

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

In the Matter of the Appeal of:

NIBBI BROTHERS ASSOCIATES, INC.  
180 Hubbell Street  
San Francisco, CA 94107

Employer

Docket No. 07-R1D1-2494

**DECISION AFTER  
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken this matter under submission, renders the following decision after reconsideration.

**JURISDICTION**

Beginning on May 31, 2007, the Division of Occupational Safety and Health (Division) conducted a referral inspection at a place of employment in California maintained by Nibbi Brothers Associates, Inc. (Employer). On June 5, 2007, the Division issued one citation to Employer alleging a violation of workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.<sup>1</sup>

Citation 1 alleged a Regulatory violation of section 341(c)(1)(A) [failure to obtain project permit for a construction project] and proposed a civil penalty of \$375.

Employer filed timely appeals of the citation, asserting the regulation was not violated, the classification of the violation was incorrect, and the penalty and abatement requirements were unreasonable, as well as raising various affirmative defenses.

Administrative proceedings were held, including an evidentiary hearing before an Administrative Law Judge (ALJ) of the Board on January 7, 2009. After taking testimony and considering the evidence and arguments of counsel, the ALJ issued a Decision on February 5, 2009. The Decision upheld the citation and imposed a \$375 penalty.

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<sup>1</sup> Unless otherwise specified, all references are to California Code of Regulations, Title 8.

Employer timely filed a petition for reconsideration, which petition the Board took under submission by Order of April 24, 2009. The Division did not file an answer to the petition.

### **ISSUE**

Whether the Decision was correct in sustaining the citation.

### **EVIDENCE**

The summary and discussion of the evidence in the Decision are incorporated here by reference. For convenience, we briefly summarize the evidence here.

Employer is a building construction company. In August 2006 it entered into a contract to demolish an existing 90-foot high structure and build a new five-story building at the same site, 150 Golden Gate Avenue in San Francisco. The new building was to be slightly more than 82 feet high, and was to have a basement in addition to its five stories. Employer was the general contractor for the project.

Demolition work, the first phase of the project, began on September 11, 2006. The demolition was done by a subcontractor, which had received a demolition permit from the Division for that work. That permit specified that it was for a single activity, the demolition of the existing five-story 90 foot high building.

The Division issued no other permit for the project at any time prior to March 2007, and Employer itself did not apply for any permit for the project until May 2007.

The Decision noted that the evidence did not clearly show precisely when the demolition ended or when the construction work on the new structure began. Witnesses for both parties gave testimony indicating that there was some overlap between the two types of work. The Division's witness testified that Employer's representatives stated that a second subcontractor was placing piles or similar components for the new construction in December 2006, and at least some excavation work and pouring of the concrete foundation slab occurred in January 2007. In addition, Employer's witness testified that the demolition subcontractor did construction work, such as excavation for the new building, and demolition concurrently.

The parties' chief dispute in this proceeding concerns amendments to the permit regulations which were promulgated on September 29, 2006 and took effect on October 29, 2006. In brief, the question is whether the old or new regulation applied. In this respect, Employer's witness testified that he was aware that the regulations had been amended on September 29, 2006, with an

effective date of October 29, 2006.<sup>2</sup> He further testified that he discussed the new regulation with others in the construction industry, and with Division personnel in January 2007 and in Spring 2007. Employer began the process of obtaining a permit for the project in March 2007. Formal application appears to have been made at a May 31, 2007 meeting of Employer and the Division, and the permit was issued within a few days.

### **REASONS FOR DECISION AFTER RECONSIDERATION**

In making this decision, the Board relies upon its independent review of the entire administrative record in the proceeding. The Board has taken no new evidence.

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 petitioned for reconsideration on the bases stated in Labor Code section 6617(a), (c), and (e). Employer's several arguments are addressed below.

It was not disputed that the old building that was demolished and the new building to be built in its place were both more than three stories high, and thus subject to permit requirements; *which* requirements were applicable is the question.

As noted, the amendments to the permit regulation took effect after the demolition work on the project commenced. The demolition subcontractor obtained a permit for that work before starting it. Employer first contends it was in compliance with the old regulation because the demolition subcontractor timely obtained a permit for that work, and further that only one permit is required for the work, citing *Fluor Daniel, Inc.*, Cal/OSHA App. 90-948, Decision After Reconsideration (Nov. 20, 1991) ("*Fluor Daniel*").

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<sup>2</sup> The proposed regulation was published in the California Regulatory Notice Register, 2006, Volume No. 10-Z, in March 2006.

*Fluor Daniel* is distinguished from the instant matter both because it applied regulations since replaced by those under which Employer was cited and on its facts. *Fluor Daniel* was hired to oversee the work on a building project, but “*Fluor Daniel* was not involved in the actual construction[.]” (*Fluor Daniel*.) Here Employer was the general contractor, and though it retained subcontractors to perform various portions of the project, such as demolition of the old structure, it performed other portions of the work itself.

Employer contends, again relying on *Fluor Daniel*, that since the demolition subcontractor had obtained a permit for the demolition, no other permit was required. *Fluor Daniel*, does not support that contention. We held there that, “Only one permit is required per activity.” (*Fluor Daniel*.) Demolition is an activity separate and distinct from construction, and poses different risks to employees. The demolition permit issued to Employer’s subcontractor on its face stated it was issued for a single activity, and thus did not extend to the construction phase of the project. Employer was therefore obliged to obtain a permit for the construction activities.

Employer argues that it was denied due process because the new permit regulations took effect after the start of demolition. Employer, however, was aware of the change in the regulations, and their effective date. (See *In re Winner* (1997) 56 Cal.App.4<sup>th</sup> 1481, 1488 [petitioner aware of new rules, consequences of violation; no denial of due process].) And there is nothing in the record indicating or suggesting that the change in the regulations was not made in compliance with the Administrative Procedures Act (Gov. Code § 11340 *et seq.*). Thus Employer had both actual and constructive notice of the regulatory change prior to the start of construction.

Another argument advanced by Employer is that because the work begun in December 2006 was the sinking of piles, construction did not begin then. Employer contends that sinking piles is not “construction” because they are made by placing material downward into the ground rather than up from the ground, and therefore the piles are not “erection” as the term is used in section 341(d)(4)(A): “Erection and placement of structural steel or erection and placement of structural members made of materials other than steel.” Piles are structural members intended to support the building and provide stability. Thus, they fall within the scope of section 341(d) which is concerned with work activities subject to permit requirements. That piles are constructed down into the earth instead of up does not mean they are not constructed or part of the overall building. Moreover, placing the piles was an “activit[y] on a structure intended to be more than 36 feet in height.” (§ 341 (d)(4).)

Even section 341.1(f)(4) does not assist Employer. Section 341.1(f)(4) provides that only one “Project Permit,” defined in section 341(b)(9) as a permit that authorizes an employer to conduct permit-required activities at a specific location, is required for “all or any” of certain activities at the same site. But Employer did not obtain a project permit until May 2007, well after the listed

activities began, and section 341(c)(1)(A) provides that “[w]ork on permit-required activities . . . shall not begin *until* a Project Permit has been issued for the project.” (Emphasis added.) It follows that even if Employer needed only one “project permit” for the entire project, it had to obtain that permit before starting the activity or activities for which the permit was required. Since it is undisputed that Employer did not obtain its permit until on or after May 31, 2007, and that permit-required activities had commenced prior to that date, Employer was in violation of the permit requirement.

For the reasons given above, we affirm the Decision and the civil penalty of \$375.00 assessed by the ALJ. Employer’s appeal is denied.



ART CARTER, Chairman



ED LOWRY, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

FILED ON: JUL 20 2012

