

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

In the Matter of the Appeal of:

PERFORMANCE CONTRACTING GROUP, INC.  
dba PERFORMANCE CONTRACTING, INC.  
4340 Roseville Road  
North Highlands, CA. 95660

Employer

Dockets. 08-R2D1-0025  
and 0026

**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 the petition for reconsideration filed by the Division of Occupational Safety and Health (Division) matter under submission, renders the following decision after reconsideration.

**JURISDICTION**

Beginning on August 1, 2007, the Division of Occupational Safety and Health conducted an accident inspection at a place of employment maintained by Performance Contracting, Inc. (Employer), at 2500 La Jolla St., West Sacramento, California. On December 14, 2007, the Division issued two citations to Employer alleging violations 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 Serious violation of section 1513(a) [failure to maintain good housekeeping practices]. Citation 2 alleged a Serious violation of section 1670(a) [employee not utilizing a personal fall arrest system]. The Division proposed a penalty of \$18,000.

Employer filed timely appeals of the citations.

Administrative proceedings were held, including a contested evidentiary hearing before an Administrative Law Judge (ALJ) of the Board. After taking testimony and considering the evidence and arguments of counsel, the ALJ

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

issued a Decision on February 18, 2010. The Decision upheld the violation of Citation 1, but reduced the penalty, and vacated Citation 2 in its entirety, finding that the Employer had proven the defense of independent employee act.

The Division timely filed a petition for reconsideration of the ALJ's Decision in Citation 2. The Employer filed an answer to the petition.

### **ISSUE**

Was the "foreman" a management employee for the purposes of applying the defense of independent employee action?

### **EVIDENCE**

The Decision summarizes the evidence adduced at hearing in detail. We summarize that evidence briefly below, focusing on the portions relevant to the issue presented.

Employer was engaged in plastering work at an elementary school site. Chris Hileman (Hileman), a plasterer with 30 years of experience, had been called back to work for Employer on July 25, 2007; Hileman is a union plasterer who had secured work with Employer via the union hall in the past. The parties stipulated that Hileman is not a foreman or supervisor. Because he had not worked for Employer for some period of time, he was required to attend a safety course taught by Employer's safety engineer, Gregory Tate (Tate), which lasted about 2.5 hours, on July 25. This training was basic, but did cover safety harnesses and lifelines. Hileman testified that he had also received a "scaffold user training" in fall 2005 from Employer, and had taken various safety tests and received safety documents from Employer over the course of his employment with Employer in 2005, 2006 and 2007.

Tate testified on the details of the Employer's safety handbook, orientation program, and safety award program, which includes incentives for employees who are able to stay accident and injury free, as well as a progressive disciplinary system. Tate's job duties, he testified, include conducting job site inspections, new hire trainings, and assisting foremen. Tate recalled that the Employer issued 67 written warnings in 2007, 157 in 2008, and 93 in 2009. He explained that foremen, superintendents and branch managers have the authority to give written discipline under the safety program. When asked if he had provided Hileman with training specific to the school plastering assignment, Tate testified that more specific training was the duty of the on-site foreman.

Hileman testified that on July 26, 2007, he reported to the school. He had been directed by Lamont Rausch, Employer's plastering superintendent, to report to that location and to see David Lopez, the job foreman. Lopez directed

Hileman to begin the “float work” on two panels, while another employee, Jackson, spread the finish coat. Hileman and Jackson plastered, working from atop scaffolding, and once that work was completed, Jackson left the worksite. Hileman asked Lopez where he should plaster next. Lopez, according to Hileman, who was also on the scaffolding doing his own plastering, walked over to the corner of the building, and gestured down, telling Hileman, “right here, underneath me.”

