

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

In the Matter of the Appeal of:

ARMOUR STEEL CO., INC.
6601 26th Street
Rio Linda, CA 95673

Employer

Dockets. 08-R2D1-2649 through 2655

**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 ordered reconsideration of the Administrative Law Judge's Decision (Decision) in this proceeding on its own motion and taken the petition for reconsideration filed by Armour Steel Co. (Employer) under submission, renders the following decision after reconsideration.

JURISDICTION

Beginning on April 16, 2008, the Division of Occupational Safety and Health (Division) conducted an inspection at a place of employment in Rancho Cordova, California maintained by Employer. On June 4, 2008 the Division issued seven citations to Employer alleging violations of workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.¹

Employer filed timely appeals of citations one through seven. The Division subsequently withdrew Citation 1, Item 1, and Citation 4, and reclassified Citations 2, 3 and 6 as General. The parties agreed to a reduced penalty of \$700 for Citations 2 and 3.

Citation 1, Item 2 alleges a General violation of section 1630(a) [failure to install a construction passenger elevator], with a proposed penalty of \$875. Citation 1, Item 3 alleges a General violation of section 1710(g)(6)(B) [failure to place holes in a perimeter column to permit installation of perimeter safety cables], proposed penalty of \$875. Citation 1, Item 4 alleges a General violation of section 1710(l)(7) [failure to provide a planked floor under beams on which

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

work was being performed], with a proposed penalty of \$875. Citation 2 alleges a Serious violation of section 1709(b)(1) [failure to laterally and progressively brace beams during erection of a steel structure], proposed penalty of \$6300. Citation 3 alleges a Serious violation of section 1710(f)(1)(D) [failure to have a competent person evaluate all columns during erection of a steel building to determine if guying or bracing is needed], proposed penalty of \$6300. Citation 5 alleges a Serious violation of section 1710(m)(2) [failure to provide fall protection to iron workers who were exposed to falls greater than 30 feet], proposed penalty \$7875. Citation 6 alleges a Serious violation of 1710(q)(2) [failure to provide adequate training on fall protection to employees], with a proposed penalty of \$6300. Citation 7 alleges a Serious violation of 3640(o) [failure to ensure that an employee was secured to the basket while elevated in an aerial device], proposed penalty \$7875.

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 December 13, 2011. The Decision granted in part and denied in part Employer's appeal.

Employer timely filed a petition for reconsideration of the ALJ's Decision alleging error in those citations that the ALJ affirmed. The Division filed an answer to the petition. On its own motion the Board ordered reconsideration to consider whether the evidence in the record established a serious violation of Citation 6. Both the Employer and Division filed an answer to the Board's Order of Reconsideration.

ISSUE

Did the ALJ correctly decide Citation 1, Item 2; Citation 1, Item 4; Citation 2; Citation 3; and Citation 6?

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 is in the business of erecting structural steel for buildings. As the result of a complaint, the Division's Senior Safety Engineer, Gary McIver, Jr., visited a building under construction by Employer in Rancho Cordova, California in 2008. At the time of the inspection, Employer was near completion of the steel structure it had been subcontracted to complete. McIver met with Armando Lozano, Employer's on-site foreman, and conducted an opening conference.

McIver testified that he saw a worker on the steel beams of the project at a height estimated to be about 48 feet. He was able to determine the approximate height from a copy of plans of the finished building, which were provided by the general contractor. The plans show the height of the building at the top of the parapet as 65 feet, 6 inches. McIver testified that during the opening conference, both Lozano and the general contractor, both of whom provided him a copy of the finished building plan, stated that the height of the building was 65 feet. (Div. Ex. 4.)

McIver questioned Lozano about how the steel structure was stabilized. Lozano provided a document entitled "Erection Sequence" to McIver, which includes the stamp of a registered professional engineer and steps for erection of columns and beams. The document specifies that "the contractor shall provide adequate shoring, bracing and guys in accordance with the state and local ordinances." (Div. Ex. 5.) According to McIver's testimony, during the course of the inspection, he asked Lozano who the Employer's competent person was on site, to determine if guying or bracing was needed. Lozano stated he was the competent person, although he had no formal training and was not an engineer by profession. McIver also discussed employee training in regards to falls and fall protection with Lozano; McIver stated Lozano was not aware of any of the industry-specific training requirements.

