

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

In the Matter of the Appeal  
of:

**CABRILLO ECONOMIC DEVELOPMENT  
CORPORATION**  
702 County Square Drive  
Ventura, CA 93003

Employer

DOCKETS 11-R4D3-3185  
and 3186

**DECISION  
AFTER REMAND**

**Statement of the Case**

Cabrillo Economic Development Corp. (Employer) is a construction contractor. Beginning August 15, 2011, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer Jeff Magro conducted an accident inspection at a place of employment maintained by Employer at 4208 Center Street, Piru, California (the site). On December 9, 2011, the Division issued Employer Citation 2<sup>1</sup>, citing Employer as the controlling Employer at a multi-employer construction site.

Employer filed timely appeals, as amended<sup>2</sup>, which included all grounds for appeal and multiple affirmative defenses for all violations.

A contested evidentiary hearing was held before an Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board on November 14, 2012. On March 29, 2013, the ALJ issued a Decision

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<sup>1</sup> Unless otherwise specified, all references are to Sections of California Code of Regulations, Title 8. Citation 2 alleged a serious violation of section 1632, subdivision (b)(1) failure to guard a floor opening, with a proposed penalty of \$12,600. Citation 1, Item 1, alleged a general violation of section 1509, subdivision (a). Citation 1, Item 2 alleged a general violation of section 3395, subdivision (f)(3). Prior to the hearing on November 12, 2014, the Division moved to withdraw instances 1 and 3 of Citation 1, Item 1, and reduce the penalty to a stipulated amount of \$50. The Division moved to withdraw Citation 1, Item 2 due to a showing of substantial compliance by Employer. The motions were granted and Employer withdrew its appeal of Citation 1, Item 1.

<sup>2</sup> Employer's motion to amend appeals was granted on April 10, 2012.

granting Employer's appeal of Citation 2<sup>3</sup>. On May 3, 2013, the Division of Occupational Safety and Health filed a petition for reconsideration for Citation 2. On June 18, 2013, the Occupational Safety and Health Appeals Board (Board) took the petition for reconsideration under submission.

On October 16, 2014, the Board issued a Decision After Reconsideration and Remand. The Board found a violation of Citation 2 and remanded the matter to determine whether Employer was a properly cited entity.

The ALJ who initially heard the matter left the Board before she was able to hear the matter on remand. Pursuant to regulation 375.1(c), the matter was transferred to another ALJ for hearing. Employer exercised its right to a hearing *de novo*.

On March 26, 2015, this matter came for hearing *de novo* before ALJ Dale A. Raymond. Barbara Macri-Oritz, Attorney, represented Employer. James Clark, Staff Counsel, represented the Division. The parties submitted the case based entirely on written stipulations and documentary evidence. The parties requested, and were granted, leave to file briefs. The matter was submitted on June 11, 2015. The ALJ extended the submission date to November 30, 2015, on her own motion.

### **Issues**

1. Was Employer the proper entity to cite as a controlling employer?
2. Did Employer exercise due diligence in undertaking its safety responsibility?

### **Findings of Fact**

1. Employer was a general contractor at a site for the construction of a farm worker family rental housing development known as Valle Naranjal (the "Project."). The Owner is Valle Naranjal Associates, L.P. Exhibit B is the Prime Contract between the Owner and Employer.

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<sup>3</sup> The parties agreed to bifurcate the case, and to accept the decision in a companion case, *Mid-Coast Builders Supply, Inc., dba Mid Coast Builders, Inc.* on the legal issue in Citation 2: whether section 1632, subdivision (b)(1) was appropriately cited. Should the ALJ find for the Division, the parties agreed they would hold further proceedings to determine whether Employer Cabrillo Economic Development Corporation had been correctly cited as a controlling employer. As the ALJ found for the employer in that case, no further proceedings were held. In its Decision After Reconsideration (*Cabrillo Economic Development Corp.*, Cal/OSHA App. 11-R4D3-3185 and 3186, Decision After Reconsideration and Remand (Oct. 16, 2014)), the Board found that section 1632, subdivision (b)(1) was appropriately cited and that section 1632, subdivision (b)(1) had been violated. This left open the issue of whether Employer Cabrillo Economic Development Corporation had been correctly cited as a controlling employer, for which reason the matter was remanded.

