

Mediterranean Pacific Corp.

SAFETY AND HEALTH

Burden of proof

General contractor liability for safe environment

To establish a violation of WAC 296-155-100(1)(a), the Department has the burden of proving a contractor's failure to establish, supervise, and enforce, in a matter that is effective in practice, a safe and healthful working environment. *J. E. Dunn v. Department of Labor & Indus.*, 139 Wn. App. 35 (2007). The Department satisfies its burden by presenting evidence of violations of specific safety standards at the worksite. **...In re Mediterranean Pacific Corp., BIIA Dec., 06 W0162 (2007)**

Scroll down for order.

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

IN RE: MEDITERRANEAN PACIFIC CORP.) DOCKET NO. 06 W0162
CITATION & NOTICE NO. 309782498) DECISION AND ORDER

APPEARANCES:

Employer, Mediterranean Pacific Corp., per
John Ayar, owner, Pro Se

Department of Labor and Industries, by
The Office of the Attorney General, per
Matthew E. Lund, Assistant

The employer, Mediterranean Pacific Corp., filed an appeal with the Board of Industrial Insurance Appeals on July 13, 2006, from a Corrective Notice of Redetermination of the Department of Labor and Industries dated June 22, 2006. In this Corrective Notice of Redetermination, the Department affirmed Citation and Notice of Assessment No. 309782498, in which it alleged a serious violation of WAC 296-155-100(1)(a) in that, as a general contractor controlling jobs on a jobsite, the employer did not establish, supervise, and enforce in a manner that was effective in practice, a safe and healthful working environment, by allowing the employees of its subcontractors, Thomas O'Conner Stucco and Allen Johnson Contracting, to be subjected to hazards in violation of the Washington Administrative Code. The Department order is **AFFIRMED**.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the employer to a Proposed Decision and Order issued on April 2, 2007, in which the industrial appeals judge affirmed the Department Corrective Notice of Redetermination dated June 22, 2006. All contested issues are addressed in this order.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed.

Although we agree with the ultimate result set forth in the Proposed Decision and Order, we have granted review because after our industrial appeals judge issued his decision on April 2, 2007, the Court of Appeals, Division I, issued the decision of *J. E. Dunn Northwest, Inc. v. Washington State Department of Labor and Industries* No. 56301-7-I (April 16, 2007). The Court of Appeals' decision in *J. E. Dunn Northwest* holds that the Department of Labor and Industries has the burden

1 of proving as an element of a violation of WAC 296-155-100(1)(a) that the employer did not
2 establish, supervise, and enforce in a manner that was effective in practice, a safe and healthful
3 working environment. The only violation set forth in the Corrective Notice of Redetermination is a
4 violation of WAC 296-155-100(1)(a). We have granted review to clearly set forth our finding that
5 the Department has met the requirements set forth in *J.E. Dunn Northwest* and that the violation
6 should be affirmed.

7 Our industrial appeals judge affirmed the single violation in the Corrective Notice of
8 Redetermination, in which the Department cited a violation of WAC 296-155-100(1)(a). The
9 Department alleges that Mediterranean Pacific Corp. was engaged in constructing a home and was
10 acting as the general contractor. WAC 296-155-100(1)(a) provides that: "it shall be the
11 responsibility of management to establish, supervise, and enforce, in a manner which is effective in
12 practice: (a) a safe and healthful working environment." The Department then set forth six specific
13 WAC standards which were violated by subcontractors in order to prove that the general contractor,
14 Mediterranean Pacific Corp., had violated WAC 296-155-100(1)(a). In *J. E. Dunn Northwest*, the
15 Court of Appeals, Division I, held that:

16 The establishment, supervision and enforcement of a safe and healthful
17 working environment that is effective in practice, and the enforcement of
18 an accident prevention program, are requirements of WAC 296-155-
19 100(1). Accordingly, a showing that such requirements are not met is
20 an element of the violations alleged against J.E. Dunn pursuant to
21 Item 2 and Item 3a, the burden of proving which must be borne by the
22 Department.

