

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

DECISION

Statement of the Case

840 The Strand, LLC (Appellant) is a limited liability corporation¹ which owns an apartment building. Beginning June 19, 2013, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer Hein Le (Le) conducted a complaint inspection at a site maintained by Employer at 840 The Strand, Hermosa Beach, California (the site). On September 5, 2013, the Division cited Appellant for (1) failure to establish, implement and maintain an effective Injury and Illness Prevention Plan, (2) failure to post a Code of Safe Practices, (3) failure to establish and maintain a written Heat Illness Prevention Plan and (4) failure to tie or secure a rolling scaffold.

Appellant filed timely appeals contesting the existence of the violations and the reasonableness of the penalties for all citations. In addition, Appellant appealed the classification of Citation 2 (concerning the failure to secure a scaffold). Further, Appellant asserts that 840 The Strand, LLC is not an employer.

¹ Pursuant to California Corporations Code section 17701.01 et seq. "limited liability company," except in the phrase "foreign limited liability company," means an entity formed under this title or an entity that becomes subject to this title pursuant to Article 13 (commencing with Section 17713.01).

This matter came on regularly for hearing before Ursula L. Clemons, Presiding Administrative Law Judge (PALJ) for the California Occupational Safety and Health Appeals Board, at West Covina on May 27, 2014. Jay Mitchell, sole LLC member, represented the Appellant. Zohra Ali, District Manager, represented the Division. The parties presented oral and documentary evidence. The record was closed on May 27, 2014. The undersigned extended the submission date to June 11, 2014.

Issues

1. Whether Appellant was an Employer as defined by the Labor Code.
2. Whether Appellant had an Injury Illness and Prevention Plan (IIPP), Code of Safe Practices (CSP) and Heat Illness Prevention Plan (HIPP).
3. Whether the rolling scaffold was tied or secured to the building located at 840 The Strand, Hermosa Beach, CA.
4. Was there a realistic possibility that death or serious physical harm would result from the actual hazard created by violation of Section 1646(a)?
5. Were the penalties properly calculated and reasonable for all violations?

Findings of Fact

1. Appellant paid a natural person to perform construction work.
2. The natural person was paid to do construction work on an apartment building owned by Appellant.
3. The natural person hired to perform the work did not hold a contractor's state license to perform this work.
4. At the time of inspection Appellant was asked to produce an IIPP, a CSP and HIPP.
5. Appellant did produce an IIPP, a CSP and HIPP but only after the inspection in an effort to be cooperative; the documents were delivered to the Division approximately a week or two after citations issued.
6. Division Inspector Le observed two people on a scaffold performing construction work on the building owned by Appellant.
7. The scaffold used was a rolling scaffold and was not secured or tied to the building.
8. The rolling scaffold was approximately 26 feet high from the concrete ground.
9. The actual hazard was the potential tipping of the scaffold due to lack of it being secured or tied to the three story building.
10. If a person were to fall from the 26 foot scaffold height, there is a realistic possibility that serious injury would result.
11. Appellant knew the scaffold was neither tied nor secured to the building.
12. Since Appellant was cooperative, Good Faith rating is Fair (15%).
13. Appellant had only two employees. Size credit is 40% credit.

14. Appellant had no history of citations, so History is rated “good” allowing for 10% penalty reduction.
15. Severity, extent and likelihood were all properly rated low because there were only two employees exposed to the fall hazard of 26 feet from the top of the rolling scaffold to the ground.

ANALYSIS²

1. 840 The Strand, LLC was an Employer.

Jay Mitchell (Mitchell), building owner and sole member of 840 The Strand, LLC contested the existence of the violations, asserting that neither he nor the entity cited was an Employer. The threshold question is whether the relationship between 840 The Strand, LLC and worker “Erick,” under the Occupational Safety and Health Act of 1973 (the Act) is that of employer-employee. To sustain the citations under the posture of the law, a relationship of employer/employee must exist between the Employer and the injured worker. (*Moran Constructors, Inc.* OSHAB 74-381, DAR (Jan. 28, 1975).

