

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

In the Matter of the Appeal of:

HARRIS CONSTRUCTION COMPANY, INC.  
5085 East McKinley Avenue  
Fresno, CA 93727

Employer

Docket. 03-R2D5-3914

**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 ordered reconsideration of the Decision After Remand of the administrative Law Judge (ALJ) dated February 4, 2013 (as amended February 21, 2013 to correct clerical errors) hereby issues the following decision after reconsideration.

**JURISDICTION AND PROCEDURAL HISTORY**

Commencing on July 23, 2003 the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Harris Construction Company, Inc. (Employer or Harris).

On September 19, 2003 the Division issued a citation to Employer alleging violations of occupational safety and health standards codified in California Code of Regulations, title 8.<sup>1</sup> The citation alleged a general violation of section 3329(d) (failure to relieve internal pressure before opening a closed system) and that Employer was a “controlling employer” under section 336.10 (multi-employer workplace standard).

Employer timely appealed.

Thereafter administrative proceedings were held before an ALJ of the Board, including a contested evidentiary hearing.

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<sup>1</sup> References are to California Code of Regulations, title 8 unless specified otherwise.

On October 12, 2005 the ALJ issued a Decision sustaining the alleged violation and imposing a civil penalty.

The Board took the matter under reconsideration and issued a Decision After Reconsideration (DAR) on March 30, 2007 which reversed the ALJ and granted Employer's appeal.

United Association Local Union 246, AFL-CIO (Local 246) filed a petition for writ of mandate in Sacramento County Superior Court seeking judicial review of the Board's DAR. The Division later joined that action as a party.

The Superior Court reversed the Board's DAR on the basis that it was improper to require the Division prove a controlling employer was in a position to abate the specific violative condition cited as part of its prima facie case. On appeal, the Court of Appeal affirmed the Superior Court regarding the Division's burden in a case against a controlling employer. The Court of Appeal further held that a controlling employer must be granted the opportunity to prove it acted with due diligence under the circumstances in failing to correct a hazard created by a subcontractor on a multi-employer worksite. (*United Association Local Union 246, AFL-CIO v. California Occupational Safety and Health Appeals Bd.* (2011) 199 Cal.App.4<sup>th</sup> 273.)

The Board accordingly remanded the proceeding to the ALJ to conduct further proceedings affording Employer the opportunity to establish that it had acted with due diligence under the circumstances.<sup>2</sup> After a hearing on the due diligence issue, and taking additional testimony from two witnesses offered by Employer on that issue, the ALJ issued his Decision After Remand on February 4, 2013 (as amended). The Board took the Decision After Remand under reconsideration on its own motion.

Both Employer and Division filed an individual Answers to the Board's order of reconsideration. Worksafe and others (Worksafe), which had represented Local 246 in the writ of mandate proceeding, filed an untimely motion to intervene in the administrative proceeding, which Employer opposed and the Board denied and further construed as a motion to file an amicus brief, which motion the Board granted. Worksafe subsequently filed an amicus brief in response to the Order of Reconsideration. One other Amicus brief was submitted and considered. Employer did not file an Answer to the Board's Order of Reconsideration.

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<sup>2</sup> The ALJ who issued the original decision in this proceeding had retired from State service prior to the Board's remanding for further proceedings. Consequently a different ALJ presided over the post-remand proceedings.

## **ISSUE**

Does the evidence show that Employer had acted with due diligence under the circumstances?

### **REASONS FOR DECISION AFTER RECONSIDERATION**

The Board has fully reviewed the record in this case, including the arguments presented in the Answer to the Order or Reconsideration and amicus briefs. Based on our independent review of the record, we find that the ALJ's Decision After Remand addressed an issue distinct from the issue remaining to be resolved after the ruling issued by the Court of Appeal. The Decision After Remand revisited the issue of whether Employer was a controlling employer. However, the remand order and the Decision of the Court of Appeal limited the scope of the remand proceeding to a determination of whether Employer established a due diligence affirmative defense available to controlling employers. Thus, we do not re-examine whether the Division met its burden of proof to establish Employer was a controlling employer.