Hileman went to the corner of the scaffolding and climbed down a level. In order to access the work area, Hileman crossed the sloped roof. Although Hileman could not recall exactly what happened, he surmised that he slipped on the debris that was lying on the roof, and fell through the plastic sheeting that was draped on the scaffold. Hileman was not wearing a safety harness, and fell 11 feet 9 inches onto the ground. The parties stipulated that Hileman’s injuries were serious.<sup>2</sup>

The Division’s Associate Safety Engineer, Jon Weiss, testified regarding the accident investigation he conducted. Weiss initially met with the general contractor at the worksite, and then asked to meet with a representative of Employer. Weiss testified that he was directed to David Lopez, who identified himself as the foreman of the job, and an opening conference was held. Weiss also testified that he reviewed Employer’s safety program as part of his investigation, and he had not noticed any deficiencies or issued any citations related to the Employer’s safety program.

### **DECISION AFTER RECONSIDERATION**

In making this decision, the Board relies upon its independent review of the entire evidentiary record in the proceeding. The Board has taken no new evidence. The Board has also reviewed and considered the Division’s petition for reconsideration and the Employer’s answer to it.

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.

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<sup>2</sup> As defined by section 330(h).

The Division petitioned for reconsideration on the basis of Labor Code section 6617(a), (c) and (e). In its petition, the Division argues that the decision of the ALJ was correct in finding a violation of section 1670(a), but in error in finding that the Employer was entitled to the affirmative defense of Independent Employee Act (or "IEAD"). The Division correctly states that the Board does not recognize the affirmative defense when a supervisor is at the worksite, and argues that the Division has shown that Lopez was a supervisor. (*B & B Roofing*, Cal/OSHA App. 85-515, Decision After Reconsideration (Jul. 27, 1987), *Kingston Constructors, Inc.*, Cal/OSHA App. 95-1098, Decision After Reconsideration (Sept. 15, 1999), *Polvera Drywall Corp. dba Great Western Drywall*, Cal/OSHA App. 90-1246, Decision After Reconsideration (Sept. 6, 1991).)

The ALJ's decision rests upon a finding that Dave Lopez is not a member of management. Under *Davey Tree Surgery Company v. Occupational Safety & Health Appeals Bd.* (1985) 167 Cal.App.3d 1232; 213 Cal. Rptr. 806, an employee's supervisory status for the purpose of the Act is measured by responsibility. In *Davey Tree*, the Appeals Court quoted a Board definition of supervisor, as an individual who is:

responsible for more than just their personal safety; they are responsible for the safety of the workers under their supervision. They are their employer's representatives at the work site and directly ensure their employer's compliance with statutory and regulatory requirements. (*Davey Tree, supra, p. 1242*).

Davey Tree explains the rationale behind this rule:

When an employer has placed significant responsibilities on an employee, so that the employee may be viewed as the employer's safety representative at the worksite, the employer must bear the responsibility for that employee's actions, because those actions determine the credibility of the employer's compliance with OSHA, and unless the employer bears direct responsibility for them, its safety program is meaningless. (*Davey Tree, supra, p. 1242*).

The ALJ found that Lopez, who undisputedly held the title of "foreman" for Employer, was not shown to be "in charge" of employees at the worksite.<sup>3</sup> (Decision, p. 13). From that finding, the decision went on to allow the Employer to assert the IEAD, and to find that all elements of the defense were met by Employer.

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<sup>3</sup> In Employer's closing argument, Employer refers to "Dave Lopez, who was a foreman on the job." Employer's Exhibit N, copies of Cal/OSHA field documents, includes copies of business cards stapled to the documents. A card from Dave Lopez, Foreman, is attached to a document summarizing the results of the inspection.

The Division presented evidence that Lopez was invested with actual supervisory status on the day of the violation. According to the testimony of the injured employee, Hileman, Lopez directed the work of Hileman and his coworker, Jackson, instructing them on where to start plastering, and once they had that task finished, where to work next. That Lopez himself was also doing plastering work is of little import; an employee may be engaged in the same work as other employees, or have responsibility for only a small number of workers, but still be considered supervisory. (*California Erectors, Bay Area, Inc.*, Cal/OSHA App. 84-337, Decision After Reconsideration (Sept. 26, 1985).)

