

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

In the Matter of the Appeal of:

CHARLES PANKOW BUILDERS, LTD.
199 South Los Robles Avenue, Suite 300
Pasadena, CA 91101

Employer

Docket No. 13-R4D1-1759

**DENIAL OF PETITION
FOR RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code hereby denies the petition for reconsideration filed in the above entitled matter by Charles Pankow Builders, Ltd., (Employer).

JURISDICTION

Commencing on February 5, 2013 the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On May 14, 2013 the Division issued a citation to Employer alleging violations of occupational safety and health standards codified in California Code of Regulations, title 8.¹

Employer timely appealed.

Thereafter administrative proceedings were held before an administrative law judge (ALJ) of the Board, including a duly-noticed contested evidentiary hearing.

On July 9, 2015 the ALJ issued a Decision (Decision) which sustained the citation and imposed a civil penalty.

Employer timely filed a petition for reconsideration.

The Division filed an answer to the petition.

¹ References are to California Code of Regulations, title 8 unless specified otherwise.

ISSUE

Did Employer prove it could not have known of the hazardous condition in the exercise of due diligence?

REASON FOR DENIAL OF PETITION FOR RECONSIDERATION

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's petition contends that the Decision was issued in excess of the ALJ's power, the evidence does not justify the finding of fact, and the findings of fact do not support the Decision.

The Board has fully reviewed the record in this case, including the arguments presented in the petition for reconsideration. We have taken no new evidence. Based on our independent review of the record, we find that the Decision was based on a preponderance of the evidence in the record as a whole and appropriate under the circumstances.

Employer was the general contractor at a large mixed-purpose construction project in Santa Monica, California. A subcontractor had covered a floor opening in the first floor of one of the buildings being constructed with a sheet of plywood, but had not secured the plywood. Employer's employee fell through the opening to the level below and was seriously injured. Immediately before he fell the employee was sweeping the floor as assigned and moving backwards while doing so. His foot contacted the plywood cover and displaced it, resulting in his fall.

The Division cited Employer for a serious, accident-related violation of section 1632, subdivision (b)(3), which provides:

1632. Floor, Roof, and Wall Openings to be Guarded.

. . .

(b)(3) . . . Covers shall be secured in place to prevent accidental removal or displacement, and shall bear a pressure-sensitized, painted or stenciled sign with legible letters not less than one inch high, stating: "Opening--Do Not Remove."

The cover over the opening was not secured and was not labeled as required by section 1632, subdivision (b)(3).

The evidence was that the cover had been in place for at least three days prior to Employer's employee's accident.

Employer contends that given the large size of the project it was not feasible for its management team to walk every square foot of the project every day. Employer further contends that the holding of the Decision effectively makes a due diligence defense impossible to satisfy.

We hold that the Decision reached the correct result, though we share Employer's concern about its language. (*Alzate Building Corporation*, Cal/OSHA App. 07-3104, Denial of Petition for Reconsideration (May 6, 2010), citing *People v. Smithy* (1999) 20 Cal.4th 936, 972 [lower court's decision upheld if correct even if reasoning faulty].)

Given the facts here, we need not and do not decide whether due diligence requires a general contractor to inspect every aspect of a project every day.² We find, instead, that the dispositive facts were the existence of the hazard presented by the unsecured cover for at least three days and Employer's assigning the injured employee the task of sweeping the floor in question on the day of the accident. We hold that it is not unreasonable to expect Employer would discover the unsecured cover in such a period, or to expect it would inspect the area where it was directing its employee to work for hazards. We need not decide whether Employer's inspections were generally frequent enough to be duly diligent; on the present record we hold, instead, that Employer failed to act with due diligence because it failed to discover the hazard posed by the unsecured cover even though it knew one of its employees would be working in the area. Thus, we uphold the result of the Decision, but not its ruling on what is needed to show due diligence.

² Employer, as the general contractor, was also the "controlling employer" at the worksite. (Lab. Code § 6400, subd. (b).) Under the present circumstances, it was also an "exposing" employer. (*Id.*) The due diligence affirmative defense available to a controlling employer has not been held to be applicable to the other categories of employers listed in Labor Code section 6400, subdivision (b). (See *United Association Local Union 246, AFL-CIO v. Occupational Safety and Health Appeals Bd.* (2011) 199 Cal.App.4th 273, 284.) We need not and do not address that question here.

DECISION

For the reasons stated above, the petition for reconsideration is denied.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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