Employer is a licensed building contractor. In 2003 it entered into a contract to perform as a general contractor for a construction project to expand Madera Community College in Madera, California. Employer retained Champion Industrial Construction (Champion) as a subcontractor charged with performing pipefitting work on the project. Champion was one of several subcontractors (estimated to be 20 or 30) employed on the project.

On March 28, 2003 Jeff Gilkison, one of Champion's employees, was injured while he was attempting to repair a leak at the end of a "chill water line." The chill water line served to transport cold water for air conditioning purposes and consisted of 8-inch diameter pipe in a trench approximately four feet deep. The leak was located under a concrete "thrust block" which served to hold the water line in place within the trench.

Gilkison testified that he was a level three apprentice pipefitter who had worked for Champion for approximately two months, beginning in January 2003. Gilkison was instructed by his foreman to repair the leaking water line by shortening the pipe return. Gilkison did the work alone.

He testified that he did not realize that the water line was pressurized when he was doing the work. In retrospect Gilkison realized that the steps he took pressurized the line instead of depressurizing it. Among the factors contributing to the pressure were the sequence in which he closed certain valves, his decision not to open the valve he was adjusting to release the water

in the line, the valve's location at the lowest point in the system, and his detaching the valve assembly from the thrust block. Gilkison did not appreciate the effect of the above factors until after his accident.

Gilkison also testified that he spoke to two men he believed were Harris foremen while working that day, but before his accident. This conversation was described by Gilkison as him mentioning, in a general way, what he was working on, but it was not a discussion of Champion's plans for repairing the leak in any detail.

At the hearing after remand Employer presented the testimony of two witnesses, its president (Marsh) and the person who was its project manager at the Madera Community College project at relevant times (McKnight). Their testimony was summarized in detail in the Decision After Remand, and is briefly recapped here for what it adds the record of the previous hearing.

Employer is not a licensed plumbing or heating, ventilation and air conditioning (HVAC) contractor, nor does it have the expertise to do such work. When it is hired for projects involving specialized types of work for which it is not licensed, Employer retains the services of other firms which have the requisite expertise, skills and licenses as subcontractors. At the Madera College project, Champion was selected as the plumbing and HVAC subcontractor because Employer had hired it previously without a safety incident and Champion had a good reputation for safety. Champion was on the project full time working on mechanical systems (HVAC) and plumbing systems such as those bringing water into the buildings and those taking waste water out of buildings.

Employer generally had on site at the Madera College project a project manager, a project administrator, and one or two foremen. There was always at least one foreman on site, and a second when one of Employer's own crews was performing work.

Testing pipes for leaks and their ability to maintain a specified water pressure was a routine step in the construction process. At the Madera College project the testing or inspection was done by an inspector hired by the College, the owner of the project. The evidence was that leaks are detected in about five to ten percent of such tests.

Also, the testimony was that independent inspectors were regularly on site throughout each work day. Often four or five inspections of various elements of the work occurred each day.

It would have been normal practice for Champion, as the pipefitting and plumbing subcontractor, to have informed Employer that there would be a test or inspection of a particular section of pipe on a specific date and time to be conducted by an independent inspector working for the College. Employer was not told of the specific steps the test would involve and its personnel were not knowledgeable about the steps or methods involved, but it would be told after the event about which tests had been performed, which results were satisfactory, and which tests the work had failed. When it was informed by a subcontractor that such an inspection and/or test were to be performed, Employer kept unnecessary personnel away from the area.

