

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

RAAM CONSTRUCTION, INC.
341 West First Street, Suite 100
Claremont, CA 91711

Employer

DOCKET 15-R1D4-0155

DECISION

Statement of the Case

RAAM Construction, Inc. (“Employer” or “RAAM”) is a general building contractor licensed in the State of California. Beginning June 23, 2014, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer David Hornung (Hornung),¹ conducted an inspection at 19020 MacArthur Boulevard, Oakland, California (the site). On December 22, 2014, the Division cited RAAM for one violation of California Code of Regulations, title 8: allowing a worker to stand on the step below the topcap of a step ladder to perform work overhead which is prohibited by section 3276, subdivision (e)(15)(E).²

RAAM filed a timely appeal of the citation, contesting the existence of the violation, the classification, and the reasonableness of the proposed penalty. Employer also alleges that the safety order was not violated by RAAM Construction, Inc., its employees, or workers within its control and that the violation is wrongfully assigned and unreasonable.

This matter was heard by J. Kevin Elmendorf, Administrative Law Judge for the California Occupational Safety and Health Appeals Board (OSHAB), at Oakland, California on October 1, 2015. Peter Lindborg, Esq., represented Employer. Gregory Santiago, Legal Unitounsel, represented the Division. The parties were granted leave to file post-hearing briefs by October 23, 2015. The matter was submitted for decision on October 23, 2015. Both parties filed

¹ Prior to the date of the hearing, David Hornung had been promoted to the Oakland District Manager position.

² Unless otherwise specified, all references are to sections of California Code of Regulations, title 8.

timely post-hearing briefs. On its own motion, OSHAB extended the submission date of the case to November 23, 2015.

Issues

1. Was RAAM the controlling employer of the worksite at 10920 MacArthur Boulevard, Oakland, California at the time of the inspection on June 23, 2014?
2. Was the individual observed working overhead while standing on the step below the tocap of a step ladder at the worksite an employee at the worksite?
3. Did RAAM violate section 3276, subdivision (e) (15) (E), by allowing the individual employee to stand on the step below the topcap on the step ladder while performing work?

Findings of Fact

1. RAAM was the general contractor on the site for the construction of a 32 unit senior living facility.
2. Subcontractors were used by RAAM during the construction project at the site and RAAM had employees working at the site on June 23, 2014.
3. On the date of the inspection, June 23, 2014, RAAM had not completed the process of transferring control of the construction site to the owner or other third-party because it had not completed its punch-list items that were identified as needing correction and had its employees and subcontractor's employees working on the site.
4. An individual was observed at the worksite working overhead while standing on the step below the topcap of a step ladder on June 23, 2014.³
5. RAAM had not transferred control of the work site to the owner and had employees and subcontractors on the site, RAAM was the controlling employer on the worksite on June 23, 2014, at the time the individual worker stood on the step below the topcap of a step ladder.

³ The parties stipulated that "An individual just inside the garage entrance was standing on the step below the topcap of a step ladder."

6. At the time of inspection on June 23, 2014, the individual on the step ladder was an employee of some employer at the worksite of 10920 MacArthur Boulevard, Oakland, California.
7. As the controlling employer, RAAM was responsible for the safety of the individual on the step ladder, who was an employee on the worksite on June 23, 2014.
8. Employer RAAM Construction, Inc. violated section 3276, subdivision (e) (15) (E), by allowing the individual employee to stand on the step below the topcap on the step ladder.
9. The violation was correctly classified as “serious” and the proposed penalty is reasonable.⁴

Analysis

1. Was RAAM the controlling employer of the job site of 10920 MacArthur Boulevard, Oakland, California at the time of the inspection on June 23, 2014?

The rules for determining whether an Employer may be the subject of citations issued by the Division on a multi-employer worksite are set forth in section 336.10 as follows:

Section 336.10. Determination of Citable Employer.

