

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

WESTERN DOOR
719 Palmyrita Avenue
Riverside, California 92507

Employer

Docket No. 01-R3D1-2827

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), having taken this matter under reconsideration on its own motion, issues this Decision After Reconsideration pursuant to the authority vested in it by the California Labor Code.

Jurisdiction

Commencing on June 12, 2001, the Division of Occupational Safety and Health (the Division) conducted an accident investigation at a place of employment maintained by Western Door (Employer) at Canyon View and Summerhill, Lake Elsinore, California. On July 6, 2001, the Division cited Employer for violation of Section 1621(a)¹ of the occupational safety and health standards and orders found in Title 8, California Code of Regulations.²

Employer filed a timely appeal and the matter was heard by an Administrative Law Judge (ALJ) of the Board on April 12, 2002 and April 28, 2006.³

At the hearing on April 28, 2006, the Division moved to amend the citation to change the name of Employer and Employer moved to dismiss the citation because it contended that the Division failed to cite a then-existing legal entity.

¹ The section number originally cited was 1627(a). At the April 12, 2002 hearing, Employer moved to dismiss because it alleged that the Division cited the wrong safety order. The ALJ, however, granted the Division's motion to amend the citation to correct the erroneous citation to section 1621(a) according to proof.

² Unless otherwise noted, all section references are to Title 8, California Code of Regulations.

³ The Division moved for a continuance at the first day of hearing because it had exercised due diligence to secure the injured employee's attendance but had been unsuccessful. The ALJ granted the motion because the testimony was considered to be beneficial to the resolution of the appeal.

Both parties contended that Employer should have been cited as Jenstar Enterprises, Inc. dba Western Door. The parties submitted post-hearing briefs regarding these motions. The matter was submitted on June 22, 2006 and the ALJ's decision was issued on July 20, 2006. The ALJ denied both motions as untimely. She further stated that, even had the motions been timely, there was insufficient evidence in the record to grant either motion.

On August 16, 2006, the Board ordered reconsideration of this matter on its own motion to address whether naming the correct employer entity is jurisdictional. Both parties filed answers to the Board's order. Moreover, the ALJ granted Employer's appeal because she found that the Division failed to meet its burden of proof.

In their answers to the order, each party asserted that the issue identified for reconsideration by the Board was moot, because the ALJ's decision addressed the merits of the appeal.⁴ The parties contended that the jurisdictional question stated in the Board's order is no longer at issue.

Issue for Reconsideration

Is naming the correct employer entity jurisdictional?

Decision and Analysis

Before addressing the issue for reconsideration, we briefly address the parties' argument that the issue stated for reconsideration is moot. We believe that the issue posed is of great public importance to employers throughout California and to the Division. We are also confident that issues regarding whether an employer was properly named in the citation will recur. Indeed, the Board currently has another matter pending on reconsideration that raises this issue. Accordingly, we believe guidance is much needed in this area, and we find it best to address it although we also believe the ALJ reached the correct result in granting the appeal. See, *Save Stanislaus Area Farm Economy v. Board of Supervisors* (1993) 13 Cal. App. 4th 141, 146-147; 9 Witkin, *California Procedure*, (4th ed. 1997), Appeals, section 652, pp. 682-689.

We now turn to the question at issue. The citation involved here names Employer as Western Door. The appeal form submitted by Employer lists the employer name as "Western Door" and the legal name as "Jenstar Enterprises, Inc. dba Western Door." Similarly, correspondence submitted by Employer's representative in conjunction with this appeal repeatedly refers to Employer as Jenstar Enterprises, Inc. dba Western Door. Moreover, Employer submitted a print-out from the California State Contractors License Board (CSCLB), filed

⁴ Employer further asserted that the Board may only order reconsideration based on one of the grounds listed in Labor Code section 6617. Section 6617 explicitly identifies grounds upon which a petition for reconsideration may be based. Because the Board does not petition for reconsideration, section 6617 does not apply to it.

November 1991 and valid through November 2007, which references Jenstar Enterprises, Inc. dba Western Door.⁵ Employer submitted the latter document to support its contention that the Division had named the wrong employer.

During the Division's investigation, Employer sent the Division a fax, including what appears to be a pre-printed coversheet, which reads "Western Door" at the top, provides Employer's contact information, and lists its California License number. The latter number and the contact information match the information on the print-out from the CSCLB for Jenstar Enterprises, Inc. dba Western Door. Similarly, the copy of the contract between Employer and Granite Homes, Inc. (the general contractor for the project on which the accident occurred) supplied by Employer with the referenced fax coversheet refers to Employer as Western Door, is signed by Employer, and, under the signature, the handwritten word "President" appears.