The Board's primary concern is with the elements of authority as defined in *Davey Tree, supra*. As the Board stated in another decision, which focused on the actual duties of employees at the work site:

the crucial determinant is whether an employee is invested with enough power by an employer to control the work, e.g., to direct such things as whether a backhoe is to be used in mobbing pipe from a truck to a trench, how it is to be done, and the role other employees will assume in the process. (*Granite Construction Co.*, Cal/OSHA App. 84-648, Decision After Reconsideration (Mar. 13, 1986).)

An employee may have delegated authority at the jobsite to direct another worker or crew of workers, even if he or she is not technically in a management position. (*Bilardi Construction, Inc.*, Cal/OSHA App., 84-308, Decision After Reconsideration (Jul. 27, 1987).) On the other hand, an employee may have a title in name only, and no actual supervisory authority. It is un rebutted in the record that Hileman was directed to seek out Lopez for instruction at the worksite, and that Lopez directed Hileman's plastering work.

Employer's safety engineer, Tate, provided testimony which allows the Board to infer that employees with the job title of "foreman" have responsibility for safety. Tate's testimony indicated that foremen are both responsible for safety training of employees at the jobsite, and have authority to discipline employees for violations of Employer's safety program. Employer's Exhibit L Safety Handbook also describes "General Foremen and Foremen" as being responsible for enforcing safety rules and regulations" while "Employees" must follow established safety rules, and report unsafe conditions. While Tate did not specifically discuss Lopez as a foreman, from his testimony it is reasonable to infer that Lopez, as plastering foreman, was Employer's representative in safety matters, and had delegated supervisory authority to enforce Employer's safety program. The Board may rely upon Tate's testimony concerning the duties of a foreman, as well as Hileman's testimony, to find that Lopez was standing as a supervisor for purposes of the Act at the time in question. (See,

*Contra Costa Electric, Inc.*, Cal/OSHA App. 90-470 Decision After Reconsideration (May 8, 1991).)

However, the Board must also consider Employer's standing hearsay objection. Under the Board's rules of practice and procedure, hearsay will not be sufficient in itself to support a finding unless it would be admissible over objection in a civil action. (Board Rule section 376.2). Admissions by a party, or its representative, are not inadmissible under the hearsay rule.<sup>4</sup> The record establishes that there is also independent, non-hearsay evidence which shows Employer had delegated supervisory authority to its foreman, Lopez. For instance, the general contractor indicated to inspector Weiss that Lopez was on site, and introduced Weiss to Lopez. Weiss' testimony, in which he indicates that upon questioning the general contractor labeled Lopez as a representative of PCI is hearsay, but the action of the general contractor taking Weiss to Lopez at the worksite is not. That the general contractor introduced Weiss specifically to Lopez, rather than one of the other plasterers that were on site, tends to show that Lopez was known as a representative of Employer. (*Sherwood Mechanical, Inc.*, Cal/OSHA App. 08-4692, Decision After Reconsideration (Jun. 28, 2012).)

Lopez's acquiescence to serving as management representative at the opening conference and walkthrough with the Division's investigator also tends to show that he was the Employer's responsible supervisor at the site; had he not been, it seems likely that he would have pointed Weiss to the appropriate employee, or indicated that he did not have authority to answer Weiss' questions. (*Sherwood Mechanical, Inc.*, *supra*). Further bolstering the inference is Employer's Exhibit N, the Cal/OSHA documents which list Lopez as the "foreman" present for both the opening conference and inspection.<sup>5</sup> As in *Sherwood Mechanical*, these examples of independent, non-hearsay evidence support a finding of supervisor status, a finding also supported by the Employer's failure to produce Lopez to testify, or other evidence rebutting Lopez's status.<sup>6</sup> It is established that Lopez was a foreman with supervisory

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<sup>4</sup> See Evidence Code section 1222: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if: (a) The statement was made by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement; and (b) The evidence is offered either after admission of evidence sufficient to sustain a finding of such authorization or, in the court's discretion, as to the order of proof, subject to the admission of such evidence."

