

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

In the Matter of the Appeal of:

INDUSTRIAL MASONRY, INC.
1600 East Steel Road
Colton, CA 92324

Employer

Docket Nos. 07-R3D2-0735 and 0736

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken the petition for reconsideration filed by Industrial Masonry Inc. (Employer) in the above-entitled matter under submission, issues this decision after reconsideration.

JURISDICTION

On February 14, 2008, an Administrative Law Judge (ALJ) for the Board issued an order accepting the agreed settlement of two citations issued to Employer. Those citations alleged three violations of Title 8, California Code of Regulations. The citations were issued to Employer on February 6, 2007, and a representative of Employer timely filed appeals on Employer's behalf. That representative, Thomas Herold, signed the appeal forms and provided his address as 21250 Box Springs Road, Suite 207, Moreno Valley, CA, 92557. The appeal form also listed Employer's name and address in the appropriate spaces on the first page of the form.

On January 2, 2008, the Appeals Board acknowledged a change of representative from Thomas Herold to Karen Day, at the same address as Thomas Herold, specifically, 21250 Box Springs Road, Suite 207, Moreno Valley, CA 92557. On January 3, 2008, the Board issued a Notice of Pre-Hearing Conference addressed to Thomas Herold, but mailed to the address for both Thomas Herold and Karen Day at Box Springs Road. That Notice identified a telephonic pre-hearing conference scheduled for February 11, 2008. At the appointed time, Karen Day appeared by telephone and represented the Employer, and agreed to the settlement incorporated in to the Order and Summary Table.

Thereafter, Employer retained another representative and timely filed a petition for reconsideration of the ALJ Order dated February 14, 2008. The Division filed an answer to petition for reconsideration on April 23, 2008. Employer filed a supplemental petition for reconsideration on June 3, 2008, and the Division filed an answer to supplemental petition for reconsideration on July 8, 2008. The Appeals Board took the matter under submission by Order dated May 8, 2008. Therein the Board granted leave to file the supplemental petition and answer. We have considered all arguments in the various petitions and answers, as well as the entire record, in reaching this Decision After Reconsideration.

PROCEDURAL AND FACTUAL SUMMARY

In 2007, Employer retained Thomas Herold, a non-lawyer safety professional, to process the appeals of two citations issued by the Division on February 6, 2007. In his capacity as representative, Herold filed appeals of both citations, listing himself as the representative, and in January of 2008, he informed the Board when the representation of Employer changed from himself to another representative in his firm, Karen Day. Tom Herold acknowledged the hearing date set for February 28, 2008, in his January 2, 2008, letter confirming the change of representative.

Karen Day spoke with Employer nearly three months prior to the pre-hearing conference regarding the citations at issue. In that conversation she discussed with Employer its “positions and beliefs regarding the citations.” She appeared as Employer’s representative at the duly-noticed telephonic pre-hearing conference on February 11, 2008, and assented to settlement terms on behalf of Employer. After learning the terms of the settlement, Employer retained a different representative, a law firm, and filed a petition for reconsideration challenging the validity of the settlement agreement memorialized in the ALJ Order dated February 14, 2008.

In its petition for reconsideration Employer avers, through a declaration of its president Greg Wilson, that while it retained Thomas Herold to “prepare the written appeals and pursue appeals of all citations,” it did not specifically authorize the representative to bind it to any settlement that left in force the serious classification of the violation alleged in Citation 2. There is no evidence, other than Wilson’s declaration, to support this assertion. Rather, Employer had multiple conversations with both of its representatives, and was aware of the pre-hearing conference date scheduled for February 11, 2008, yet it never instructed the Appeals Board, the Division, or either of its two representatives that their authority to “pursue the appeals of all citations” did not include the authority to enter into full settlement of the appeals.

ISSUE

Is Employer bound by the agreement entered into by its representative?