It is clear, then, that Employer held itself out to the public at large, as well as to governmental entities, as conducting business under the name "Western Door" at and around the time the citation issued. As stated in the decision, a citation is not fatal or invalid merely because it only includes the fictitious business name and not the corporate name. This is true because there is no legal distinction between an employer's corporate name and its fictitious business name. See, e.g., *Pinkerton's Inc. v. Superior Court* (1996), 49 Cal. App. 4th 1342, 1347-48.⁶ The ALJ's decision further concluded that, where a corporation elects to follow the statutory procedure of Section 17900, *et seq.* of the Business & Professions Code, it has held itself out to those with whom it does business as having adopted that name for all business purposes. Notice to it under that adopted name is all that the law requires. See, *Billings v. Edwards* (1979) 91 Cal.App.3d 826, 830, fn1; *Pinkerton's Inc. v. Superior Court*, *supra*, 49 Cal. App. 4th at 1347-48.

We adopt this conclusion and now evaluate the consequences, if any, of failing to comply with Business & Professions Code section 17900 *et seq.* California Business & Professions Code section 17910 states, in relevant part,

Every person⁷ who regularly transacts business in this state for profit under a fictitious business name shall do all of the following:

⁵ The Board, and its ALJ, may properly take official notice of the document from the CSCLB website under Title 8, section 376.3(c)(2).

⁶ The court in *Pinkerton's Inc. v. Superior Court of Orange County*, *supra*, (1997) 49 Cal.App.4th 1342, 1348, stated: "Use of a fictitious business name does not create a separate legal entity. As the First District Court of Appeal recently noted, [t]he designation [DBA] means "doing business as" but is merely descriptive of the person or corporation who does business under some other name. *Doing business under another name does not create an entity distinct from the person operating the business.*' [Citation.] The business name is a fiction, and so too is any implication that the business is a legal entity separate from its owner." (citing, *Providence Washington Ins. Co. v. Valley Forge Ins. Co.* (1996) 42 Cal.App.4th 1194, 1200 [50 Cal.Rptr.2d 192]) (Emphasis added).

⁷ "Person" is defined in section 17902 to include individuals, limited liability companies, partnerships and other associations, and corporations.

(a) File a fictitious business name⁸ statement in accordance with this chapter not later than 40 days from the time the registrant commences to transact such business. . . .

Section 17900(a)(1) states that,

The purpose of this section is to protect those dealing with individuals or partnerships doing business under fictitious names, and it is not intended to confer any right or advantage on individuals or firms that fail to comply with the law. The filing of a fictitious business name certificate is designed to make available to the public the identities of persons doing business under the fictitious name.

The intent of these sections is to protect those doing business with an entity operating under a fictitious business name, and the onus is on the company operating under the fictitious business name to submit the proper filing.⁹ The only penalty for failing to comply with these requirements is a limitation on actions that may be brought by the entity under the fictitious name.¹⁰

We see no basis on which to treat an entity that appeals citation(s) but fails to comply with these provisions differently than an entity that fulfills its legal obligations. For our purposes, we hold that a fictitious business name is any name under which an employer holds itself out as doing business. We further hold that when an entity uses a fictitious business name and holds itself out as doing business under that name, it may be cited by the Division in that name, irrespective of whether the name is officially or unofficially adopted. An employer will not be heard to profit from work performed under a given name, yet seek to avoid liability by claiming that the same name is not its legal name. Allowance of such an approach would be wholly inconsistent with the Occupational Safety and Health Act's intent to provide a safe workplace for California's employees.

In addition, we find that, where service is otherwise properly made, and the person served is aware that he is the person named as a defendant, jurisdiction is obtained. See, *Billings v. Edwards, supra*, 91 Cal.App.3d at 830. Here, it is beyond dispute that Employer knew it was being named in the citation; it participated in the first day of hearing without suggesting that it had

⁸ Section 17900(b)(3) defines a fictitious name for a corporation (e.g., Jenstar Enterprises, Inc.) as being any name other than the corporate name stated in its articles of incorporation filed with the California Secretary of State. Here, Employer submitted a print-out from the Secretary of State that refers to Jenstar Enterprises, Inc. only. From this, we infer that this is the name included in Employer's articles of incorporation. This inference, however, is not essential to our holding.

⁹ There is no evidence in the record to show whether or not Employer complied with the referenced Business & Profession Code sections.

¹⁰ Business & Professions Code section 17918; See also, 9 Witkin, Summary of California Law, (10th ed. 2005) Partnerships, section 8, p. 582

been improperly named. We therefore conclude that due process was satisfied in this case and the Board had jurisdiction over Employer. We do not decide other jurisdictional issues involved in naming the proper employer because such issues are not presented here.

