

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

In the Matter of the Appeal of:

RICHARD LOMPA
1319 Sanderling Island
Richmond, CA 94801

Employer

Docket No. 12-R1D4-1796

**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 Richard Lompa (Employer).

JURISDICTION

Commencing on March 12, 2012, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On May 17, 2012, the Division issued a citation to Employer alleging two General violations of occupational safety and health standards codified in California Code of Regulations, Title 8.¹ Citation 1, Item 1 alleged a violation of section 1529(f)(2)(A) [failure to assure competent person conducted an asbestos exposure assessment] and Citation 1, Item 2 alleged a violation of section 1529(k)(2)(A) [failure to determine presence, location, quantity of asbestos containing material and/or presumed asbestos containing material].

Employer timely appealed the Citation.

Thereafter administrative proceedings were held before an Administrative Law Judge (ALJ) of the Board, including a duly-noticed contested evidentiary hearing held on May 1, 2013. At the hearing the Division moved to amend the Citation to allege "Willful General" violations according to proof.

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

On June 24, 2013, the ALJ issued a Decision (Decision) which upheld Citation and granted the motion to amend.

Employer timely filed a petition for reconsideration.

The Division filed an Answer to the petition.

ISSUE

Were the alleged violations established by the evidence in the record?

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 asserts that the ALJ acted in excess of powers, the evidence does not justify the findings of fact, and the findings of fact do not support the Decision. Employer argues that the evidence was insufficient to prove the alleged violations and that he was not an employer.

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.

Employer is the owner of two condominium units in Albany, California, which he rents to others for residential use.

Employer testified that on March 5, 2012 he hired two "handymen" to help him remove the "popcorn" (a sprayed on material which gives the ceiling a

textured appearance)² from the ceiling of one of his units, # 1726. The manager of the condominium complex also testified that he observed the removal work being done by two men on March 5, 2012, and that he also observed the removal work being done on March 7, 2012.

The uncontradicted evidence established that the popcorn material contained at least 7% asbestos, above the applicable regulatory threshold of 1%. That concentration of asbestos obligated Employer, among other duties, to have an exposure assessment performed, to determine the quantity of asbestos containing material present, and to have his employees use protective equipment. Employer testified that he was aware of asbestos' hazardous nature on March 5, 2012. He also testified that the handymen he hired did not know or care whether the ceiling material contained asbestos.

The evidence established that Employer, despite his claim that he did not know the ceiling material contained asbestos, had been informed that the material contained asbestos above the regulatory threshold. Employer executed two leases, one in 2007, advising his tenants that the ceiling contained asbestos, and he had received a notice from the condominium association informing him of the asbestos in the ceiling material.

Section 1529 applied to this work. Section 1529(a)(1) states, in pertinent part, that the section "regulates asbestos exposure in all construction work as defined in section 1502 including but not limited to . . . (B) Removal or encapsulation of materials containing asbestos." Section 1529(b) defines "removal" as "all operations where ACM [asbestos containing material] is taken out or stripped from structures or substrates, and includes demolition operations." Section 1529(b) also defines "surfacing material" as "material that is sprayed, troweled-on or otherwise applied to surfaces (such as acoustical plaster on ceilings and fireproofing on structural members, or other materials on surfaces for acoustical, fireproofing and other purposes)." In light of the quoted definitions the work Employer caused to be done fell within the scope of section 1529. The popcorn was a "surfacing material" which was being "remov[ed]" by the handymen Employer had hired on March 5, 2012.

Citation 1, Item 1 alleged Employer had violated section 1529(f)(2)(A), which requires the potential for asbestos exposure be assessed by a competent person before or when work on asbestos containing material begins. The evidence adduced at hearing shows that no such assessment had been done on or before March 5, 2012 by Employer. Further, Employer did not put on any evidence that he had done such an assessment (even assuming he were competent to do so) or caused an assessment to be done. Indeed, Employer's denial that the ceiling material even contained asbestos, despite his being informed that it did, acknowledging as much in two leases, and in view of the

² We will not use quotation marks around the term *popcorn* for the remainder of this decision.

test results in evidence showing it did, establishes that he did not have the required assessment done. The violation of section 1529(f)(2)(A) was thus established.

The evidence summarized above also shows the violation to have been willful. Employer knew the ceiling material contained asbestos, and he chose not to have an assessment performed. Section 334 provides that a violation is willful if either (1) an employer intentionally violated a safety law; or (2) an employer had actual knowledge of an unsafe or hazardous condition and yet did not attempt to correct it. (*Rick's Electric v. California Occupational Safety and Health Appeals Bd.* (2000) 80 Cal.App.4th 1023, 1034.) At a minimum, Employer satisfied the second test of willfulness: he knew asbestos was hazardous, knew the ceiling material contained asbestos, and did nothing to correct the condition or to protect his employees from it.