On multi-employer worksites, 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:

- (a) The employer whose employees were exposed to the hazard (the exposing employer);
- (b) The employer who actually created the hazard (the creating employer);
- (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 the authority for ensuring that the hazardous condition is corrected (the controlling employer); or

⁴ The parties stipulated that if the Employer is found to be an employer subject to citation for the violation, the designation of the violation as “serious” is not contested and that the calculation of the penalty was accomplished according to the policies, rules and regulations of the Division.

- (d) The employer who had the responsibility for actually correcting the hazard (the correcting employer).

Note: The employers listed in subsections (b) through (d) may be cited regardless of whether their own employees were exposed to the hazard.

At a multi-employer worksite, the Division may cite an employer for a violation created by another employer if the cited employer is a controlling employer. (*C. Overaa v. California Occupational Safety and Health Appeals Board* (3rd Dist. 2007) 147 Cal. App. 4th 235; Labor Code § 6400; Cal. Code of Regs. tit. 8, § 336.10.) A controlling employer is one who "was responsible, by contract or through actual practice, for safety and health conditions on the worksite, which is the employer who had the authority for ensuring that the hazardous condition is corrected (the controlling employer)." (Labor Code § 6400(b), adopting language from section 336.10.) *John Liang Holmes*, Cal/OSHA App.04-0194, 0195 Decision After Reconsideration (Jan. 20, 2011).

Labor Code Section 6400, subdivision (a) provides, "Every employer shall furnish employment and a place of employment that is safe and healthful for the employees therein."

RAAM's site supervisor, Nick Wilson (Wilson), testified that the worksite in question was for the construction of a 32 unit senior living facility. As of June 23, 2014, after serving as the general contractor for the project since 2013, RAAM was in the process of completing its construction duties on the project and moving its equipment off the site. On June 23, 2014, RAAM exercised control over plumbing sub-contractor employees as well as its own employees on site to complete punch lists⁵ and other final work that, according to Wilson, needed to be completed in order to obtain the Temporary Certificate of Occupancy ("TCO") for the project.⁶ In that RAAM had not completed its construction duties and had employees and subcontractors on the site, the unsigned Temporary Occupancy Request (Employer's Exhibit "H-6") dated June 20, 2014, does not establish that Employer had transferred control of the worksite to the owner or its property manager prior to June 23, 2014.

As RAAM, the general contractor, had not transferred control of the project to the owner or any third party as of the date of the inspection, the project was not completed. RAAM is found to be the controlling employer for the worksite on June 23, 2014. As the controlling employer, RAAM may be cited regardless of whether its own employees were exposed to the hazard.⁷

⁵ A "punch list" is a list of usually minor tasks to be completed at the end of a project. See Division's Exhibit "4".

⁶ See Employer's Exhibit C-1, midway down the lower half of the July 31, 2014 email from Nick Wilson to David Hornung.

⁷ Section 336.10 subdivision (c) and Section 336.10 Note. See also, Labor Code section 6400, subdivision (a).

2. Was the individual observed working overhead while standing on the step below the topcap of a step ladder at the worksite an employee at the worksite?

As cited above, the “Note” at the end of Section 336.10, provides:

“Note: The employers listed in subsections (b) through (d) may be cited regardless of whether their own employees were exposed to the hazard.”

Labor Code section 6304.1, subdivision (a) defines “employee” as “...every person who is required or directed by any employer to engage in any employment or to go to work or be at any time in any place of employment.”

An “employee” is a person who works in the service of another person under an express or implied contract of hire, under which the employer has the right to control the details of work performance (*Black's Law Dictionary*).

As RAAM has been determined to be the controlling employer on the work site, if the individual standing on the step below the topcap of the ladder is found to be an employee of RAAM or some other employer at the work site, RAAM will be held responsible for the conduct of the individual on the ladder.

The Division inspector, Hornung, testified that upon arriving at the worksite on June 23, 2014, he saw an individual standing on the step below the topcap of a ladder in an on-site garage while working overhead using a grinder to grind down tabs on an electrical box. Hornung asked the individual his name and the name of his employer. The individual responded that his name was “Oscar Martinez” (Martinez) and that his employer was RAAM Construction. At that time, Martinez pointed across the street to a building as being the location where his employer could be found.