Because “[p]rosecuting the proper entity is an element of a violation that comes within the Division’s burden of proof,”¹¹ where an employer contends it was improperly named, and the Division does not, or cannot, amend the citation(s), the Division must show that the employer operates under a fictitious business name as we have defined it. Evidence that the entity served is aware that it is the person named in the citation may be used to support an allegation that the employer uses a fictitious business name. Evidence of a fictitious business name filing pursuant to Business & Professions Code section 17910 obtained from an official governmental website may also be used. Similarly, evidence such as business cards and stationary, signed statements by individuals whose statements may bind an employer,¹² legal documents, and advertisements offered by the employer may also serve to demonstrate that an employer operates under a fictitious business name.

In the instant case, there is ample evidence from which to conclude that Employer held itself out as Jenstar Enterprises, Inc. dba Western Door and Western Door in its business dealings. The variance in the names is not material and did not mislead employer or prejudice its defense on the merits.¹³ Under the circumstances presented here, the Division could elect to cite and serve Employer either as Western Door, or Jenstar Enterprises, Inc. dba Western Door.¹⁴ As a result, the Division was not required to amend the citation prior to the hearing, so there is no need to address whether the Division’s motion to amend was timely made.

However, in order to best serve the Act’s stated objective of promoting occupational safety and health, in cases in which the parties have litigated the issue of the employer’s proper name and the Division has satisfied its burden of proof, the Board, through its ALJs, will amend the cited employer’s name to specify its full corporate or legal name pursuant to Title 8, California Code of Regulations, section 386(a)(2). It is well established under California law that such amendments are permissible and relate back to the original action. See,

¹¹ *Alfredo Annino/Alfredo Annino Construction, Inc. of Nevada*, Cal/OSHA App. 98-311, Decision After Reconsideration (April 25, 2001), *citing*, *C.C. Myers, Inc.*, Cal/OSHA App. 00-008, Decision After Reconsideration (April 13, 2001).

¹² See, *Macco Construction*, Cal/OSHA App. 84-1106, Decision After Reconsideration (Aug. 20, 1986); Evidence Code section 1222.

¹³ See, 5 Witkin, California Procedure (4th ed. 1997) Pleading, section 1151: *Hawkins v. Pacific Coast Bldg. Products, Inc.* (2004) 124 Cal.App.4th 1497.

¹⁴ We do not believe the Division was required to cite Employer under its corporate name once it became aware of that name. Although the *Pinkerton* court so held, that court cited California Code of Civil Procedure section 474 to support its conclusion and the Board is not bound by the Code of Civil Procedure. *Pinkerton’s Inc*, *supra*, 49 Cal. App. 4th at 1349. In addition, we note that the Billings court distinguished between the type of fictitious name referred to in section 474 and fictitious business names. *Billings*, *supra*, 91 Cal. App. 3d at 831. We believe it was correct to do so.

e.g., *Hawkins v. Pacific Coast Bldg. Products, Inc.*, (2004) 124Cal.App.4th 1497, 1503-1504; *Cuadros v. Superior Court*, (1992) 6 Cal.App.4th 671, 677-678; *Mayberry v. Coca Cola Bottling Co.* (1966) 244 Cal.App.2d 350, 353-354.

Our holdings in this Decision After Reconsideration are limited to situations in which an employer uses a fictitious business name and is cited under that name. Our decision does not apply to situations in which there is a legal distinction between the entity cited and the employer that allegedly violated a safety order. In short, it applies when one entity conducts business under more than one name, but does not pertain when two entities bear some relationship to each other but are legally separate.¹⁵ As a result, the Board's decisions in *C.C. Myers, Inc.*, Cal/OSHA App. 00-008, Decision After Reconsideration (April 13, 2001) and *Alfredo Annino/Alfredo Annino Construction, Inc. of Nevada*, Cal/OSHA App. 98-311, Decision After Reconsideration (April 25, 2001) are distinct from the matter at hand and are unaffected by our decision here.

Although we find that the citation properly named Employer, we concur with the ALJ that the Division failed to meet its burden of proof to show that Employer violated section 1621(a). Accordingly, the disposition of the appeal remains unchanged.

Decision After Reconsideration

The Employer was properly named, the Board had jurisdiction over Employer to hear its appeal, and the decision of the ALJ granting the appeal is affirmed.

CANDICE A. TRAEGER, Chairwoman
ROBERT PACHECO, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: June 9, 2008

¹⁵ See, *Hawkins v. Pacific Coast Bldg. Products, Inc.*, *supra* at 1504, citing *Thompson v Palmer Corporation* (1956) 138 Cal. App. 2d 387, 390.