The same reasoning applies to Citation 1, Item 2, which alleged that Employer violated section 1529(k)(2)(A) by failing to determine the “presence, location, and quantity” of asbestos containing material before the work began. Employer told the Division’s inspector that he did not know the ceiling contained asbestos. It is reasonable to infer from that statement that Employer had not determined the “presence, location, and quantity” of the asbestos containing material before having the work done. First, Employer was on notice that the ceiling material did contain asbestos, and second even if he had “forgotten” he took no steps to check into the issue or inform himself further. Also, Employer’s testimony that the two handymen did not know or care whether the ceiling material contained asbestos indicates that he did nothing to satisfy section 1529(k)(2)(A)’s requirements or tell his workers about the asbestos. Instead, we view the evidence as at best showing that Employer maintained a deliberate but disingenuous “ignorance” of the situation.

And here, too, at least the second test of willfulness in section 334 is satisfied for the same reasons. (*Rick's Electric*, 80 Cal.App.4th 1104, *supra.*)

Employer’s second line of defense is his claim that he was not an employer. Employer testified that he initially hired two handymen to remove the ceiling material.³ He argues they were independent contractors, but provided no proof of their status as such, other than his testimony.

The California Occupational Safety and Health Act (Labor Code § 6300 *et seq.*) incorporated the definition of “employer” given in Labor Code section 3300. (Labor Code § 6304.) In pertinent part, Labor Code section 3300 provides that “employer” “means . . . (c) Every person including any public service corporation, which has any natural person in service.” Employer, as a

³ Later, after some removal was done, Employer hired a licensed asbestos removal firm to complete the project.

natural person, is a “person” as the term is used in Labor Code section 3300, and he had two other natural persons, the handymen, in service on March 5 and March 7, 2012.

Status as “employees” and “independent contractors” is distinguishable based on the right of control. (*McDonald’s Van Ness*, Cal/OSHA App. 00-1621, Decision After Reconsideration (Sep. 26, 2001).) The right of control is the most important factor in determining what type of employment relationship exists in a given circumstance, although several secondary indicia may also be considered. (*Borello & Sons, Inc. v. Dept. of Industrial Relations* (1989) 48 Cal.3d 356; *Shiho Seki dba Magical Adventure Balloon Rides*, Cal/OSHA App. 11-0477, Denial of Petition for Reconsideration (Aug. 31, 2011).) The evidence shows that Employer controlled the location of the work and the task to be accomplished. The two handymen were apparently casual hires. And although the work appears to have been done by them initially without special tools, equipment or skills, to be done *safely* and in compliance with applicable regulations, the work of asbestos removal operations *does* require special tools, equipment, methods and skills.⁴

Employer put on no evidence which would tend to indicate that the handymen were independent contractors, such as evidence that they supplied their own tools, had special skills, were licensed contractors or otherwise qualified to perform asbestos removal. As already mentioned Employer testified, in contrast, that the handymen did not care whether the ceiling material contained asbestos, which if true would indicate a degree of indifference incompatible with appropriately skilled and/or licensed contractors. And, even if we assume the handymen were independent contractors, they were not shown to be licensed to perform asbestos removal. Labor Code section 2750.5 establishes the presumption that an unlicensed persons performing work for which a contractor’s license is required is an employee.

The work at issue involved renovation or remodeling of a residence, albeit one Employer rented rather than occupied. Assuming for analytical purposes, without deciding the question, that the work here involved remodeling of a residence, we note that the California Supreme Court has held that “whether a home remodeling project extends beyond mere household maintenance will generally depend on the totality of the circumstances, including but not limited to, the scope of the project and the extent to which it involves significant demolition and construction work, the labor and skills required for the project, the need for building and/or other construction permits, and the extent to which those hired for the project are subject to state licensing requirements.” (*Cortez v. Abich* (2011) 51 Cal.4th 285, 295 fn. 4.) The “totality of the

⁴ We note that in addition to the safety order, section 1529, at issue here, Employer’s work was also subject to regulations of the Bay Area Air Quality Management District.

circumstances” here shows that while the work was not extensive, it did involve exposure to dangerous (carcinogenic) material in concentrations several times greater than the regulatory threshold, which required special skills to perform safely and in compliance with regulatory requirements, as well as permits to do the work and state licensing. Accordingly, we affirm the Decision’s holding that the handymen were employees and not independent contractors as argued.

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 12, 2013