

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

In the Matter of the Appeal of:

FERMA CORPORATION
1262 Montecito Avenue
Mountain View, CA 94043

Employer

Docket No. 12-R2D2-1669

**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 Ferma Corporation (Employer) matter under submission, renders the following decision after reconsideration.

JURISDICTION

Beginning on April 4, 2012 the Division of Occupational Safety and Health (Division) conducted an inspection at a construction site in Rio Vista, California maintained by Employer. On May 18, 2012 the Division issued one citation to Employer alleging a violation of workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.¹

The citation alleged a Regulatory violation of section 341(d)(3) [Failure to have a project permit].

Employer filed a timely appeal of the citation.

Administrative proceedings were held, including a contested evidentiary hearing before an Administrative Law Judge (ALJ) of the Board. After taking testimony and considering the evidence and arguments of counsel, the ALJ issued a Decision on April 19, 2013. The Decision denied Employer's appeal and upheld the violation, imposing a civil penalty of \$1250.

Employer timely filed a petition for reconsideration of the ALJ's Decision. The Division did not file an answer to the petition.

¹ Unless otherwise specified, all references are to California Code of Regulations, Title 8.

ISSUE

Did Employer violate section 341(d)(3)?

EVIDENCE

The Decision summarizes the evidence adduced at hearing in detail. We summarize that evidence briefly below, focusing on the portions relevant to the issue presented.

Employer is a construction company specializing in demolition work. Associate Safety Engineer Ronald Aruejo (Aruejo) was assigned to conduct a construction permit inspection of Employer's worksite on April 4, 2012. The Division's Concord District Office had received an Activity Notification form from Employer stating that work would begin at the Rio Vista site on January 30, 2012, and was expected to be completed by April 15, 2012. Aruejo was unable to find a Project Permit on file for the project, which involved demolition of structures over 80 feet in height.

At the worksite, Aruejo spoke with Dan Zoke (Zoke), an employee and supervisor of Employer's. Zoke referred Aruejo to Pete Buzz (Buzz), Employer's Project Manager. Buzz informed Aruejo that Employer was in charge of the Rio Vista project and that Employer was finished at that worksite. Aruejo requested a copy of the Project Permit, and other documents from Employer; Employer responded by submitting their annual permit for demolition work, but did not submit a project permit for the Rio Vista job.

DECISION AFTER RECONSIDERATION

In making this decision, the Board relies upon its independent review of the entire evidentiary record in the proceeding. The Board has taken no new evidence. The Board has also reviewed and considered Employer's 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 petitioned for reconsideration on the basis of Labor Code section 6617(c) and (e).

The Division alleges a violation of section 341(d)(3), which requires permits to be procured in demolition work. The section states:

(3) To conduct the demolition or dismantling of any building or structure more than 36 feet in height, the Project Administrator shall hold a Project Permit and all other employers directly engaging in demolition or dismantling activity shall hold an Annual Permit.

Section 341(d)(3) was amended in 2006, in part to clarify which party has the responsibility to procure the project permit at a jobsite. The amended section 341 now includes a definition of the term “Project Administrator”:

(b)(8) “Project Administrator” means a person or entity that has overall onsite responsibility for the planning, quality, management, or completion of a project involving the erection or demolition of a structure. Examples of Project Administrators include, without limitation, general contractors, prime contractors, owner/builders, joint ventures, and construction managers.

Employer argues that it was not a project administrator, and was hired to accomplish a discrete portion of the task at the Rio Vista site—demolition of wind turbines and remedial grading. The overall project included the creation of new roads and installation of more modern wind turbines at the client’s five acre wind farm. Employer’s un rebutted testimony establishes that the project involved more than the demolition Employer was engaged in. According to Tim Ruff (Ruff), Employer’s Chief Estimator, Employer had no control or involvement in the construction of the road or the new wind turbines, but had been hired only to complete demolition work and was acting under the direction of Robert Shaw (Shaw), the on-site representative of Enxco, which owned the wind farm project. While Ruff was on site about once a week, Shaw was there every day. Ruff was required by the owner to attend these meetings with Shaw, and Ruff testified that Shaw was “in charge” of the overall project.

Aruejo testified that he inferred from his conversation with Buzz that Employer was the Project Administrator. Aruejo provided no clear foundation for this assumption—he did not testify to any employee of Employer stating that Employer had such a role at the site, or to observances that lead to this conclusion. Rather, Employer’s un rebutted testimony established that there were several contractors working on the project, and the preponderance of the evidence in the record shows that Employer was a subcontractor rather than Project Administrator directing the Rio Vista wind farm upgrade. Under the section 341 scheme as amended, a Project Administrator, who remains with

the job from beginning through to completion, is responsible for obtaining the Project Permit, while those subcontractors who engage in permit-required activities, but have no broad authority over the entire project, are only required to have an Annual Permit for their work, as Employer did.²

The Division has failed to show that Employer, who admittedly was engaged in demolition work, at any point “had overall onsite responsibility for the planning, quality, management, or completion of [the] project”. (Section 341(b)(8).) The Board notes that before beginning demolition work, Employer would be wise to ensure that there is a Project Administrator designated and appropriate permits have been secured by that designee. However, the Division has not demonstrated by a preponderance of the evidence that Employer was the Project Administrator as defined by section 341, and the citation cannot be upheld.

Therefore, we grant Employer’s appeal and vacate the civil penalty.

ART CARTER, Chairman
ED LOWRY, Board Member
JUDITH S. FREYMAN, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: JULY 31, 2014

² See, *Initial Statement of Reasons, Proposed Amendments to Section 341 Permit Requirements and Section 341.1 Issuance of Permits*. [Where language may be subject to multiple interpretations, Legislative history is an appropriate resource to determine what the enactment does. (*SDCCD - Continuing Education N C Center*, Cal/OSHA App. 11-1196, Decision After Reconsideration (Dec. 4, 2012), citing *Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 122-123).]