<sup>5</sup> As explained in *Dunnick Bros., Inc.*, Cal/OSHA App. 06-2871, Decision After Reconsideration (Apr. 13, 2012), Labor Code 6314(d) requires the Division to give the site supervisor the opportunity to accompany an inspector during any inspection of the worksite. In order to fulfill this requirement, a Division inspector must request the supervisor identify him or herself. There is a presumption that official duties are regularly performed. (Evidence Code Section 664). Admissions adverse to an employer made by a representative of that employer are an exception to the hearsay rule and may support a finding of fact. (Evidence Code Section 1222; *Macco Construction*, Cal/OSHA App. 84-1106, Decision After Reconsideration (Aug. 20, 1986), *MV Transportation, Inc.*, Cal/OSHA App. 02-2930, Decision After Reconsideration (Dec. 10, 2004).

<sup>6</sup> See Evidence Code Section 413: In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or to

authority, and statements attributed to Lopez by Hileman are properly admitted.<sup>7</sup>

The ALJ found a violation of section 1670(a); the Board upholds the finding. (Decision, p. 11). The violation was classified as serious by the Division. The parties stipulated that the injury suffered by Hileman was serious. A serious violation is one in which there is substantial probability that death or serious physical injury could result from a violation.<sup>8</sup> Through testimony, Weiss established that in similar accident investigations he had conducted, it was more likely than not that a serious injury would occur, should an employee fall from a similar height while not utilizing a personal fall arrest system. Weiss testified that of the 56 fall investigations with an approximate fall distance of 11 feet that he had conducted; at least 77 percent had resulted in serious injury, defined as hospitalization of more than 24 hours, or death.

Employer argues in its response to the Division's petition that there is no evidence showing that the violation of the safety rule occurred in plain view of any supervisory employee of Employer. An employer may defend against a serious violation if it demonstrates that it did not, and could not with the exercise of reasonable diligence; know of the presence of the violation. (Labor Code section 6432(b).) "A serious violation shall not be deemed to exist, however, if the employer can demonstrate that it did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." (*Architectural Glass & Aluminum Co., Inc.*, Cal/OSHA App. 01-5031, Decision After Reconsideration (Mar. 22, 2004).) Knowledge of a foreman is imputed to the employer. (See, *Greene and Hemly, Inc.*, Cal/OSHA App. 76-435, Decision After Reconsideration (Apr. 7, 1978).) From the credible testimony of Hileman, it is clear that with exercise of reasonable diligence, the foreman on site could have learned that an employee was accessing work locations without wearing a personal fall arrest system. Employer, who has the burden of persuasion in this matter, presented no evidence to demonstrate otherwise.

Weiss testified that because the employee experienced an injury as a result of a failure to utilize a fall arrest protection system from the 11 foot roof, the violation was classified as accident-related serious and no reduction in penalty may be granted, as Employer has over 100 employees. (*Mascon, Inc.*, Cal/OSHA App. 08-4278, Denial of Petition for Reconsideration (Mar. 4, 2011).) A violation may be classified as accident related when there is a causal nexus between the violation and the serious injury. (*Obayashi Corp.*, Cal/OSHA App. 98-3674, Decision After Reconsideration (Jun. 5, 2001).) In this instance, it is

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deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto, if such be the case.

<sup>7</sup> Section 376.2, hearsay evidence may be used for the purpose of supplementing or explaining other evidence.

<sup>8</sup> Labor Code 6432, as in effect in 2007. Changes to section 6432 went into effect on January 1, 2011.

undisputed that Hileman suffered a serious injury. There is also a finding by the ALJ that Employer failed to ensure that Hileman wore fall protection when he accessed a sloped roof area over 11 feet high. The accident-related classification is found to be proven for Citation 2, as Hileman would not have been injured but for the violation of 1670(a).

The decision of the ALJ is reversed in part. The proposed civil penalty of \$18,000 is affirmed.

ART CARTER, Chairman  
ED LOWRY, Board Member  
JUDITH S. FREYMAN, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
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