

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

In the Matter of the Appeal of:

ONESTOP INTERNET, INC.
2332 East Pacifica Place
Rancho Dominguez, CA 90220

Employer

Dockets. 11-R4D2-2636 and 2637

**DECISION AFTER
RECONSIDERATION
and
ORDER OF REMAND**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having ordered reconsideration of the Decision of the Administrative Law Judge on its own motion, renders the following decision after reconsideration.

JURISDICTION

Beginning on March 24, 2011, the Division of Occupational Safety and Health (Division) conducted an accident inspection at a place of employment in Rancho Dominguez, California maintained by Onestop Internet, Inc. (Employer). On September 22, 2011, the Division issued two citations to Employer alleging a violation of workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.¹

Citation 1 alleged a Serious violation of section 2320.3 [failure to treat electrical component as energized until proven de-energized]. Citation 2 alleged a violation of section 2320.4(a) [failure to notify personnel of electrical work and ensure authorized person performed disconnection].

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 issued a Decision on May 31, 2013. The Decision granted Employer's appeal of both citations.

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

The Board ordered reconsideration on its own motion. The Division filed an answer to the Order of Reconsideration.

ISSUE

Did the ALJ properly apply Labor Code section 2750.5?

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.

Associate Safety Engineer Maurice Fernandez (Fernandez) testified regarding the inspection he conducted shortly after receiving a report from the Sheriff's department of a possible electrocution at Employer's place of business. Fernandez conducted an opening conference with Neda Gazanfarpour, Employer's human resources manager, Yoruba Etiwara, Employer's warehouse manager, and Jonathan Blua, a supervisor of Employer. Fernandez learned that a transformer was being relocated from a server room to a north wall of Employer's warehouse when the accident occurred.

Carlos Avila (Avila) also testified at hearing. Avila was engaged by Michael Gora (Gora, also known as "Cheetah") of Cheetah Construction to complete the electrical work at Employer's place of business. Avila and Gora had an ongoing business relationship, and Gora had hired Avila to work at Employer's work site on several prior occasions. On this occasion, Avila brought along his cousin, Jose Cruz (Cruz) as an assistant on the electrical work. Avila and Cruz took the transformer out of the server room and were installing the transformer in the warehouse when the accident occurred. Avila had checked to see that the breaker which powered the transformer was off on the morning of March 24, 2011. He did not put a sign on the breaker, lock the breaker out, or inform others not to tamper with the breaker. He did not test the wires connected to the transformer to see if they were live. He testified that he believed someone turned the breaker back on, although he did not know why, as the breaker was labeled as powering only the transformer. Avila had labeled the breaker when he initially installed the transformer into Employer's server room in 2009 or 2010.

Cruz was standing on the top of a rack in the warehouse, while Avila was at work on the floor. The two were working on installing the transformer when Avila heard Cruz moan and then begin to fall away from the rack. Avila believed that Cruz had inadvertently grabbed the wires, which were live. Avila was able to catch Cruz and yell for help. Employees dialed for an ambulance, and Cruz was taken to a hospital. Cruz experienced cardiac arrest, and died shortly thereafter. (Ex. 5).

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 Division's answer to the Board's order of reconsideration.

Employer raised as a defense to the citations at issue that Avila and Cruz were hired by Gora to complete construction work, and were not employees of Employer, but rather were sub-contractors working for Cheetah Construction. The Division argued that Avila was properly classified as an employee of Employer under Labor Code section 2750.5. The Division asserted that because Gora's Cheetah Construction Company did not hold a valid contractor's license, and Avila himself had only a C-10 contractor's license that had expired on December 27, 2010, Avila was an employee under Labor Code section 2750.5.

The Labor Code at section 2750.5 establishes the presumption that an unlicensed person performing work for which a contractor's license is required is an employee.² (*Richard Lompa*, Cal/OSHA App. 12-1796, Denial of Petition for Reconsideration (Sep. 12, 2013).) More specifically, Labor Code section 2750.5 creates a rebuttable presumption related to the burden of proof: a worker who is performing services for which a license is necessary under state law, or who is performing the services for a person who is required to obtain a

² Labor Code section 2750.5: There is a rebuttable presumption affecting the burden of proof that a worker performing services for which a license is required pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, or who is performing such services for a person who is required to obtain such a license is an employee rather than an independent contractor. Proof of independent contractor status includes satisfactory proof of these factors:

(a) That the individual has the right to control and discretion as to the manner of performance of the contract for services in that the result of the work and not the means by which it is accomplished is the primary factor bargained for.

(b) That the individual is customarily engaged in an independently established business.