2. Employer selected Mid-Coast Builders Supply, Inc. dba Mid-Coast Builders, Inc. (MCBS) as the framing subcontractor. Exhibit A is the contract between Employer and MCBS. It incorporated the Prime Contract (Exhibit B.) As part of its contract, the principal of MCBS initialed a letter that explained Employer's safety requirements and procedures. (Exhibit L)
3. In accordance with its contractual obligations, MCBS provided Employer copies of its Illness and Injury Prevention Program, Code of Safe Practices Booklet with Addendum A, Fall Hazard Training Manual, Addendum to Fall Prevention Plan, Stacking Observer Training Manual, Heat Illness Training Manual, and proof that weekly safety meetings were held.
4. Framing work began on or about June 28, 2011.
5. Juan Ayon (Ayon) was Employer's Construction Superintendent for the Project. Ayon was responsible to ensure that the subcontractors' work was performed according to specifications. His duties included conducting safety meetings with all the foremen for all trades, participating in inspections and tail gate meetings. Ayon walked the site on a daily basis, watching for safety problems. Ayon coordinated all building and safety inspections.
6. Ayon was familiar with Cal/OSHA's regulations.
7. Ayon met regularly with the MCBS Superintendent responsible for safety to discuss safety protocol. When Ayon would observe a MCBS employee not following appropriate safety protocol, he would call attention to the employee, if feasible, and report the incident to MCBS.
8. Ayon had the authority and responsibility by contract and practice to ensure that hazardous conditions were corrected. Employer was a controlling employer.
9. Ayon did not go up to the second floor during framing activities except for sign-off with building inspectors. As of August 3, 2011, no inspections had been conducted on the second floor of Building 2.
10. David Martinez (Martinez), an MCBS employee, was working on the second floor of Building 2 when he fell from the second floor through an unguarded opening where stairs were to be constructed.

### **Analysis**

#### **1. Was Employer the proper entity to cite as a controlling employer?**

The Division cited Employer as a controlling employer under section 336.10, subdivision (c) which reads as follows:

On multi-employer work sites, both construction and non-construction, citations may be issued only to the following categories of employers when the Division has evidence that an employee was exposed to a hazard in violation of any requirement enforceable by the Division: ...

(c)...The employer who was responsible, by contract or through actual practice, for safety and health conditions on the worksite, i.e. the employer who had authority for ensuring that the hazardous condition is corrected (the controlling employer); ...

An employer may not delegate statutory duties relating to employee safety. (*Southern California Gas Co.*, Cal/OSHA App. 81-0259, Decision After Reconsideration (Sep. 28, 1984).)

Employer's Prime Contract required Employer to evaluate worksite safety<sup>4</sup>. If Employer determined that the means, methods, techniques, sequences or procedures may not be safe, Employer was required to notify the Owner and Architect and to stop work until it received written instructions.

Employer's written contract with its subcontractor MCBS imposed numerous specific safety requirements<sup>5</sup>. These requirements included attendance at safety meetings, compliance with all OSHA safety orders, and Employer audits to ensure compliance with multiple safety requirements. The requirements included copies of their Illness and Injury Prevention Program, their Heat Illness Prevention Program, Material Safety Data Sheets for all hazardous substances, proof of weekly tailgate safety training, proof of safety inspections, copies of all permits, first-aid and fire equipment, and use of hardhats and other personal protective equipment.

Although Employer's subcontractor was required by contract to comply with all Cal/OSHA safety orders, and a clause stated "Subcontractor accepts sole responsibility for providing a safe place to work,"<sup>6</sup> Employer may not delegate its duty to provide a safe and healthful working environment. Such a contract does not relieve Employer of its responsibilities for safety.

Employer's Construction Superintendent Juan Ayon (Ayon) walked the site on a daily basis watching for safety problems<sup>7</sup>. He was responsible to ensure that work was being performed safely. He conducted safety meetings, performed inspections, and had the right to remove unsafe equipment and non-complying workers. He would cure safety problems directly with the person in violation and then report the incident to the sub-contractor's superintendent. Employer was in a position to abate safety order violations.