Labor Code section 6300 establishes the California Occupational Safety and Health Act of 1973 (the Act) “for the purpose of assuring safe and healthful working conditions for all California working men and women...” Section 6304 specifies that “Employer” is to have the same meaning as it has pursuant to section 3300(c), which states an Employer is “every person including any public service corporation, which has any natural person in service.”

Labor Code section 6304.1(a) provides:

“Employee” means 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. (*Sully-Miller Contracting Co.* OSHAB 99-0896 DAR (Oct. 30, 2001).)

Labor Code section 6303(a) provides:

“Place of employment” is any place and the premises appurtenant thereto, where employment is carried on except a place where the health and safety jurisdiction is vested by law in, and actively exercised by, any state or federal agency other than the division.

² Exhibits received and testifying witnesses are listed on Appendix A. Certification of the Record is signed by the ALJ. Unless otherwise specified, all section references are to Sections of Title 8, California Code of Regulations.

Labor Code section 6303(b) provides:

“Employment” includes the carrying on of any trade, enterprise, project, industry, business, occupation, or work, including all excavation, demolition, and construction work, or any process or operation in any way related thereto, in which any person is engaged or permitted to work for hire, except household domestic service.

California Business and Professions Code (B & P Code) section 7026 defines “Contractor”. “It is any person who undertakes to or offers to undertake to, or purports to have the capacity to undertake to, or submits a bid to, or does himself or herself or by or through others, construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building, highway, road, parking facility, railroad, excavation or other structure, project, development or improvement, or to do any part thereof, including the erection of scaffolding or other structures or works in connection therewith, or the cleaning of grounds or structures in connection therewith, or the preparation and removal of roadway construction zones, lane closures, flagging, or traffic diversions, or the installation, repair, maintenance, or calibration of monitoring equipment for underground storage tanks, and whether or not the performance of work herein described involves the addition to, or fabrication into, any structure, project, development or improvement herein described of any material or article of merchandise.”

California B & P Code Section 7026.1(a)(2)(A) states contractor includes:

“Any person, consultant to an owner-builder, firm, association, organization, partnership, business trust, corporation, or company, who or which undertakes, offers to undertake, purports to have the capacity to undertake, or **submits a bid** to construct any building or **home improvement project, or part thereof.**” (emphasis added)

Under Labor Code section 2750.5, a presumption attaches that an unlicensed person performing work for which a contractor’s license is required by Business and Professions Code (B & P) section 7000 et seq., is an employee and not an independent contractor. *Foss v. Anthony Industries*, (1983) 139 Cal.App.3d 794, held that Labor Code section 2750.5 applies to proceedings under Division 5 of the Labor Code, the Occupational Safety and Health Act. Labor Code section 2750.5 provides that it is presumed that a worker who is performing services for which a contractor’s license is required, or who is working for a person who is required to be licensed, is an employee of the person for whom the work is being done. (See *State Compensation Ins.*

Fund v. Workers' Comp. Appeals Bd. (1985) 40 Cal.3d. 5). This rule applies in Cal/OSHA proceedings (see *Tree People*, OSHAB 91-315, Denial of Petition for Reconsideration at p.2 (Dec. 31, 1991).)

Labor Code sections 6303 and 6304.1, provide that an employee and an independent contractor are distinguishable based on the right of control, and the considerations listed in Restatement of Agency section 220. (See *Commercial Diving*, OSHAB 91-921, DAR (Apr. 14, 1994).) Whether the person is an employee or an independent contractor depends upon considerations, such as whether the worker holds himself out as an independent contractor, whether the worker provides his own tools, whether the work is customarily done by independent contractors, and whether there is any suggestion of a subterfuge in the arrangement. (*Oasis Springs Corporation*, OSHAB 95-009 DAR (Feb. 18, 1998).)

The threshold issue in the present appeal is whether the Division established by a preponderance of the evidence that Erick (and Hector) was an employee of 840 The Strand, LLC.