DECISION AFTER RECONSIDERATION

An employer's representative in a Board proceeding has authority to bind the employer. (*Kenyon Plastering, Inc.*, Cal/OSHA App. 07-3026, Denial of Petition for Reconsideration (May 13, 2008); *Jack Barcewski dba Sunshine Construction*, Cal/OSHA App. 06-1257, Denial of Petition for Reconsideration (Apr. 16, 2007); *Terra Bella Nursery Inc.*, Cal/OSHA App. 09-3444, Denial of Petition for Reconsideration (Sep. 9, 2010).) Ostensible authority can bind the principal to an agreement reached by an agent who acts within the apparent scope of the agency. (3 Witkin, Summary of California Law, *Agency and Employment* §133 et seq. (2005, and Supp. 2011); see also *Helpmates Staffing Services*, Cal/OSHA App. 05-2239, Decision After Reconsideration (Jan. 20, 2011).) If the principal specifically limits the agent's authority in a contract with a third party, the principal may not be held to the contract. (Witkin, supra, § 134, citing *Iverson v. Metropolitan Life Ins Co.* (1907) 151 Cal. 746, 751.) When the principal imposes no specific limitation on the agent's authority, and fails to communicate any such limitation to either the agent or the third party, third parties may rely on the appearance of the agent's authority being unlimited. (*Leavens v. Pinkham & McKeivitt* (1912) 164 Cal. 242, 247-248, *Pasadena Medi-Center Associates v. Superior Ct* (1973) 9 Cal. 3d 773, 781 [agent acting within his ostensible authority binds his principal].)

“Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third party to believe the agent to possess.” (Cal. Civ. Code § 2317.) Transactions appearing regular on their face allow a third party to rely on the authority of an agent. (*Kamen & Co. v. Paul H. Aschkar & Co.* (1967) 382 F.2d 689 (certiorari dismissed 393 U.S. 801).) Consistent with the Civil Code provision, the Board has relied on apparent authority of representatives to bind their principals to settlement agreements. “An employer's representative has the implied and apparent authority to act on the employer's behalf in the Board proceeding, including the authority to enter into an agreement with the Division which, if accepted by the Board, would resolve the matter. See, *ARB, Inc.*, Cal/OSHA App. 92-1001, Decision After Reconsideration (Sep. 8, 1997).” (*Kenyon Plastering*, supra.)

Here, the principal failed to limit the representative's authority to settle the appeals. No such limit was communicated to either the agent (Kathy Day or Thomas Herold) or the third party (the Division), or the Board. Thus, when Kathy Day gave her assent to the settlement at the pre-hearing conference, as typically occurs in the normal course of board proceedings, the Division was justified in relying on her representation that she had authority to settle the

contested classification of the violation in Citation 2. Title 8, California Code of Regulations, section 374 requires parties to be fully prepared to address any issue arising in the course of the appeal at a duly scheduled pre-hearing conference.

(b) Each party to a prehearing conference shall be prepared to discuss the issues, stipulate to any factual or legal issue about which there is no dispute, stipulate to the identification and admissibility of documentary evidence, comply with any request for discovery, report on discovery status where the ALJ has compelled discovery prior to the prehearing, and to do such other things as may aid in the disposition of the proceedings.

(c) The failure of a party or its representative to prepare for and participate in the prehearing conference shall be grounds for the imposition of such sanctions, inferences or other orders, then or during the hearing, as the Appeals Board may deem appropriate. These sanctions may include striking or excluding evidence offered by the non-complying party on that dispute, or precluding that party from contesting the position or information on that issue provided by the complying party.”

Failure of a party to prepare for the pre-hearing conference can result in commensurate sanctions. When a representative appears on behalf of the party, the Board and the other party(ies) are justified in relying on the representative’s authority to bind the party to the resolution of any issue reached during the pre-hearing conference. These can range from stipulating to an uncontested issue, or agreeing on terms that resolve the entire appeal. Thus, a party must adequately prepare its representative to participate in the pre-hearing conference.

We have previously considered miscommunication or confusion regarding a representative’s authority to be “internal operating procedures” and thus not grounds to grant reconsideration. (*Kenyon Plastering, supra; Cleveland Wrecking Company*, Cal/OSHA App. 92-9054, Denial of Petition for Reconsideration (Nov. 18, 1992) [branch manager mishandled citation]; *Southern California Edison*, Cal/OSHA App. 08-9062, Denial of Petition for Reconsideration (Jan. 30, 2009) [secretary failed to follow instructions]; *De Soto Gardens Apartments G & K Management Co., Inc.*, Cal/OSHA App. 96-2418, Denial of Petition for Reconsideration (Jul. 16, 1997) [Division sought to withdraw from settlement after its district manager erred by settling].)

The only evidence here of any limitation on the representative’s authority to “pursue the appeals” is Employer’s post hoc assertion that it would not have agreed to a settlement wherein the serious classification of the violation in Citation 2 remained, and its statement that it did not specifically grant

settlement authority to Kathy Day to so agree. Day also states in her declaration that Employer did not specifically grant her authority to settle. Even if true, such facts are not dispositive, because Employer did not tell Day she had no authority or limited authority to settle, and further the miscommunication between Employer and Day was not and could not have been known to the Division or the Board.