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<sup>4</sup> Exhibit B

<sup>5</sup> Exhibit L

<sup>6</sup> Exhibit A, p. 8

<sup>7</sup> Stipulation of Facts, paragraphs 18, 19, 23

Employer was not in charge of correcting hazardous conditions, but it is found that Employer had the authority and opportunity to correct the violation both by contract and by practice. Accordingly, Employer was properly cited as a controlling Employer.

Unless Employer established that it exercised due diligence in the performance of its safety duties, it will be in violation of section 1632, subdivision (b)(1), which issue is discussed next.

## **2. Did Employer exercise due diligence in undertaking its safety responsibility?**

Employer asserted the defense of due diligence and cited to the provisions of Labor Code section 6432, subdivision (c), asserting that it had complied with the requirements of subdivisions (c)(1) and (c)(2).

Labor Code section 6432, subdivision (c) provides as follows:

(c) If the Division establishes a presumption pursuant to subdivision (a) that a violation is serious, the employer may rebut the presumption and establish that a violation is not serious by demonstrating that the employer did not know and could not, with the exercise of reasonable diligence, have known of presence of the violation. The employer may accomplish this by demonstrating both of the following:

- (1) The employer took all the steps a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation, taking into consideration the severity of the harm that could be expected to occur and the likelihood of that harm occurring in connection with the work activity during which the violation occurred. Factors relevant to this determination include, but are not limited to, those listed in subdivision (b).
- (2) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered.

“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.” (*Harris Construction Company, Inc.*, Cal/OSHA App. 03-3914, Decision After

Reconsideration (Feb. 26, 2015) p. 2, citing *United Association Local Union 246, ALF-CIO v. California Occupational Safety and Health Appeals Bd.* (2011) 199 Cal.App.4<sup>th</sup> 273 at 284.)

“Adequacy of inspections is a valid consideration when evaluating circumstances involving controlling employers.” (*Harris Construction Company, Inc.*, Cal/OSHA App. 03-3914, Decision After Reconsideration (Feb. 26, 2015) p. 6)

The Appeals Board has interpreted “inspection” to mean a “careful and critical examination or scrutiny sufficient to determine compliance with regulations or detect susceptibility to hazards. This definition connotes that an expectation that an inspection will be done thoroughly and meaningfully.” (*Underground Construction Co., Inc.*, Cal/OSHA App. 98-4105, Decision After Reconsideration (Oct. 30, 2001), *affirmed in part regarding definition of inspection*, Judgment Granting Peremptory Writ of Mandamus, Sacramento County Superior Court, State of California, 01CS01671 (June 24, 2005), Amended Decision After Reconsideration (Feb. 22, 2006) vacating Decision After Reconsideration issued Oct. 30, 2001.)

Failure by a general contractor’s supervisor to inspect, and reliance on the expertise of a subcontractor are not excuses for being unaware of a patent hazard. Rather, it is a demonstration of a lack of due diligence. (See *Overaa Construction v. Cal OSHA Appeals Board etc. et al.* (2007) 147 Cal. App. 4<sup>th</sup> 235, 250.)

Reasonable diligence includes the obligation by foremen or supervisors to oversee the entire work site where safety and health hazards are present if exposure to an unsafe condition exists. (See *Trio Metal*, Cal/OSHA App. 03-0317, Decision After Reconsideration (Feb. 25, 2009); *Vance Brown, Inc.*, Cal/OSHA App. 00-3318, Decision After Reconsideration (Apr. 1, 2003); *A.A. Portanova & Sons*, Cal/OSHA App. 83-891, Decision After Reconsideration (Mar. 19, 1986) pp. 4-5.) A hazard that could have been discovered through periodic safety inspections is deemed discoverable through reasonable diligence. (See *Vance Brown, supra*; *Sunrise Windows*, Cal/OSHA App. 00-3220, Decision After Reconsideration Jan. 23, 2003; *Sturgeon & Son, Inc.*, Cal/OSHA App. 84-113, Decision After Reconsideration (July 19, 1994); *Anheuser-Busch, Inc.*, Cal/OSHA App. 84-113, Decision After Reconsideration (July 30, 1987).)