Here, Mitchell testified that Erick stated he was a handyman contractor, yet Mitchell presented no evidence that Erick held a license. Le testified that she could not find a license for this person given the limited information she had (first name only and city of Rancho Cucamonga). Upon questioning, Erick told Le he did not have a building contractor's license. The type of work being performed as admitted by both Erick and Mitchell and observed by Le was caulking work in preparation for painting the apartment building. This activity qualifies as home improvement project, or part thereof, and thus meets the definition of contractor's work as indicated in B & P Code sections 7026 and 7026.1(a)(2)(A). Pursuant to section 2750.5 one who is performing such work for which a contractor's license is required is an employee of the person for whom the work is being done. Hence, since there is no evidence that Erick had such license he is presumed to be an employee of 840 The Strand, LLC.

There is clearly an employee-employer relationship as Erick, a natural person, was in the service of 840 The Strand, LLC. Mitchell admitted to paying Erick for the work and Erick stated to Le that he did not have a license from Contractor's State Licensing Board. The employment undertaken according to Mitchell, the sole member of the LLC, was that of construction work at a place or the premises appurtenant thereto, the apartment building under renovation located at 840 The Strand, Hermosa Beach, CA.

In order to rebut the presumption in the first sentence of section 2750.5, the worker must have a valid contractor's license. If that is established, other factors such as direction and control may be relevant.

Such a license was not presented by Employer (Mitchell) and therefore he has failed to establish on this record the independent contractor status of Erick. Further, Erick's associate, Hector, is considered an employee of Mitchell as a corollary of this finding (See *Blew v. Horner* (1986) 187 Cal.App.3d 1380.)

2. The Division established that Employer did not have an Illness and Injury Prevention Plan, Code of Safe Practices or Heat Illness Prevention Plan.

Every Employer is required to establish, implement and maintain an effective Injury Illness Prevention Program (§ 1509(a)). The Code of Safe Practices shall be posted at a conspicuous location at each job site or provided to each supervisory employee who shall have it readily available (§1509(c)). The employer's procedures for complying with each requirement of Heat Illness Prevention Program standard required by subsections (f)(1)(B), (g), (H) and (I) shall be in writing and shall be made available to employees and to representatives of the Division upon request (§ 3395(f)(3)).

In *Paramount Scaffold, Inc.*, Cal/OSHA App. 01-4564, Decision After Reconsideration (Oct. 7, 2004) the Appeals Board held that where the Division presents evidence which, if believed, would support a finding if unchallenged (*prima facie* case), the burden of producing evidence shifts to the employer to present convincing evidence to avoid an adverse finding.

The evidence establishes Employer did not have an IIPP, a code of safe practices, or necessary training and inspection records on the date of the inspection. DOSH Safety Engineer Le gave a Document Request sheet (Exhibit 2) to Employer during her visit on June 20, 2013. She requested a copy of the IIPP, Workplace Safety Inspection Records for rolling scaffold, Employee Training Records for Erick and Hector, the HIPP and the CSP as well. Employer did not have any of the documents requested and in fact Mitchell told Le he was not aware of what the requested items were.

The Division, through Le, issued Citation 1, Item 1 because every Employer is required to have an IIPP (§ 1509(a)). Citation 1, Item 2, was issued because the CSP is required of every employer in the construction industry § 1509(c)). Citation 1, Item 3, was issued because the employees were working outdoors on top of the unsecured rolling scaffold placed next to the exterior of the building (see Exhibit 4) and thus, a HIPP was required (§ 3395(f)(3)).

Appellant Mitchell admitted he did not have any of the documents requested because he believed the LLC was not an employer and thus such programs were not required. In an effort to cooperate, Mitchell did put together a program and delivered it to OSHA approximately a week or two after being cited.

The Division enjoys a rebuttable presumption that its proposed penalties are reasonable once it establishes that they were calculated in accordance with the Division's policies, procedures and regulations (*Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).)

Le presented Exhibit 3, Division's Proposed Penalty Worksheet and stated that for Citation 1, Items 1, 2 and 3, she rated Good Faith as Fair (15%) because although initially non-compliant Employer was cooperative; Size at 40% because there were two employees and History as Good (10%) because Employer did not have a history with the Division. Severity, extent and likelihood were all rated low because there were only two employees exposed to the fall hazard of 26 feet from the top of the rolling scaffold to the ground.