Rachel Blythe (Blythe), a Division employee who was with Hornung at the time of the inspection, corroborated Hornung’s testimony that the individual identified himself as Oscar Martinez and that Martinez had identified RAAM Construction as his employer. Further, Blythe confirmed that Martinez pointed across the street to identify the location his employer could be found.

Hornung further testified that upon crossing the street to where the individual worker had pointed, Hornung and Blythe met with Nick Wilson (Wilson) who identified himself as being the site supervisor for RAAM Construction. Further, Wilson stated that RAAM Construction had a main role

in the construction project. At no time during the inspection did Wilson deny that the individual on the ladder was an employee of RAAM Construction.

The credible and consistent testimony of Hornung and Blythe regarding Martinez's statement identifying himself by name and RAAM as his employer is corroborated by each other's testimony and by their testimony that Martinez pointed across the street to RAAM's construction site office which they subsequently entered and met with Wilson, the site's supervisor.

Evidence Code § 412 states that "If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust." (See, e.g., International Transportation Service, Inc. OSHAB 93-2001, Decision After Reconsideration (June 26, 1997); see also Contri Construction Co., OSHAB 76-921, Decision After Reconsideration (Mar. 31, 1983).)

Rather than providing as a witness the principal of RAAM, Richard Lara (Lara), who was present in the hearing room, RAAM chose the weaker, less satisfactory testimony of Wilson to assert that Martinez was not an employee of RAAM. Wilson's testimony is less persuasive when weighed against the credible testimony of Hornung and Blythe that Martinez identified himself by name and identified his employer as being RAAM Construction.

Further, as to the documents submitted by RAAM that purportedly establish that Oscar Martinez was not on RAAM's payroll,⁸ again Employer chose the weaker, less satisfactory testimony of Wilson, rather than Lara, who could have testified under oath as to whether Martinez was a RAAM employee and whether the payroll records were the sole and exclusive documents reflecting RAAM's payroll on June 23, 2014. Moreover, Lara could have been asked on cross-examination whether Martinez was paid cash for his services. Accordingly, the testimony of Wilson as to the payroll documents and whether Martinez was a RAAM employee is viewed with distrust. It is found that the payroll documents that do not include the name of Oscar Martinez are not persuasive as proof that Martinez was not a RAAM employee.

It is not disputed that RAAM was the general contractor for the project and had employees at the site on June 23, 2014. RAAM also does not deny that an individual was standing on a ladder in the garage while working overhead. No evidence was offered by RAAM to suggest that the individual on the ladder

⁸ Employer's Exhibits H-3 and H-5

working overhead was an independent contractor or a stranger or a volunteer who had no connection to the building.

Accordingly, it is found that the Division established by a preponderance of the evidence that the individual who was standing on the step below the topcap of a ladder while working overhead at the worksite on June 23, 2014 was an employee in service to some employer. In that RAAM was the controlling employer at the site, RAAM was responsible for the safety of the individual employee standing on the step ladder.⁹

3. Did Employer RAAM Construction violate section 3276, subdivision (e) (15) (E), by allowing the individual employee to stand on the step below the topcap of the step ladder?

Section 3276, subdivision (e) (15) (E), under “Climbing and Working on ladders.” provides the following:

(E) Employees shall not sit, kneel, step or stand on the pail shelf, topcap or the step below the topcap of a step ladder.

It is undisputed that on June 23, 2014 an individual was observed at the inspection site standing on the step below the topcap of a step ladder while performing work overhead.

As it has been proven by a preponderance of the evidence that RAAM was the controlling employer at the site on June 23, 2014 and an individual employee at the site was allowed to stand on the step below the topcap on the step ladder, RAAM is found to have violated section 3276, subdivision (e)(15)(E).

Therefore, the Division has met its burden of proof, and thus, the violation is established.

Conclusions

The Division has met its burden of proof that RAAM Construction, Inc. was the controlling employer at the subject worksite and that it allowed an

⁹ Although there is ample evidence to support a finding that Oscar Martinez was the individual on the ladder and that Martinez was an employee of RAAM, it is not necessary to reach that conclusion because under section 336.10, RAAM was the controlling employer and the individual on the ladder was an employee at the worksite whose safety was the responsibility of RAAM.

employee at the worksite to stand on the step below the topcap of a step ladder while performing work.

