

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

In the Matter of the Appeal of:

**BUZEK CONSTRUCTION, INC.**  
**7297 HAZEL AVENUE**  
**ORANGEVALE, CA 95662**

**Employer**

Inspection No.  
**1203246**

**DECISION AFTER  
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code issues the following Decision After Reconsideration in the above-entitled matter.

**JURISDICTION**

Buzek Construction, Inc. (Employer) is a general contractor engaged in residential construction. Beginning January 17, 2017, the Division of Occupational Safety and Health (Division) through Compliance Officer Michael Buzdas, conducted an accident inspection at a place of employment maintained by Employer at 8450 Winterhawk Lane, Granite Bay, California (the worksite).

On April 10, 2017, the Division cited Employer for four alleged violations of the California Code of Regulations, title 8.<sup>1</sup> Citation 1 included three items as follows: Item 1, section 342, an alleged regulatory violation of subdivision (a) [reporting serious and fatal workplace injuries]; Item 2, an alleged general violation of section 1509, subdivision (a) [Illness and Injury Prevention Program]; Item 3, an alleged general violation of section 3395, subdivision (i) [Heat Illness Prevention Program]. Citation 2 alleged a serious violation of section 1716.2, subdivision (e) [erection and construction, residential/light commercial].

Employer filed timely appeals with the Board. For Citation 1, Item 1, Employer contested the existence of the alleged violation, and asserted a jurisdictional defense that there was no employer-employee relationship. Employer did not appeal Citation 1, Items 2 or 3. Employer again asserted the jurisdictional defense regarding lack of an employment relationship as to Citation 2, but specified no other grounds of appeal.

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

The matter was heard before an Administrative Law Judge (ALJ) of the Board on August 9, 2018. On October 4, 2018, the Board informed the parties that the hearing ALJ was unavailable to complete the proceedings. The parties agreed to issuance of a decision based upon the record, rather than a de novo hearing. A decision issued on November 15, 2018.

In making this decision, the Board has engaged in an independent review of the entire record. The Board additionally considered the pleadings and arguments filed by the parties. The Board has taken no new evidence.

## **ISSUES**

Are Navarro and Arechiga employees, and if so, who is their employer?

## **FINDINGS OF FACT**

1. The general contractor on the site, JC Design, consented to the Division's inspection which began on January 17, 2017.
2. The jobsite was located at 8450 Winterhawk Lane, in Granite Bay California 95746.
3. The accident occurred on January 25, 2017, at the jobsite.
4. Alfredo Cira Navarro (Navarro) suffered a serious injury as a result of the January 25, 2017 accident at the jobsite.
5. The Division's proposed civil penalties were calculated in accordance with the Labor Code and the Director's regulations title 8 section 334 through 336.<sup>2</sup>
6. Joshua Crosby is owner of JC Design, a general contractor hired to complete work at the worksite.
7. Dustin Buzek is President of Buzek Construction, Inc. Buzek Construction, Inc. was hired by general contractor JC Design, to do certain framing and demolition work at the jobsite, including opening walls in order to prepare the structure for additions and remodeling.
8. At the time of the accident, Buzek Construction Inc. had a valid contractor's license, but did not carry workers' compensation insurance or liability insurance.
9. Dustin Buzek did not ask Jaime Arechiga (Arechiga) if he had workers compensation or liability insurance before hiring him to work at the site.
10. Navarro did not have a contractor's license at the time of the accident.
11. Arechiga made a bid to do the truss work at the price of \$5000. Via phone calls and texts, Buzek and Crosby had agreed to allow Arechiga take on the truss job, leaving Arechiga to recruit a crew and ensure completion of the work.
12. Navarro was seriously injured while rolling roof trusses in the garage of the worksite.

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<sup>2</sup> Findings of fact 1 through 5 were stipulated to by the parties at hearing.

## DISCUSSION

Are Navarro and Arechiga employees, and if so, who is their employer?

There is no dispute that the remodel and addition work (to an 8,000 square foot home in Granite Bay) that Navarro was engaged in at the time of the accident constituted work requiring a contractor's license pursuant to California Business and Professions Code, sections 7026, and 7026.1. Because this is work for which a license is required, Labor Code section 2750.5 is applicable. The Labor Code provisions are key in establishing the employment status of both Navarro and Arechiga as either employees or independent contractors:

There is a rebuttable presumption affecting the burden of proof that a worker performing services for which a license is required pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, or who is performing such services for a person who is required to obtain such a license is an employee rather than an independent contractor. Proof of independent contractor status includes satisfactory proof of these factors:

- (a) That the individual has the right to control and discretion as to the manner of performance of the contract for services in that the result of the work and not the means by which it is accomplished is the primary factor bargained for.
- (b) That the individual is customarily engaged in an independently established business.
- (c) That the individual's independent contractor status is bona fide and not a subterfuge to avoid employee status. A bona fide independent contractor status is further evidenced by the presence of cumulative factors such as substantial investment other than personal services in the business, holding out to be in business for oneself, bargaining for a contract to complete a specific project for compensation by project rather than by time, control over the time and place the work is performed, supplying the tools or instrumentalities used in the work other than tools and instrumentalities normally and customarily provided by employees, hiring employees, performing work that is not ordinarily in the course of the principal's work, performing work that requires a particular skill, holding a license pursuant to the Business and Professions Code, the intent by the parties that the work relationship is of an independent contractor status, or that the relationship is not severable or terminable at will by the principal but gives rise to an action for breach of contract.