Knowing the representative was going to attend the pre-hearing conference, Employer did not retract or limit its earlier unrestricted statement as to the scope of the representative's authority. Rather, Employer acknowledges Kathy Day had the authority to dispose of the appeal by settlement, but asserts it did not specifically authorize her to accept one element of this settlement. We have consistently rejected efforts such as this to undo settlements by claiming the representative lacked authority to act for an employer in pre-hearing proceedings that resolve the appeal. (*Borders*, Cal/OSHA App. 09-3607 Denial of Petition for Reconsideration (Aug. 4, 2010).) We conclude Employer's unlimited grant of authority includes all reasonable actions of a representative, which our rules make clear include disposing of an appeal by settlement at a pre-hearing conference. (§ 374(c).)

The Division reasonably relied on Kathy Day's representation that she had the authority to bind Employer to a settlement. (*Associated Creditors' Agency v. Davis* (1975) 13 Cal. 3d 374 [transaction appearing regular on its face allows third party to rely on authority of agent].) Employer frames the issue as whether "an Order based upon the unauthorized act of an agent in excess of his or her authority [is] subject to rescission for that fact?" Here, the evidence is at best equivocal as to whether the agent's authority was actually limited as claimed. And, the agent had ostensible authority to act as she did, and Division's reliance thereon binds the principle to the agreement entered into by its agent. The settlement agreement contained in the order is thus valid.

Next, Employer asserts fraud underlies the agreement, thus providing grounds to avoid the settlement. (Labor Code § 6617(b).) Section 364(b)¹ allows for a withdrawal of an appeal to be rescinded if (inter alia) the withdrawal is a result of fraud or coercion. There is no claim or evidence of coercion. For the reasons set forth below, we conclude the Order was not procured by fraud.

¹ Board Regulation section 364(a) allows an employer to withdraw its appeal. Section 364(b) further provides in pertinent part that, "An appeal so dismissed [by employer withdrawal] shall be reinstated by the Appeals Board if appellant files a written motion with sufficient facts to show that the withdrawal resulted from misinformation given by the Division or Appeals Board, or from fraud or coercion." Division asserts section 364(b) is the only basis to allow the Employer to rescind the settlement and requires the Division to have undertaken the misrepresentation or purported fraud. We read the comma after "Appeals Board" in the rule to indicate that the phrase "fraud or coercion" is not limited to actions of the Division or the Appeals Board.

To establish the Order was procured by fraud, the Employer must establish the Division created a misunderstanding which induced Employer's assent to the agreement, or that the elements of a fraud claim otherwise exist. (*Luu's Brothers Corp. dba A & A Supermarket*, Cal/OSHA App. 07-5156, Denial of Petition for Reconsideration (Feb. 23, 2009).) Here, there is no alleged misrepresentation by the Division or the Appeals Board that induced Employer to enter the agreement. Employer asserts fraud or coercion at the hand of its representative justifies voiding the settlement. But the facts presented in support of fraud or coercion by Ms. Day only establish an innocent miscommunication between Employer and Day. The agreement cannot be avoided on these bases either.

A claim of fraud has five elements. Fraud occurs when "... a false representation of material fact, made recklessly or without reasonable ground for believing its truth, with intent to induce reliance thereon, and on which the injured party justifiably relies" is made. (*F.P. Lathrop Construction Co.*, Cal/OSHA App. 81-0819, Decision After Reconsideration (Feb. 8, 1985), citing *Hale v. George A. Hormel & Co.* (1975) 48 Cal.App.3d 73)." (*Concrete Wall Sawing Co., Inc.*, Cal/OSHA App. 97-1777, Decision After Reconsideration (Jun. 5, 2001).) Damage must also result. (1 Witkin, *Summary of California Law, Contracts* §286 (2005).) Employer established none of these elements.

The evidence shows that neither the Division nor Employer's representative made a false misrepresentation intended to induce Employer's assent to the settlement. The Division conveyed a settlement offer which was accepted by Day, who communicated accurately the terms proposed and accepted to Employer. Thus there can be no inference of any intent to defraud from this communication. Day's intent must be inferred from her actions and her declaration. She declares she received a settlement offer from the Division and communicated it to Employer. There is dispute as to whether Employer received this information. Day failed to follow up on this call. Employer asserts this shows intentional or reckless inducement. This assertion is unfounded. For Day's failure to follow up to amount to intentional or reckless misrepresentation, Employer must establish Day knew its wishes were different from the proposed settlement terms. There is no evidence that such was the case.