As determined above, Appellant is an Employer and thus the safety orders requiring an IIPP, Code of Safe Practices and HIPP apply. Employer did not possess any of the required documentation, thus the violations are established. Employer did not present any evidence to rebut the presumption about calculation of the penalties, and therefore, the penalties for Citation 1, Items 1 through 3, are found reasonable.

3. The Division established the rolling scaffold was not tied or secured to the building located at 840 The Strand, Hermosa Beach, CA.

The Division cited Employer for violation of section 1646(a) which provides as follows:

The minimum dimension of the base of any free-standing tower or rolling scaffold shall not be less than 1/3 the height of the scaffold unless such scaffold is securely guyed or tied. For restrictions when worker rides scaffold see paragraph (f) following.

The Division alleged the following:

There were two employees working on a rolling scaffold (26 feet high, 5 feet base). The rolling scaffold was not tied or secured to the building as required. The scaffolds were located at the North side of the building and next to the 4 slot parking lot.

The Division has the burden to establish employee exposure to the cited hazard. The Board has held that an employer may be held responsible only for those violations to which one or more of its employees is exposed. (See *Red's Express*, OSHAB 81-1256, Decision After Reconsideration (Mar. 7,

1985); *Moran Constructors, Inc.*, supra. The Division has the burden of proof of establishing exposure of such an employee as part of its prima facie case.

Here Le observed two employees on a rolling scaffold located at 840 The Strand, Hermosa Beach, CA. She measured the width of the base as five feet and the height as 26 feet. Because the height was more than three times the width of the base, the safety standard required the scaffold to be guyed or tied. However, here the rolling scaffold was not tied to the three story building or secured in anyway. She took pictures (Exhibits 4 A-D) from a few angles, all of which showed the scaffold was not tied off. There were no tie offs observed by Le. The top level where the employees were observed working was fully planked. Le testified that the scaffold was resting on sloped concrete adjacent to the parking lot of the building. There was employee exposure to the hazard of the scaffold tipping as the ground was uneven and the rolling scaffold was not secured to the building. Mitchell was not present during her investigation/inspection. During hearing he testified that the scaffold was up when Erick was hired. It had been taken down quite a few times since the project started a couple of months prior to the Division's investigation. Thus, Employer violated section 1646(a).

Labor Code Section 6432(a) provides "There shall be a rebuttable presumption that a "serious violation" exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard."

The legal standard "realistic possibility" is not defined in the safety orders. The Appeals Board utilized a "reasonable possibility" standard in *Oliver Wire & Planting Co., Inc.*, Cal/OSHA App. 77-693, Decision After Reconsideration (April 30, 1980) when analyzing whether an employer must ensure workers possibly exposed to the danger of splashing caustic chemicals were required to wear eye protection. The Appeals Board determined that it is unnecessary for DOSH to "present actual proof of hazardous splashing if a realistic possibility of splashing exists." They explained, "[c]onjecture as to what would happen if an accident occurred is sufficient to sustain (a violation) of the existence of unsafe working conditions if such a prediction is clearly within the bounds of human reason, not pure speculation." This definition was again utilized in *Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (September 27, 2001).

Pursuant to Labor Code section 6432, the "demonstration of a violation by the Division is not sufficient by itself to establish that the violation is serious. The actual hazard may consist of the existence in the place of employment of an unsafe or unhealthful practice, means, methods, operations or processes that have been adopted or are in use."

Here, the citation issued was properly classified as Serious. Le testified that there was a realistic possibility of serious injury were an employee to fall 26 feet to the concrete sloped ground from the unsecured scaffold with tipping hazard. Her testimony was un rebutted and credible.

An employer may defeat a Serious classification if it can establish that “the employer did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation”. (*Vance Brown, Inc.*, Cal/OSHA App. 00-3318, DAR (Apr. 1, 2003)) That is not the case here. Appellant admitted to having knowledge that the scaffold was erected and there was no mechanism in place to prevent employees from accessing it. The employees were observed in plain view standing on the top (fourth) level of the rolling scaffold performing caulking duties at the sited location.

