

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

In the Matter of the Appeal of:

JOHNNY'S AUTOMOTIVE REPAIR
7245 32nd Street, Unit P
North Highlands, CA 95660

Employer

Docket No. 05-R2D1-4076

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), having taken the petition for reconsideration filed by Johnny's Automotive Repair (Petitioner) under submission, issues this Decision after Reconsideration pursuant to the authority vested in it by the California Labor Code.

JURISDICTION

On May 11, 2005, a representative of the Division of Occupational Safety and Health (Division) conducted an inspection at 7245 32nd Street, Unit K, North Highlands, California, a business operated by Petitioner. The Division issued Petitioner various citations for violations of the Title 8 occupational safety and health standards, which Petitioner timely appealed.

A hearing was set for July 18, 2007, and a Notice of Hearing was sent to Petitioner. The envelope containing the notice was returned to the Board and was stamped "not deliverable as addressed." The Board then issued a Notice of Intent to Dismiss Appeal and Order Cancelling Hearing, which was sent certified mail. The envelope for this notice was stamped "unclaimed" and was also returned to the Board. Subsequently, the Board issued an Order Dismissing Appeal on August 30, 2007, which Petitioner apparently received.

Petitioner filed a petition for reconsideration on October 3, 2007. The petition asserted that the Division's inspection was conducted in conjunction with an inspection by the Division of Worker's Compensation during which both agencies were informed that Petitioner had no employees.

A hearing on Petitioner's worker's compensation citation was held prior to Petitioner filing its appeal with the Board and Petitioner submitted a portion of the findings and order from that hearing with its appeal. This document was also submitted with the petition for reconsideration. The order, dated September 19, 2005, concluded that the state failed to demonstrate that Petitioner had any employees and, as a result, the worker's compensation citation was dismissed.

The Division did not file an Answer in response to Employer's petition for reconsideration.

ISSUE

Was Petitioner an "employer" subject to citation by the Division?

FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

California Labor Code section 6304 of the Occupational Safety and Health Act (Act) incorporates the definition of "employer" stated in Labor Code section 3300 of the Worker's Compensation Act. In essence, with certain exceptions that are not relevant here, the definition includes any entity that has a natural person in service.¹ At its worker's compensation hearing, Petitioner argued that it is not an "employer," as defined, and prevailed. We hold that we are bound by this determination and conclude that Petitioner is not subject to citation by the Division because it is not an "employer" as defined by the Act.

The California courts have held that the principles of res judicata and collateral estoppel apply to administrative adjudications. *People v. Sims (1982) 32 C.3d 468; 7 Witkin California Procedure (4th Ed.) Judgment, section 339.* Under these principles, an issue that was fully litigated by the parties, or by an entity in privity with a party, may not be litigated anew in a separate proceeding. *French v. Rishell (1953) 40 C.2d 477, 479.*

Three factors must exist before res judicata or collateral estoppel will bar an action: 1) the issue decided at the previous proceeding must be identical to the one sought to be litigated anew; 2) the previous proceeding must have resulted in a final judgment; and 3) the party against whom collateral estoppel is asserted must have been a party or in privity with a party to the prior proceeding. *Sims, supra.* In order for these principles to apply to an administrative decision, the adjudicatory administrative agency must be acting

¹ Labor Code section 6304 refers to section 3300, which includes the following subsection (c): "Every person including any public service corporation, which has any natural person in service."

in its judicial capacity to resolve a disputed issue of fact that is properly before it and the parties must have been given a full and fair opportunity to litigate their claims. *Sims, supra*; *Carmel Valley Fire Protection Dist. v. State of California, et al.* (1987) 190 Cal. App. 3d 521, 535.

Here, the issue in contention before us is identical to the one decided in conjunction with the worker's compensation citation: Did Petitioner have any employees? That adjudication resulted in a final judgment as evidenced by Petitioner's submittal of the order issued in that proceeding.

We next address the third factor, the identity of the parties to the prior proceeding. There is no indication in the record to suggest that the Division was a party to the worker's compensation hearing. It demonstrates, however, that a representative from the Division of Worker's Compensation participated in the prior hearing and was questioned specifically about Petitioner's status as an "employer." We now consider whether the Division of Worker's Compensation and the Division of Occupational Safety and Health are in "privity" for purposes of applying the doctrines of res judicata and collateral estoppel.

California courts have expanded the definition of "privity" over time and have held that it includes situations in which the relationship between the party to be estopped and the unsuccessful party below is "sufficiently close" to justify application of the doctrine. *Dyson v. State Personnel Bd.* (1989) 213 Cal. App. 3d 711, citing, *Lynch v. Glass* (1975) 44 Cal. App. 3d 943. Moreover, the courts have held that agents of the same government are in privity with each other, since they represent not their own rights but the right of the government. *Carmel Valley, supra*, citing, *Lerner v. Los Angeles City Board of Education* (1963) 59 Cal.2d 382, 398. In *Carmel Valley, supra*, the Division was found to be in privity with other state agencies that had participated in the prior litigation because the agencies were all agents of the State of California and had a mutual interest in the prior proceedings. A finding of privity is further justified when the agents have a mutual interest in the subject matter. *Id*; *Dyson, supra*.

Here, the Division of Worker's Compensation and the Division of Occupational Safety and Health are both state agencies and are both components of the Department of Industrial Relations. The citations issued by these agencies appear to have resulted from inspections conducted simultaneously. The interests of the two Divisions in litigating whether Petitioner is an "employer" are substantially similar (i.e., enforcing worker protection laws and upholding their respective citations) and the need to demonstrate that Petitioner was an "employer" was critical to both.

We therefore conclude that the Division of Occupational Safety and Health was in privity with the Division of Worker's Compensation. This conclusion is bolstered by the Division's decision not to contest Petitioner's claims by filing an Answer in response to Petitioner's petition for reconsideration.

Based on the foregoing, we hold that the principles of res judicata and collateral estoppel apply to this proceeding and conclude that we are bound by the prior determination reached by the worker's compensation hearing officer that Petitioner is not an "employer" as defined by the Act.

ORDER

The Order Dismissing Appeals in this matter is vacated and the appeal of Johnny's Automotive Repair is granted.

CANDICE A. TRAEGER, Chairwoman
ROBERT PACHECO, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: February 13, 2008