21 *J. E. Dunn Northwest*, at 11.

22 The Department presented its case by introducing the Department file, which is Exhibit
23 No. 1 to the record. The testimony presented by the inspector, Michael O'Hagan, focused on the
24 issue regarding whether there was evidence to establish that Mediterranean Pacific Corp. was
25 actually engaged as a general contractor in building the home or whether the owner of the
26 corporation was building the home for his own personal use and was not engaged in a general
27 contract to build the home for others. There was no testimony offered by Mr. O'Hagan regarding
28 the underlying requirements of WAC 296-155-100(1) concerning whether Mediterranean Pacific
29 Corp. had established, supervised, and enforced a safe and healthful working environment which
30 was effective in practice. The employer offered no evidence. We also note that Mr. Ayar, who is
31 the owner of Mediterranean Pacific Corp., did not respond to the discovery request by the
32 Department.

1 We have reviewed the Department file and find that there is sufficient evidence on this
2 record to establish that Mediterranean Pacific Corp. had not established, supervised, or enforced a
3 safe and healthful working environment that was effective in practice. The Department inspector,
4 Mr. O'Hagan, noted in the Department file that he observed: (1) an employee of the subcontractor,
5 Thomas O'Conner Stucco, engaged in wall preparation activities for stucco siding on a three-story
6 residential building while being exposed to a fall hazard of 35 feet 6 inches, a height from which a
7 fall can cause broken bones, head and internal injuries, or death, requiring medical attention or
8 hospitalization; (2) that debris and accumulation of material were present and that hoses and
9 electrical conductors were not covered or suspended overhead so as to avoid a tripping hazard in
10 areas where workers pass or work; (3) that workers were working at levels on a scaffold that did not
11 have a complete guardrail system installed along open sides and that the ends of the scaffolding
12 system were being used by employees with no safety rail installed, exposing workers to a 16-foot
13 fall hazard; (4) that open-sided work surfaces were not protected with a standard guardrail system
14 and that workers were exposed to fall hazards of 11 feet 2 inches; (5) that workers were using
15 stepladders instead of straight ladders to gain access to the roof, exposing the employee to a fall
16 hazard of approximately 12 feet from the roof edge to the deck below; and (6) that there were
17 stairways which had more than four or more risers and that they were not protected with a stair rail
18 system along the unprotected side and that employees were exposed to a fall hazard that could
19 cause severe broken bones.

20 The number, seriousness, and the general nature of the hazards that Mr. O'Hagan observed
21 at the work site clearly demonstrate that Mediterranean Pacific Corp. did not take workplace safety
22 seriously. The description of the violations which were observed by Mr. O'Hagan is sufficient to
23 establish that Mediterranean Pacific Corp. violated the provisions of WAC 296-155-100(1)(a) by
24 failing to establish, supervise, and enforce a safe and healthful working environment which was
25 effective in practice. We note that the employer, Mediterranean Pacific Corp., offered no evidence
26 to show that it had established, supervised, and enforced a safe and healthful working environment
27 which was effective in practice.

28 We also find that Mediterranean Pacific Corp. was acting as a general contractor for the
29 construction of the home. The general contractor at a construction site has a duty to comply with
30 WISHA regulations in regard to the oversight of all employees on the site. *Stute v. P.B.M.C., Inc.*,
31 114 Wn.2d 454 (1990). Corrective Notice of Redetermination No. 309782498 is affirmed.

32

FINDINGS OF FACT

1. On March 2, 2006, an inspector with the Department of Labor and Industries conducted an inspection of the Mediterranean Pacific Corp., jobsite in Des Moines, Washington. Following the inspection, the Department issued Citation and Notice No. 309782498, on May 10, 2006. In the citation the Department cited serious violations of WAC 296-155-100(1)(a), for a total penalty of \$2,100. The employer filed an appeal on May 23, 2006. On June 5, 2006, the Department reassumed jurisdiction. On June 22, 2006, the Department issued a Corrective Notice of Redetermination in which it affirmed all aspects of the original citation, and reduced the penalty to \$1,800. On July 13, 2006, the employer filed a Notice of Appeal with the Department. On July 14, 2006, the appeal was forwarded to the Board of Industrial Insurance Appeals. On July 14, 2006, the Board issued a Notice of Filing Appeal and assigned Docket No. 06 W0162.