Le rated severity serious and extent and likelihood low. Good Faith was rated fair (15%), Size was rated at 40% and History was rated as good (10%). With an original penalty amount of \$18,000 and applying abatement credit, the proposed penalty was calculated at \$1,575. The penalty for Citation 2 is properly calculated according to § 336 and is affirmed.

Conclusion

Appellant is determined to be an Employer as defined by the applicable Labor Code sections. Employer admittedly did not have an IIPP, Code of Safe Practices or HIPP and thus violations of sections 1509 and 3395 are established as alleged. The rolling scaffold was required to be tied off or secured to the building as the base was less than 1/3 of the height of the scaffold, and therefore section 1646(a) was violated, as alleged in Citation 2. The citation was properly classified as Serious because there was a reasonable possibility of a tipping hazard resulting in serious injury from a 26 foot fall.

Order

The Appellant’s appeals are denied. Citation 1, Items 1, 2 and 3 and Citation 2 are affirmed and the penalties proposed are assessed as set forth in the attached summary table.

Dated: July 2, 2014

URSULA L. CLEMONS
Presiding Administrative Law Judge

ULC:ml

APPENDIX A

**SUMMARY OF EVIDENTIARY RECORD
840 The Strand LLC
Dockets 13-R3D5-3353/3354**

Date of Hearing: May 27, 2014

Division's Exhibits

Exhibit Number	Exhibit Description	Admitted
1	Jurisdictional Documents	Yes
2	Document Request Sheet	Yes
3	Proposed Penalty Worksheet	Yes
4	Photographs (A-D) – rolling scaffold	Yes
5	Print out of webpage advertising apartments	Yes
6	Secretary of State Business Entity Detail – 840 The Strand, LLC	Yes
7	Order Prohibiting Use (OPU)	Yes

Witnesses Testifying at Hearing

1. Hien Le
2. Jay Mitchell

CERTIFICATION OF RECORDING

I, Ursula L. Clemons, the California Occupational Safety and Health Appeals Board Presiding Administrative Law Judge duly assigned to hear the above matter, hereby certify the proceedings therein were electronically recorded. The recording was monitored by the undersigned and constitutes the official record of said proceedings. To the best of my knowledge, the electronic recording equipment was functioning normally.

Signature

Date

**SUMMARY TABLE
DECISION**

In the Matter of the Appeal of:

**840 THE STRAND, LLC.
Dockets 13-R3D5-3353 and 3354**

Abbreviation Key:	
Reg=Regulatory	
G=General	W=Willful
S=Serious	R=Repeat
Er=Employer.....	
AR=Accident Related	
DOSH=Division	

IMIS No. 125874479

DOCKET	CITATION	ITEM	SECTION	TYPE	MODIFICATION OR WITHDRAWAL	AFFIRMED	VAITED	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT HEARING	FINAL PENALTY ASSESSED BY BOARD
13-R3D5-3353	1	1	1509(a)	G	[IIPP] ALJ sustained violation.	X		\$85	\$85	\$85
		2	1509(c)	G	[Code of Safe Practices] ALJ sustained violation.	X		\$85	\$85	\$85
		3	3395(d)(3)	G	[HIPP] ALJ sustained violation.	X		\$85	\$85	\$85
13-R3D5-3354	2	1	1646(a)	S	[Failure to securely tie or secure rolling scaffold] ALJ sustained violation.	X		\$1,575	\$1,575	\$1,575
								\$1,830	\$1,830	\$1,830

Total Amount Due*

(INCLUDES APPEALED CITATIONS ONLY)

\$ 1,830

<p>NOTE: <i>Please do not send payments to the Appeals Board. All penalty payments must be made to:</i> Accounting Office (OSH) Department of Industrial Relations P.O. Box 420603 San Francisco, CA 94142 (415) 703-4291 (415) 703-4308 (payment plans)</p>
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*You will owe more than this amount if you did not appeal one or more citations or items containing penalties. Please call (415) 703-4291 if you have any questions.

ALJ: ULC/ml
POS: 07/02/14