

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

In the Matter of the Appeal of:

DESERT VALLEY DATE, INC.
dba DESERT VALLEY DATE
51332 Van Buren
Coachella, CA 92236

Employer

Docket No(s). 2011-R6D2-2207
through 2011

**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 the California Division of Occupational Safety and Health (Division).

JURISDICTION

Commencing on June 21, 2011, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Desert Valley Date, Inc., doing business as (dba) Desert Valley Date (Employer).

On August 18, 2011 the Division issued five citations to Employer alleging violations 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 formal evidentiary hearing. At the hearing the Division moved to amend Citations 1 through 4 and Employer moved to withdraw its appeals to those Citations, as amended. The motions were granted. The remaining Citation, Citation 5, alleged a Serious violation of section 3458(a)(1) [no fall protection for date palm tree worker].

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

At the hearing the parties also stipulated that the violation alleged in Citation 5 had occurred and the penalty was properly calculated. The only remaining issue was whether Employer had an employment relationship with two brothers who worked at Employer's premises.

On June 6, 2013, the ALJ issued a Decision which granted Employer's appeal of Citation 5.²

The Division timely filed a petition for reconsideration.

Employer filed an answer to the petition.

ISSUE

Was the ALJ correct in deciding that the relationship in question was that of "independent contractor"?

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.

The Division's petition contends the Decision was issued in excess of the ALJ's authority, the evidence does not justify 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.

² On June 26, 2013 the ALJ issued an "Errata" to correct a typographical error in the summary table attached to the Decision. The correction is not material to this Denial of Petition for Reconsideration.

During an inspection of Employer's premises by three State agencies including the Division, the inspectors encountered three individuals, Employer's foreman, Luis Rodriguez, and two brothers, Jose and Guadalupe Ponce. One of the brothers was observed working in a date palm tree without fall protection in violation of section 3458(a)(1). As a result of her inspection the Division's inspector concluded that the Ponce brothers were Employer's employees, and cited Employer for the observed violation.

The Board incorporates by reference the evidence summarized in the Decision and briefly recapitulates it here for convenience.

Jose Ponce testified that he and his brother, doing business as Ponce Brothers, have produce dates for Employer at Employer's property under the terms of for several years. Each year the terms of the contract are renegotiated, and in 2012 they and Employer did not enter into a contract. The brothers also produce dates for other persons in the years they did so for Employer. The brothers provided all their own tools and equipment. Jose Ponce does not consider himself or his brother to be Employer's employee, in large part because he makes his own decisions about how to conduct the date production process.

Mr. Greg Kirkjan, Employer's vice-president, testified that Employer did not consider the Ponce brothers to be employees, and was aware that the brothers produced dates for some of its competitors and sold dates to others as well. Mr. Kirkjan also testified to the contracts between Employer and the Ponce brothers.

Based on the facts in the record and her analysis of the California Supreme Court case of *S. G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (1989) 48 Cal.3d 341, the ALJ held that the Ponce brothers were not Employer's employees but rather independent contractors. Since the California Occupational Safety and Health Act (Lab. Code §§ 6300 *et seq.*) applies to employees and not independent contractors, she granted Employer's appeal of Citation 5. (See Decision, p. 9.)

In its petition for reconsideration, the Division argues that the ALJ improperly placed the burden of proof on it, rather than Employer. Not so. The ALJ, while noting that the burden is normally on the Division to prove its case by a preponderance of the evidence, cited *Borello, supra*, which dealt with the claim of independent contractor status as an affirmative defense to be established by the party asserting it. The ALJ considered the several factors established in *Borello* and applicable Board precedent as well, and determined on that basis that the Ponce brothers were independent contractors. Although the Decision did not *explicitly* state that the burden of proof regarding independent contractor status was on Employer, the ALJ treated the evidence in that light and did not place the burden on the Division.

The Division also argues that the Decision incorrectly analyzed and applied the *Borello* factors. We do not agree. The Decision made a detailed and nuanced analysis, finding that some factors tended to show employment status and others independent contractor status, and concluding that on balance the evidence weighed in favor of the latter. (Decision, pp. 10 - 13.)

The Decision was correct in concluding that on balance the arrangement in question was in the nature of independent contract and not employment. Moreover, the Court in *Borello, supra*, before listing the “additional factors” used to assess whether a relationship is one of employment or independent contractor, notes that “[strong] evidence in support of an employment relationship is the right to discharge at will, without cause. [Citations.]” (*Borello, supra*, at p. 351; brackets in original.) The contracts between the two men and Employer *do not* provide for termination at will without cause. If the right so to discharge is “strong evidence” of an employment relationship, the absence of that right is indicative of the lack of an employment relationship.

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: August 23, 2013