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BEFORE THE

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

DEPARTMENT OF INDUSTRIAL RELATIONS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	
DUKE TIMBER CONSTRUCTION CO., INC. 2841 Dow Avenue Tustin, California 92680	DOCKET NO. 81-R4D6-347 DECISION AFTER RECONSIDERATION

The Occupational Safety and Health Appeals Board, acting pursuant to authority vested in it by the California Labor Code and having granted the petition for reconsideration filed in the above-entitled matter by Duke Timber Construction Co., Inc. (Employer), makes the following decision after reconsideration.

JURISDICTION

On February 3 through 9, 1981, a representative of the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment maintained by Employer. On February 18, 1981, the Division issued to Employer a citation alleging a serious violation of Title 8, California Administrative Code.[1] A civil penalty was proposed.

Employer filed a timely appeal from the citation contesting a serious violation of Section 1670(a). After a hearing before an administrative law judge of the Appeals Board, the appeal was denied in a decision dated July 26, 1982.

On August 30, 1982, a timely petition for reconsideration was filed by Employer. The Appeals Board granted the petition on September 14, 1982, and vacated and stayed the decision. The Division answered the petition.

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

Citation No. 2
Serious
8 Cal. Adm. Code 1670(a)

ISSUES

Is Section 1670, as applied to Employer's operations, unconstitutionally vague and overbroad?

Did the administrative law judge err in excluding certain testimony allegedly relevant to Employer's defense?

Is the Division estopped to allege a violation of Section 1670(a) because of its administrative interpretation?

Were the requirements of Section 1670(a) suspended?

Is the evidence sufficient to establish a serious violation of Section 1670(a)?

FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

Employer argues that Section 1670 and the related Section 1669 are unconstitutionally vague and overbroad in that determining whether a violation exists requires subjective judgment. Employer asserts that a safety order is only enforceable if it contains sufficient clarity to give an employer fair warning of the conduct proscribed. The Appeals Board finds Section 1670 sufficiently definite and specific to be citable. A safety order will not be held void for uncertainty if any reasonable and practical construction can be given its language. Novo-Rados Enterprises, OSHAB 75-1170, Decision After Reconsideration (May 29, 1981). Section 1670(a) gives fair notice that work without a lifeline, a safety belt or other similar protection at a perimeter of a structure or at a shaftway and opening which exposes an employee to a fall in excess of 15 feet, is prohibited.

Employer argues that the proffered testimony of its expert witness as to the comparative safety of alternative methods used in construction of panelized roof structures and to the Divisions enforcement posture was improperly excluded by the administrative law judge. Employer cites to Section 376.2 permitting any relevant evidence to be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs. The Appeals Board finds the administrative law judge did not err, that the equivalent safety of an alternative method is not a defense but rather is a matter to be considered by the Standards Board should Employer seek a variance. It shall not be considered here. (Hampshire Construction Co., OSHAB 79-949, Decision After Reconsideration (Aug. 26, 1980).)

Employer argues that the Division failed to demonstrate that employees entered the zone of danger because as a carpenter progressed he would fill the openings with plywood sheets constantly shielding himself from the leading edge. The record does not support Employer's contentions. A representative of the Division observed an employee perform a procedure used by a deceased employee except that the employee did not use a 2 x 4 to position the 8 x 20 plywood sheets and was tied-off by a safety belt and lifeline. The Division's photographic exhibits (particularly Exhibit No. 4B) show that the deceased employee was not standing on roofing decking but was standing unprotected with one foot on the glulam beam and one foot on a purlin. The fall distance was approximately 35 feet.

Employer argues that even if exposure to a fall is established, the above-described location of intersection of glulam beam and purlin is not by definition a "perimeter" of a structure. Employer argues that a common sense interpretation of structure would mean the warehouse structure and the "perimeter" is the walls around that structure. The argument is rejected. In Valley Steel Construction, OSHAB 78-1419, Decision After Reconsideration (Dec. 17, 1984), an employee was exposed to the hazard of falling from the perimeter of a large opening within the interior of the warehouse. The violation was sustained against the employer.

Employer contests the finding of the administrative law judge that the anchor end of a lifeline could have been secured to a substantial member of the structure. Employer alleges that securing and unsecuring a safety line to the glulam beam would have been more dangerous than the exposure to a fall while in landing the 8 x 20 foot and 4 x 8 foot plywood sheets without being tied-off. Employer also argues that its roofing work fell within Section 1669(c), exempting it from the requirement of rigging and installing safety devices. Section 1669(c) provides:

> (c) When the work is of short duration and limited exposure and the hazards involved in rigging and installing the safety devices required by this Article equals or exceeds the hazards involved in the actual construction, these provisions may be temporarily suspended, provided adequate risk control is recognized and maintained under immediate, competent supervision.

The Appeals Board finds that Employer failed to establish that adequate risk control was maintained under immediate, competent supervision. "Competent supervision" means the ability to act to avert the hazards inherent in working while exposed to a fall without a safety belt and lifeline attached to a secure anchor. Employer's supervision was not competent; the foreman knew his

job, but an employee who engages in an unsafe work practice such as prying 8 x 20 foot and 4 x 8 foot plywood sheets with a 2 x 4 piece of lumber is not being properly supervised. Further, the fact that the fatally injured employee engaged in the unsafe practice for some period of time without correction combined with the fact that those working on the roof could not be easily seen by those on the ground, establishes that there was no immediate supervision which is to say supervision made or done at once as the need arises. Because Employer has failed to establish immediate, competent supervision, it is unnecessary to determine whether the work was of short duration and limited exposure or whether rigging and installing the required safety devices equals or exceeds the hazards of construction.

Employer next argues it should be excused from compliance with Section 1670(a) because of the Division's Administrative Interpretation No. AI-69, which dispenses with the need for safety belts and lifelines where work at a leading edge is performed by an experienced and competently supervised crew. The argument is without merit. AI-69 requires the work to be done under immediate competent supervision. As previously found, Employer failed to provide immediate competent supervision.

Finally, Employer argues that the Division failed to establish the serious classification of the violation. Employer alleges the Division failed to sustain its burden of establishing a substantial probability of death or serious physical injury. Employer contends the Division must prove that such consequences must almost always result from a fall, established here at 35 feet onto a concrete surface. The Appeals Board has held that probability means likely to be expected to occur and, when modified by substantial, means more likely to be expected than otherwise. "This is a lesser burden than 'is almost always the result'..." (Pacific Steel Casting Co., OSHAB 79-1514, Decision After Reconsideration (Nov. 15, 1984).)

DECISION AFTER RECONSIDERATION

The Decision of July 26, 1982, is reinstated and affirmed. The appeal from a serious violation of Section 1670(a) and from the proposed $315 penalty is denied.

Elaine W. Donaldson
ELAINE W. DONALDSON, Chairman

L. A. Harrington
L. A. HARRINGTON, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

DATED AND FILED AT SACRAMENTO, CALIFORNIA

AUG 19 1985

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