Employer violated section 3276, subdivision (e) (15) (E) as alleged in Citation 1, Item 1, by allowing an employee to stand on the step below the topcap of a step ladder while performing work.

ORDER

It is hereby ordered that Citation 1, Item 1 is upheld and the associated penalty of \$6,750 is sustained as indicated above and as set forth in the attached Summary Table.

It is further ordered that the penalty indicated above and set forth in the attached Summary Table be assessed.

Dated: December 17, 2015

J. KEVIN ELMENDORF
Administrative Law Judge

The attached decision was issued on the date indicated therein. If you are dissatisfied with the decision, you have thirty days from the date of service of the decision in which to petition for reconsideration.

Your petition for reconsideration must fully comply with the requirements of Labor Code Section 6616, 6617, 6618 and 6619, and with Title 8, California Code of Regulations, Section 390.1.

For further information, call: (916) 274-5751.

APPENDIX A

SUMMARY OF EVIDENTIARY RECORD

RAAM CONSTRUCTION, INC.

DOCKET 15-R1D4-0155

Date of Hearing: October 1, 2015

Exhibit Description

Exhibit No.	<u>Division's Exhibits</u>	<u>Status</u>
1	Jurisdictional documents	ADMITTED
2	Proposed Penalty Worksheet	ADMITTED
3	Hornung Handwritten Notes	ADMITTED
4	Punch List – 2 nd Floor	ADMITTED

Employer's Exhibits

A-1	Blythe email 7/8/14	ADMITTED
A-2	Blythe Statement 7/8/14	ADMITTED
B-1	Blythe email 7/9/14	ADMITTED
B-2	Blythe Statement 7/8/14	ADMITTED
C-1	Blythe Email 7/31/14 4:33 pm	ADMITTED
C-2	Hornung email 7/22/14	ADMITTED
C-3	Hornung email 7/10/14 5:14 pm	ADMITTED
D	Photo – Man on Ladder	ADMITTED
E	Photo – Front of Building	ADMITTED
F	OSHA Letter to Wilson 6/26/14	ADMITTED
G	Hornung email 7/9/14 4:53 pm	ADMITTED
H-1 to H6	OSHA/RAAM Letter & Attachment	ADMITTED
I-1 to I-3	Lara email 7/10/14 10:44	ADMITTED

Witnesses Testifying at Hearing

Rachel Blythe
David Hornung
Nick Wilson

CERTIFICATION OF RECORDING

*I, **J. Kevin Elmendorf**, the California Occupational Safety and Health Appeals Board 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

December 17, 2015

Date

SUMMARY TABLE ORDER

In the Matter of the Appeal of:

**RAAM CONSTRUCTION, INC.
DOCKET 15-R1D4-0155**

Abbreviation Key:	
G=General	Reg=Regulatory
S=Serious	W=Willful
Er=Employer	R=Repeat
Ee=Employee	DOSH=Division
A/R=Accident Related	

Inspection No. 317204972

Site: 10920 MacArthur Blvd, Oakland, CA 94608

Date of Inspection: 06/23/14 – 09/17/14

Date of Citation: 12/22/14

DOCKET	CITATION	SECTION	TYPE	ALLEGED VIOLATION DESCRIPTION MODIFICATION OR WITHDRAWAL	AVFIRMD	VENUE	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT PRE-HEARING or STATUS CONF.	FINAL PENALTY ASSESSED BY BOARD
15-R1D4-0155	1	1	3276(e)(15)(E)	S			ALJ affirmed violation.		
							Sub-Total		
							Total Amount Due*		
									\$6,750
									\$6,750
									\$6,750

Please do not send payments to the Appeals Board.

All penalty payments must be made to:

Accounting Office (OSH)
Department of Industrial Relations
P.O. Box 420603
San Francisco, CA 94142
(415) 703-4291, (415) 703-4308 (payment plans)

*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:JKE

POS: 12/17 /15

