumstances weighs in favor of finding that PG&E was the project administrator, section 1.5.6 of the contract provides that Employer was to get “its” [own] permit to do the work. And, given the context, it is reasonable to find that the permit in question is the project permit required by section 341.

2. Was the work being done at time of inspection demolition work requiring a project permit?

Employer contends that even if it was required to have a project permit, it was not engaged in demolition work on July 21, 2014, the date of the alleged violation. Instead, Employer contends it was removing debris from the area around the boilers to gain access to them. This would be a valid defense if the evidence supported the claim. (See § 341, subdivision (d).)

The photographic exhibits in evidence do no support this contention. One of Employer’s exhibits, Exhibit D, is an aerial photo of the project site. The photo shows what we will call the “wreckage” of the two boilers in the right-center of the picture, labeled in handwriting “12,” which a handwritten legend on the photo identifies as “boilers 1, 2, 3 and 4 to be removed[.]” The wreckage presents the appearance of structures which once stood upright but have collapsed to one side. Exhibit D does not show debris around the boilers which would restrict access to them. The area around the wreckage of the boilers appears clear of obstructions and the only objects visible appear to be components of the collapsed boiler structures. Corroborating photographic

evidence is seen in Division Exhibits 5A, 5B, and 5C, which have a time stamp of “07/22/2014” and were taken between 17:38 and 17:40 hours.

Also, Division Exhibits 7A through 7F in evidence consist of a series of photographs date stamped July 21, 2014, starting at 10:40:51 and ending at 12:54:32. The photos show a piece of heavy equipment labeled an “excavator” in various positions adjacent to one of the collapsed boiler structures. The excavator is seen carrying what appears to be portions of the boiler structure in the jaws of its “bucket” in at least two of the photos. These Exhibits show that demolition work was underway on July 21, 2014, which was before Employer obtained its project permit. They do not show any debris obstructing access to the boiler’s wreckage. We find, therefore, that the record shows Employer was conducting demolition operations on at least one of the boilers in question on July 21, 2014, which was before the project permit had been issued. A violation of the permit requirement is thus proven.

DECISION

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

ART R. CARTER, Chairman
ED LOWRY, Member
JUDITH S. FREYMAN, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: APR 28, 2016