McKnight, Employer's project manager, testified regarding the procedures it followed associated with the independent testing of pipes installed by Champion. He relayed that the test would have to be performed on a closed pipe, which was what was done. McKnight also testified that he would not have been able to determine what type of test was being conducted had he walked by the site during the test. The ALJ accepted this testimony and it was uncontradicted. And, the pipe attended to by Gilkison which resulted in his injury had been tested using the independent testing system, and the test had failed. Champion then assigned Gilkison to effectuate a repair. Gilkison inadvertently pressurized the pipe at the outset of his repair efforts. Neither he, his supervisors nor any other person knew of the pressurized pipe hazard.

We now determine that Employer acted with due diligence here in failing to correct or address the hazard. The evidence shows Employer implemented or relied on a functioning testing methodology to monitor sub-contractor performance, stayed well informed of the ongoing testing and test results, and researched the safety history of this sub-contractor. Here, no additional events or information undercut Employer's conclusion, based on history and experience, that Champion hired trained and competent employees. We decline to conclude that hiring sub-contractors with a good safety history alone is sufficient to establish the due diligence affirmative defense available to controlling employers under the Court of Appeal decision in this case. However, this evidence in conjunction with the active testing and work monitoring practice, and the on-site managers and foremen, and the active role Employer took to facilitate and follow up on testing, and the unknown nature of the hazard that was created by the unanticipated inadvertence of the subcontractor's employee, establishes that Employer demonstrated it acted with due diligence in its role as a controlling employer responsible for safety on a multi-employer worksite. (*Hart v. Browne* (1980) 103 Cal.App.3d 947, 964 [expected and customary reliance by clients and others on expert's expertise reasonable and foreseeable].)

Although not operative in California, the federal OSHA field operations manual is consistent with our holding here, to wit, that adequacy of inspections is a valid consideration when evaluating circumstances involving controlling employers. The due diligence required of a general contractor when it is the “controlling employer” varies according to the circumstances. For example the frequency of its inspections depend on the nature of the work, how much the general contractor knows about the safety history and practices of the subcontractor and the subcontractor’s level of expertise. The general contractor is not normally required to inspect for hazards as frequently or to have the same level of expertise and knowledge of applicable standards as the subcontractor it hired.

Thus, we agree with the ALJ’s conclusion that Employer’s appeal should be granted. We find that the evidence shows Employer acted with due diligence under the existing circumstances. To the extent that the Decision may reasonably be read as shifting the burden of proof to the Division to show Employer did not act with due diligence, we disapprove it. The Division would have the obligation to rebut evidence (assuming it is sufficient standing alone) produced by a controlling employer who seeks to prevail on its appeal by asserting and proving this affirmative defense. But the Division does not have an initial burden to prove employer acted without due diligence.

Amicus Worksafe further asserts the analysis in the ALJ Decision erroneously adds additional elements to the proof required of the Division to establish a general contractor is a controlling employer. We read the Court of Appeal decision as resolving the issue of whether or not the Division met its burden of proof to establish Employer was a controlling employer, and that the issue is not before the Board, nor was it before the ALJ in the remand proceeding.

Amicus Worksafe further urges the Board to hold that the civil negligence law is the applicable law in defining the due diligence affirmative defense articulated by the Court of Appeals in this case. The Court of Appeal did not direct this Board to adopt that standard, and we do not do so here. We only conclude that there is sufficient evidence in this record to establish Employer met its burden of showing it acted with due diligence. Specifically, Employer appropriately hired, supervised, monitored and followed up on the work of Champion, and the hazard was unknown to all due to its inadvertent creation by the subcontractor’s employee. Employer has established it acted with due diligence in relation to this violation, and so it has established this affirmative defense available only to controlling employers.

Amicus Construction Employers Association asserts due diligence should be defined as “appropriate carefulness, the degree of care that a prudent person would exercise which is a legally relevant standard for establishing liability.” This is also a negligence standard which we decline to adopt. We have considered all of the behaviors of Employer in concluding that, in this case, due diligence has been shown.

### **DECISION AFTER RECONSIDERATION**

As stated above, the result of the ALJ’s Decision After Remand is affirmed and Employer’s appeal is granted.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
FILED ON: FEBRUARY 26, 2015