

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

In the Matter of the Appeal of:

840 THE STRAND, LLC
P. O. Box 2495
Manhattan Beach, CA 90267-2495

Employer

Dockets. 13-R3D5-3353 and 3354

**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 840 The Strand, LLC (Employer).

JURISDICTION

Commencing on June 19, 2013, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On September 5, 2013 the Division issued two citations to Employer alleging three general and one serious violation of occupational safety and health standards codified in California Code of Regulations, Title 8.¹ Citation 1 alleged three general violations as follows: § 1509(a) [no Injury and Illness Prevention Plan], § 1509(c) [no code of safe practices], and § 3395(d)(3) [no heat illness plan]. Citation 2 alleged a serious violation of § 1646(a) [rolling scaffold not tied or secured].

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 July 2, 2014, the ALJ issued a Decision (Decision) which affirmed all four alleged violations and imposed civil penalties therefor.

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

Employer timely filed a petition for reconsideration.

The Division filed an answer to the petition.

ISSUE

Do the facts support the findings of the ALJ that Employer was an employer?

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 does not state any of the bases set forth in Labor Code section 6617 above, which is grounds sufficient to deny the petition. (Labor Code sections 6616 [petition must set forth in detail grounds for petition], 6617; *UPS*, Cal/OSHA App. 08-2049, Denial of Petition for Reconsideration (Jun. 25, 2009), citing, *Bengard Ranch, Inc.*, Cal/OSHA App. 07-4596, Denial of Petition for Reconsideration (Oct. 24, 2008).) By construing the petition liberally we may deem it to assert that the evidence does not justify the findings of fact and/or 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 facts and circumstances giving rise to the citations are set forth in detail in the Decision. We restate them briefly here for convenience.

Employer, 840 The Strand, LLC, is an entity wholly owned by Jay Mitchell. Employer had hired an individual to paint an apartment building in California which Employer owns. That individual in turn had another individual working for him. On or before June 19, 2013 the two workers had erected a rolling scaffold along the outside of one wall of the apartment building. The scaffold was measured to be approximately 26 feet high and five feet wide. A Division inspector noticed that the scaffold was not secured to the building and commenced an inspection, as a result of which the two citations in question were issued. At the time of the inspection the two workers were caulking cracks in the building's exterior wall to prepare it for painting. The two were exposed to a fall of approximately 26 feet.

The record shows that at the time of the inspection Employer did not have an Injury and Illness Prevention Plan as required by section 1509, a code of safe practices as required by section 1509(c), or a Heat Illness Prevention Plan as required by section 3395(d)(3). The record also established that the dimensions of the scaffold at issue were such as to require it to be tied or secured to the apartment building, and that it was not so secured. (§ 1646(a).)

Employer's basic premise at both hearing and in its petition for reconsideration is that no employer-employee relationship existed between it and the workers. Employer also argues that the work being done fell within what it terms the "handyman" exception to the requirement that work of the kind involved here be performed by a licensed contractor. Employer does not dispute the violations alleged in Citation 1, and challenges Citation 2 only on the basis that the photographic evidence does not show a lack of scaffold ties.

Under the California Occupational Safety and Health Act (Lab. Code § 6300 *et seq.*, the "Act") a threshold requirement for liability for an alleged violation of safety standards is that the cited person be an "employer" as defined in the Act. Labor Code section 6304 provides that "employer" in the Act has the same meaning as the term is used in Labor Code section 3300(c), namely, "every person including any public service corporation which has any natural person in service." In turn, Labor Code section 6304.1(a) defines "employee" as "every person who is required and directed by any employer to engage in any employment to go to work or be at any time in any place of employment." Employment "includes the carrying on of any trade, enterprise, project, industry, business, occupation, or work, including all . . . construction work . . . in which any person is engaged or permitted to work for hire, except household domestic service." (Lab. Code § 6303(b).)

Employer's contentions that no employment relationship existed between it and the two workers on the scaffold are discussed in detail below.

Employer contends that no employer/employee relationship existed between it and the two individuals working on the scaffold because the work being done (caulking in preparation for painting) was bid at the sum of \$200, which falls under the “handyman” exception to the requirement that the work be done by or under the direction of a licensed contractor.

Although no authority for the foregoing contention is cited in the petition, Employer appears to be referring to Business and Professions Code section 7048, the “small undertakings or projects” exception to the licensed contractor requirement. In pertinent part, section 7048 explicitly does not apply to Employer’s project: “This exemption does not apply in any case wherein the work of construction is only a part of a larger or major operation, whether undertaken by the same or a different contractor, or in which a division of the operation is made in contracts or amounts less than five hundred dollars (\$500) for the purpose of evasion of this chapter or otherwise.” The evidence at hearing was that the workers observed on the scaffold were caulking the building in preparation for its being painted. Even if, as Employer asserts, the contract price for the caulking work was approximately \$200, it was “part of a larger . . . operation” which can reasonably be understood to cost more than an additional \$300. The building in question was at least 26 feet high, thus at least three stories. It is not credible that a person would agree to paint even one side of a building of such size for less than \$300, particularly when including the cost of the paint itself.