Here, Employer’s Construction Superintendent Juan Ayon (Ayon) walked the site on a daily basis watching for safety problems<sup>8</sup>. He was responsible to ensure that work was being performed safely. He conducted safety meetings, performed inspections, and had the right to remove unsafe

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<sup>8</sup> Stipulation of Facts, paragraphs 18, 19, 23

equipment and non-complying workers. He would cure safety problems directly with the person in violation and then report the incident to the subcontractor's superintendent.

Ayon had worked for Employer since 2000. He started as a laborer, working his way up as an Assistant Superintendent, Superintendent and then General Superintendent. He had formal training and management in construction including a construction class at UCLA and a ten hour OSHA certificate. Ayon was familiar with Cal/OSHA regulations. He was not prevented from observing the unguarded floor opening hazard by any lack of expertise or knowledge.

Ayon did not go up to the second floor during framing activities except for the sign-off with the Ventura County building inspectors<sup>9</sup>. As of August 3, 2011, no inspections had been conducted on the second floor of Building 2. Reliance on the expertise of its framing subcontractor was not sufficient to meet the requirements for due diligence. Given that the general contractor and its superintendent for the project were qualified in carpentry construction and framing, due diligence required that that inspections be made. Ayon did not take all the steps a reasonable and responsible employer in like circumstances should be expected to take to anticipate and prevent the violation.

If Ayon had performed an inspection, he would have seen the unguarded floor opening. The fact that no one was working on the first floor did not negate the fall hazard to which the employees working on the second floor were exposed, including the employee who fell through the opening.

Therefore, Employer's due diligence defense fails.

### **Conclusion**

Employer is a controlling Employer. Employer did not demonstrate that it acted with due diligence under the circumstances in failing to correct a hazard created by a subcontractor. Therefore, Employer was a proper entity to cite.

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<sup>9</sup> Stipulation of Facts, paragraph 19

**Decision**

It is hereby ordered that Citation 2 is established as indicated above and as set forth in the attached Summary Table. It is further ordered that a penalty of \$12,600 be assessed.

Dated: December 3, 2015

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**DALE A. RAYMOND**  
Administrative Law Judge

DAR:ml

**APPENDIX A**

**SUMMARY OF EVIDENTIARY RECORD  
CABRILLO ECONOMIC DEVELOPMENT CORPORATION  
Dockets 11-R4D3-3185 and 3186**

**Date of Hearing: March 26, 2015**

**Division's Exhibits—Admitted**

<b>Exhibit Number</b>	<b>Exhibit Description</b>
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1	Stipulation of Undisputed Facts
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**Employer's Exhibits—Admitted**

<b>Exhibit Letter</b>	<b>Exhibit Description</b>
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A	Contract between Cabrillo Economic Development Corporation and Mid-Coast Builders Supply, Inc.
B	Prime Contract between Cabrillo Economic Development Corporation and Valle Naranjal Associates, L.P.
C	Fall Protection in Residential Framing
D	Cal/OSHA Pocket Guide for the Construction Industry
...	
L	List of Requirements for Employer's Subcontractors
M	New Mid-Coast Builders, Inc. Rough Carpentry Material and Labor Proposal (four pages)
N	N-1, N-2, N-3, N-4: Photographs of Project during construction
O	Certification by David Martinez of compliance with the Safe Practices and Operational Code Manual, the Fall Hazard Training Manual, and the Stacking Observer Manual for New Mid-Coast Builders, Inc.

**Witnesses Testifying at Hearing**

1. Transcript of November 14, 2012 hearing before Administrative Law Judge Sandra L. Hitt, prepared by *Transcription by Team Legal* from the Board's MP3 recording of the hearing.

**CERTIFICATION OF RECORDING**

*I, Dale A. Raymond, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hear the above matter, hereby certify the proceedings were not electronically recorded. The record consists of the documents described above.*

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**DALE A. RAYMOND**

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December 3, 2015