Employer provides no evidence that it informed its representative of its unwillingness to settle under terms whereby the Serious classification of the violation in Citation 2 would remain. The self-serving statement that it would not have so agreed is not evidence that Day was informed of this alleged limitation on her settlement authority prior to settling the case. Rather, Day states under penalty of perjury that she discussed the citations with Employer three months prior to the pre-hearing conference. No statements are detailed from this conversation other than "Employer conveyed [to Day] its position

regarding each citation.” We cannot conclude from this limited information that Day knew Employer’s wishes were to refuse to settle Citation 2 if the Serious classification remained unchanged. Without evidence of Day’s prior understanding, her inaction cannot be considered intentional misrepresentation. (See *Salahutdin v. Valley of California, Inc.* (1994) 24 Cal.App. 4th 555, 562-563 [fiduciary’s failure to disclose information to his principal that fiduciary knew to be critical to principal’s purchase decision supported constructive fraud claim against agent for damages, but did not allow for rescission of purchase agreement].)

The series of events contained in the declarations omits any evidence of employer communicating key, timely information to its representative regarding its specific settlement wishes. From this we conclude Employer caused the miscommunication between it and its representative, not the other way around. That is, Day appears to have been unaware of Employer’s unwillingness to settle Citation 2 by stipulating to the Serious classification. Such lack of care regarding one’s important legal affairs is not grounds for relief in board proceedings. (*Chamlan Enterprises, Inc.*, Cal/OSHA App. 08-1322, Denial of Petition for Reconsideration (Aug. 13, 2009); *Timothy J. Kock*, Cal/OSHA App. 01-9135, Denial of Petition for Reconsideration (Nov. 20, 2001).)

As a fraud claim, Employer makes a series of factual arguments that are not supported by the evidence in the record, and in any event are of no legal consequence. Employer argues Day misrepresented the “status of the appeal” and the “substantive effects of the actions taken at the pre-hearing conference.” We take this to mean Day’s failed attempt to convey the Division’s settlement offer is claimed to be a misrepresentation of the possible settlement (“substantive effects”) of the appeal at the pre-hearing conference. If Employer was ignorant of the potential effects of its agent’s actions at the pre-hearing conference, it is because Employer is unaware that some or all issues can be resolved at the pre-hearing conference, under Board Regulation section 374. However, ignorance of the law is not excusable in Board proceedings. (*Nick’s Lighthouse*, Cal/OSHA App.05-3086, Denial of Petition for Reconsideration (Jun. 8, 2007).) There is no misrepresentation when an agent does not inform a principal of the law which the principal is otherwise required to know.

And, Employer appears to claim that the representative’s receipt of the Division’s settlement offer affected the “status of the appeal.” We disagree. At the time Day received the Division’s offer, Employer was able to communicate with its representative about the scheduled pre-hearing conference. That it chose not to, and allowed its representative to appear at the pre-hearing conference without fully instructing her on the limits of her authority is not a misrepresentation by the representative. The events here establish nothing more than Employer failed to communicate its wishes to its representative in

advance of a pre-hearing conference. (*De Soto Gardens Apartments G & K Management Co., Inc., supra.*)

Also, Employer argues damage resulted from reliance on an intentional misrepresentation. Employer must pay \$2,900.00 and has a Serious violation on record. But, it avoided an accident-related finding through the conduct of Ms. Day. It is unclear whether Employer would have been in a better position had Ms. Day rejected the Division's settlement offer. It is possible Employer would have had the accident related-allegation affirmed, and would be in a worse position. Thus, Employer fails to articulate key elements of a fraud claim.

Last, Employer claims it was denied due process because its representative settled the appeal on terms it claims it would not have agreed to. However, Employer had an opportunity to be heard. That its representative misapprehended its wishes is not a denial of due process. "Failing to avail oneself of due process is not a denial of due process. (*Dr. Timothy J. Rosio, MD, dba Anew Skin Dermatology, Cal/OSHA App. 08-9149, Denial of Petition for Reconsideration, (Jun. 10, 2008); Jack Barcewski dba Sunshine Construction, Cal/OSHA App. 06-1257, Denial of Petition for Reconsideration (Apr. 16, 2007).*)" (*Chore Auto Wrecking, Cal/OSHA App. 09-0605, Denial of Petition for Reconsideration (Jan. 14, 2010).*)

The Order upholding the citations and imposing total penalties of \$2,900.00 is hereby affirmed.

ART R. CARTER, Chairman
CANDICE A. TRAEGER, Member
ED LOWRY, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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