As the Decision points out in detail, the work involved required a licensed contractor to perform it or, if the worker was not so licensed, he was by statute an employee of the building owner, the cited Employer. There was no evidence that the individual in charge of the caulking work, “Erick,” was an appropriately licensed contractor at the time the work was being performed.

Employer raises a number of additional assignments of error regarding the ALJ’s findings of fact.

Employer contends there is no evidence it paid anyone to do the work in question, and further that the LLC and its sole member are legally separate and distinct persons. To the contrary, we find it is reasonable to assume that the person doing the work was being paid or that Employer was obligated to pay him the \$200 said to be the price of the work, which Employer’s petition emphasizes in support of other arguments. Even if no agreement had been signed between Employer and Erick at the time of the inspection, the work had begun, a contract was at least implied, and Employer was liable to pay Erick for the work’s fair market value. (1 Witkin, Summary of California Law (10th Ed.) Contracts § 102.) Also, the evidence established that Jay Mitchell was the sole owner of the LLC which owns the building in question. Under the “alter ego doctrine” a corporation or LLC and its owner(s) will be liable for each other’s acts. (*Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 300.) The

two “general requirements” of the doctrine are “(1) that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow.” (Id., citing *Automotriz etc. de California v. Resnick* (1957) 47 Cal.2d 792, 796.) Thus Mitchell’s claim that he and the LLC maintained separate finances and that the LLC did not pay for the work is of no help to him. Either the LLC or Mitchell had to pay for the work. Both (either directly or indirectly) benefitted from it. If the LLC paid, then it was the employer; if Mitchell paid from a separate personal fund, he was the employer for the benefit of his wholly owned LLC and it appears he did so in an attempt to avoid legal consequences which would otherwise inure to the detriment of the LLC, such as its being the direct employer of the workers and/or skewing its finances.

Employer disputes the ALJ’s finding that “The natural person was paid to do construction work on an apartment building owned by appellant.” Employer argues that Mitchell, not the LLC, hired the workers and therefore the LLC had no one in its employ. Since the LLC can act only through humans, however, it was necessary that Mitchell conduct the transaction as he in fact did. Also, as discussed above, the LLC and Mitchell are alter egos, and the alter ego doctrine disposes of this contention.

Employer argues there is no evidence in the record to support the ALJ’s finding that Erick, the “natural person hired to perform the work did not hold a contractor’s state license to perform this work.” To the contrary, Mitchell testified that the lead worker was a “handyman contractor” but did not provide any proof that the handyman was licensed, and the handyman himself told the inspector he did not have a state contractor’s license.

Next Employer argues that the photographic evidence did not show the scaffold lacked ties, and thus the hazard that the scaffold would tip over was not established. Employer’s petition also argues that such ties are hard to see, which may well explain why the photographs taken by the inspector do not show any. On the other hand, we recognized that a photograph cannot be taken of an object which does not exist, and the absence of ties in the photographs in evidence is evidence that there were none. And, we note that Employer did not introduce any photographs showing the scaffold was in fact secured or tied as required.

Even if one assumes for purposes of discussion that the photos do not prove the lack of ties, the inspector’s testified that the scaffold was not secured or tied to the building. The inspector’s testimony about the conditions she observed is not contradicted by other evidence. That is a sufficient basis for the finding of fact. In short, photographs are not the only type of evidence which may be used to show the alleged violation.

In a related argument Employer contends that no license is required to caulk. Employers omits to mention that the caulking was being done in preparation for painting the building, and painting falls within the type of work requiring a license. (Bus. and Prof. Code § 7026.) Further, as we discussed above, dividing a project into separate tasks and/or contracts in order to avoid the licensed contractor requirement is contrary to law.

Employer challenges the finding that Mitchell knew the scaffold was not secured on the basis that there is no proof of what he knew. What that argument overlooks is that Mitchell, as the workers' employer, is charged with knowledge of their behavior. Mitchell, whether for himself or as agent for the LLC, hired the handyman and either knew the handyman was unlicensed or neglected to ask. Since the handyman was unlicensed, he became Mitchell's employee by law, and Mitchell his supervisor or manager. (Labor Code § 2750.5; *Foss v. Anthony Industries* (1983) 139 Cal.App.3d 794.) Knowledge of a manager or supervisor (here that the handyman was unlicensed) is attributed to the employer. (*Foster Dairy Farms*, Cal/OSHA App. 10-1981, Denial of Petition for Reconsideration (Feb. 8, 2013).)

Employer contends that it had only one employee, even though the inspector observed two men on the scaffold. It appears that Erick, who was hired by Employer to do the work, had another individual in service to him. Assuming for discussion purposes that only Erick was Employer's employee, it remains true that Employer had an employee. It follows that the violation was shown and the penalty calculation was correct.

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 SEPTEMBER 25, 2014