(c) That the individual's independent contractor status is bona fide and not a subterfuge to avoid employee status. A bona fide independent contractor status is further evidenced by the presence of cumulative factors such as substantial investment other than personal services in the business, holding out to be in business for oneself, bargaining for a contract to complete a specific project for compensation by project rather than by time, control over the time and place the work is performed, supplying the tools or instrumentalities used in the work other than tools and instrumentalities normally and customarily provided by employees, hiring employees, performing work that is not ordinarily in the course of the principal's work, performing work that requires a particular skill, holding a license pursuant to the Business and Professions Code, the intent by the parties that the work relationship is of an independent contractor status, or that the relationship is not severable or terminable at will by the principal but gives rise to an action for breach of contract.

In addition to the factors contained in subdivisions (a), (b), and (c), any person performing any function or activity for which a license is required pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code shall hold a valid contractors' license as a condition of having independent contractor status.

For purposes of workers' compensation law, this presumption is a supplement to the existing statutory definitions of employee and independent contractor, and is not intended to lessen the coverage of employees under Division 4 and Division 5.

license, is presumptively an employee rather than an independent contractor. The section makes clear that failure to have a license is a bar to overcoming the presumption of employee status: “any person performing any function or activity for which a license is required... shall hold a valid contractors’ license as a condition of having independent contractor status.” There is no dispute that the electrical work performed at Employer’s worksite was work requiring a contractor’s license under the California Business and Professions Code. Given the language of section 2750.5(c), and Avila’s (as well as Cruz and Gora’s) failure to hold the appropriate license for the work being performed, the presumption cannot be overcome as a matter of law. (*Hunt Building Corp. v. Bernick* (2000) 79 Cal. App. 4th 213, 220, citing *State Compensation Ins. Fund v Workers’ Comp. Appeals Bd.* (1985) 40 Cal. 3d 5, 15).

Despite the plain language of the statute, the ALJ found that the rule established by the Board in *Jesse Ramirez Drywall*, Cal/OSHA App. 93-489 Decision After Reconsideration (Mar. 23, 1999) constituted grounds on which to find Avila to be an independent contractor, relieving Employer of liability for the citations at issue. Specifically, the ALJ’s Decision reasoned that the Division cannot use Labor Code section 2750.5 as a shield to protect Avila from liability under the Act. This was error not supported by the record, as neither the Division nor Avila made such an argument. As the Board stated in *Jesse Ramirez Drywall*, the presumption regarding section 2750.5 is related to the status of a worker as an employee; it does not serve to define an individual’s status as an *employer* under the Act. The presumption applies solely where the Employer contends as a defense to a citation that a worker is not an employee of an employer, but was instead serving as an independent contractor. In other words, a finding that Avila is an employee under section 2750.5 has no bearing on whatever responsibilities Avila may have had for safety under the Act vis a vis Cruz or other workers, and should not have impacted the ALJ’s decision.

Employer argues that at the time that Avila began work at its place of business in 2009 Avila had a contractor’s license, and that estoppel should apply. (Ex. A, invoice January 22, 2009, Ex. 4, record of license). Testimony from Ani Kazarian, Employer’s human resources manager, established that Employer had begun asking for proof of required state licenses only after Cruz’s accident on March 24, 2011. After the requirement was put in place, the Employer stopped doing business with Gora’s Cheetah Construction.

In order to assert an estoppel defense, the party to be estopped must be shown to have led the other party astray through false conduct or misrepresentation. (*Owens-Illinois Glass Container, Inc.*, Cal/OSHA App. 2021, Decision After Reconsideration & Order of Remand (Jun. 16, 2014).) Where an employer would utilize estoppel in order to prevent a party from asserting that an individual is not independent contractor under section 2750.5 due to lack of

a valid license, there must be some representation by the individual that he or she carried a valid license. (*Chin v. Namvar* (2008) 166 Cal. App. 4th 994, 1004). Employer failed to show that Avila was ever asked by Employer or had made affirmative assertions related to his licensure. As the Court in *Chin v. Namvar* noted, where “the hirer does not inquire and the worker makes no representation about his licensing status... the unlicensed worker cannot be estopped.” (*Chin v. Namvar*, supra at 1006). Employer did not rely on any representation that Avila had a valid license; no estoppel defense applies.

Courts have found section 2750.5 operates to determine that a general contractor is the employer of not only its unlicensed subcontractors, but also of those employed by the unlicensed subcontractor, and we find no reason to depart from that rule here— Employer is, by operation of law, the employer of both the unlicensed general contractor and also of those employed by that unlicensed contractor--Cruz and Avila. (*Hunt Building Corp. v. Bernick*, supra, citing *Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal. App. 3d 325, 328, *Nick Hagopian Drywall v. Workers’ Comp. Appeals Bd.* (1988) 204 Cal. App. 3d 767, 771-772.)

Accordingly, the Board finds that Avila is properly classified as an employee under section 2750.5. We remand the matter to hearing operations to consider Employer’s appeal of Citation 1, Item 1 and Citation 2.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: JULY 23, 2014