**In addition to the factors contained in subdivisions (a), (b), and (c), any person performing any function or activity for which a license is required pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code shall hold a valid contractors' license as a condition of having independent contractor status.**

For purposes of workers' compensation law, this presumption is a supplement to the existing statutory definitions of employee and independent contractor, and is not intended to lessen the coverage of employees under Division 4 and Division 5. (Lab. Code section 2750.5 [emphasis added].)

The record contains unrefuted testimony from Arechiga establishing that Navarro was not licensed. This establishes, without any further analysis, that Navarro was not an independent contractor, and therefore must be considered an employee. “[R]egardless of the factors contained in subdivisions (a), (b), and (c), a valid contractor's license is a necessary condition of independent contractor status.” (*Nick Hagopian Drywall v. Workers' Comp. Appeals Board* (Sept. 16, 1988) 204 Cal.App. 3d 767, 771.)

This provision of the Labor Code establishes that Navarro was not an independent contractor but the question of who was Navarro's employer remains. Labor Code section 3300 broadly defines what constitutes an “employer”.<sup>3</sup> (*Jesse Ramirez Drywall*, Cal/OSHA app. 93-489, Decision After Reconsideration (Mar. 23, 1999.) In *Onestop Internet, Inc.*, Cal/OSHA App. 11-2636, Decision After Reconsideration and Order of Remand (Jul. 23, 2014), the Board explained that “the presumption regarding section 2750.5 is related to the status of a worker as an employee; it does not serve to define an individual's status as an employer under the Act. The presumption applies solely where the Employer contends as a defense to a citation that a worker is not an employee of an employer, but was instead serving as an independent contractor.” Indeed, the Board has a “longstanding interpretation that the policy of Division 5 of the Labor Code is best achieved by holding the employer most directly involved, the trade subcontractor, primarily responsible.” (*Jesse Ramirez Drywall*, supra.)

Here, Buzek claims that Arechiga was not his employee, and argues that Arechiga had made a bid to do the truss work at the price of \$5000. According to Buzek, via phone calls and texts, Buzek and Crosby had agreed to allow Arechiga take on the truss work under his license, leaving Arechiga to recruit a crew and ensure completion of the work. However, Buzek did not check the status of Arechiga's license, and was unaware that Arechiga did not have liability or workers' compensation insurance, making him ineligible to use his contractor's license to hire employees.

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<sup>3</sup> As used in this division, “employer” means:

- (a) The State and every State agency.
- (b) Each county, city, district, and all public and quasi public corporations and public agencies therein.
- (c) Every person including any public service corporation, which has any natural person in service.
- (d) The legal representative of any deceased employer.

Buzek is asserting an estoppel defense, and in order for Arechiga to be estopped from asserting that he was not an independent contractor, there must have been a representation made by Arechiga that he actually carried a valid license. (*OneStop Internet, Inc.*, Cal/OSHA App. 11-2637 Decision After Reconsideration and Order of Remand (Jul. 23, 2014).) No such evidence exists in the record. Buzek himself testified that he did not ask Arechiga about the status of his license, or that Arechiga made any representation regarding the status. Because Buzek did not rely on any false representation made by Arechiga about his license, no estoppel defense applies. While Buzek may have been aware that Arechiga did hold a contractor's license, he was also aware that a contractor must also secure workers' compensation insurance in order to hire employees under said license.<sup>4</sup>

Finally, because Labor Code section 2750.5 "operates to determine that a general contractor is the employer of not only its unlicensed subcontractors, but also of those employed by the unlicensed subcontractor," Navarro is necessarily classified as an employee of Buzek, even if Buzek wrongly believed that Navarro worked for Arechiga. (*OneStop Internet, Inc.*, Decision After Reconsideration and Order of Remand, Cal/OSHA App. 11-2637 (Jul. 23, 2014).)

## DECISION

The Decision of the ALJ is affirmed and all penalties shall be assessed as set forth in the attached Summary Table.

## OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

Ed Lowry, Chair

Judith S. Freyman, Board Member



FILED ON: 03/27/2019

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<sup>4</sup> Indeed, California Business and Professions Code section 7125.2, provides that:

The failure of a licensee to obtain or maintain workers' compensation insurance coverage, if required under this chapter, shall result in the automatic suspension of the license by operation of law in accordance with the provisions of this section, but this suspension shall not affect, alter, or limit the status of the licensee as an employer for purposes of Section 3716 of the Labor Code.

(a) The license suspension imposed by this section is effective upon the earlier of either of the following:

(1) On the date that the relevant workers' compensation insurance coverage lapses.  
(2) On the date that workers' compensation coverage is required to be obtained. [...]