2. On March 2, 2006, Mediterranean Pacific Corp. was acting as a general contractor building a residence at 1211 S. 272nd Street, Des Moines, Washington. Mediterranean Pacific Corp. failed to establish, supervise, and enforce in a manner that was effective in practice, a safe and healthful working environment by not discovering or controlling recognized hazards on the site. Mediterranean Pacific Corp. allowed employees of subcontractors to be exposed to the following hazards: an employee of subcontractor Thomas O'Conner Stucco was engaged in wall-prepping activities for stucco siding on a three-story residential building while being exposed to a fall hazard of 35 feet 6 inches, a height from which a fall could cause broken bones, head and internal injuries or death, requiring medical attention or hospitalization; the employer, Mediterranean Pacific Corp., had not developed and implemented a written fall protection work plan for each area of the workplace where employees are assigned, and where fall hazards of 10 or more feet exist; the employer did not ensure that in areas where workers pass or work that all debris and accumulations of material were removed, and that hoses and electrical conductors were not covered or suspended overhead so that there is no tripping hazard; the employer did not ensure that each platform on all working levels of a scaffold had a complete guardrail system installed along all open sides, and that ends of the scaffolding system being used by employees had no safety rail installed, exposing workers to a 16-foot fall hazard that could cause severe broken bones; the employer did not ensure that all open-sided work surfaces were protected with a standard guardrail system, in that an open-sided work surface at the top of the second floor, from the top of the stairs across to the north and to the east was exposing workers to fall hazards of 11 feet 2 inches to the deck below; the employer did not ensure that workers set up a ladder to provide safe access to the roof and scaffolding, in that they used stepladders as straight ladders exposing the employees to a fall hazard of approximately 12 feet from the roof edge to the deck below; and the employer did not ensure that

1 stairways having four or more risers were protected with a stair rail
2 system along the unprotected side, as the stairway to the second floor
3 did not have a stair rail system installed exposing employees to a fall
4 hazard that could cause severe broken bones.

- 5 3. Mediterranean Pacific Corp., as the general contractor, knew, or through
6 the exercise of reasonable diligence, could have known, of the hazards.
- 7 4. There was a substantial probability that death or serious physical harm
8 could result from Mediterranean Pacific Corp.'s failure to establish,
9 supervise, and enforce in a manner that was effective in practice, a safe
10 and healthful working environment.
- 11 5. For a serious violation of WAC 296-155-100(1)(a) as reflected in
12 Corrective Notice of Redetermination No. 309782498, the severity was
13 assessed at 6, the probability was 2, and the gravity was 12. With
14 deductions, this violation carried an adjusted penalty of \$1,800.

15 **CONCLUSIONS OF LAW**

- 16 1. The employer's appeal was timely filed. The Board has jurisdiction over
17 the parties and the subject matter of this appeal.
- 18 2. On March 2, 2006, Mediterranean Pacific Corp., committed a serious
19 violation of WAC 296-155-100(1)(a).
- 20 3. Corrective Notice of Redetermination No. 309782498, dated June 22,
21 2006, in which the Department assessed a total penalty of \$1,800, is
22 correct and is affirmed.

23 It is so **ORDERED**.

24 Dated: June 28, 2007.

25 BOARD OF INDUSTRIAL INSURANCE APPEALS

26 /s/ _____
27 THOMAS E. EGAN Chairperson

28 /s/ _____
29 FRANK E. FENNERTY, JR. Member

30 /s/ _____
31 CALHOUN DICKINSON Member