Armando Lozano testified for the Employer at hearing. He described his job duties as ensuring safety, as well as supervising the overall sequence of construction, including determinations regarding guying and bracing. He explained that on this particular building, about four of the columns are embedded 10 or more feet in concrete, for seismic stability. The bulk of the columns are attached via anchor bolts. Lozano testified that he did not know if there were engineering plans or drawings for the building, nor was he aware of the rating of the stress load rating of the columns.

Steve Ayres (Ayres) also testified for the Employer. As a founder of Armour Steel, Ayres has served in a variety of capacities at Employer, and is currently CEO. He testified that he generally spends much of his time at the worksite, and was at the Rancho Cordova job every day. Although Kevin Hall (Hall), Employer's Safety Manager, was a project manager at the job site, Ayres testified he had primary responsibility as the project coordinator. Ayres testified that although he was not an engineer, he had worked on hundreds of design and build projects, and was familiar with the Cal/OSHA regulations related to steel construction. He also testified that although he was not present for McIver's inspection or the informal conference, he had worked with Lozano for many years, he communicated with Lozano during the course of the inspection, and knew Lozano to be knowledgeable and skilled in steel construction work.

McIver spoke with Hall, Employer's safety manager, after completing the on-site inspection, and was told Employer did not have a written hazard training

program; rather, Employer accomplished hazard training through on-the-job and tailgate trainings. He also requested various training documents from Hall related to safety training. Upon review, McIver was unable to locate records of tailgate or other informal safety trainings related to falls and fall protection, or other steel erection hazards. Munoz, one of Employer's employees at the site, testified to being present at tailgate trainings where he was instructed to use a harness and lanyard when in the aerial basket or when doing connecting work at 32 feet or higher.

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 reviewed and considered Employer's petition for reconsideration, Employer's answer to the Board's Order of Reconsideration and the Division's answer to Employer's petition and the Board's Order of 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 petitioned for reconsideration on the basis of Labor Code section 6617(a), (c) and (e).

Citation 1, Item 2

The ALJ found a violation of 1630(a), which requires the installation of a construction passenger elevator in buildings or structures which are 60 feet or taller in height.² As explained in the Board's decision in *Anning-Johnson Company*, Cal/OSHA App. 85-1438, Decision After Reconsideration (Dec. 31, 1986), section 1630(a) is to be read in conjunction with 1630(d), which requires

² 1630(a) In addition to the stairways required in Section 1629, a construction passenger elevator for hoisting workers shall be installed and in operation on or in any building, or structure, 60 feet or more in height above or 48 feet in depth below ground level. The building or structure height shall be determined by measuring from ground level to the highest structural level including the parapet walls, mechanical rooms, stair towers and elevator penthouse structures but excluding antennas, smokestacks, flag poles and other similar attachments.

construction elevators to have landings at the third floor or 36 feet, and every third floor or 36 feet thereafter, as well as at the upper-most level of the structure.³ The Division may show employee exposure through proof that an employee was working over 36 feet, the level where the first elevator platform should be installed. McIver testified that on the date of the inspection, he saw an employee working at about 48 feet, and was told by Lozano as well as the general contractor, that the building was over 65 feet. (*Ag Labor, Inc.*, Cal/OSHA App. 96-168, Decision After Reconsideration (May 24, 2000) [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.].) The statements are corroborated by comparing the finished plans with photographs of the building on the day of the inspection, which show the beginning of the constructed parapet, and the bulk of the three story building already framed. (Div. Ex.s 3, 4.) Based on the finished plans which show the third floor to be at 49 feet, 6 inches, and the parapet to be at 65 feet, 6 inches, and comparing those plans to the photographs provided in evidence, it is clear that on the date of the inspection, the building was well over 60 feet in height, as McIver concluded.

Employer's argument in its petition is that the hazard in section 1630(a) relates to the effort of climbing up and down the stairs, and because Employer used an aerial basket to move employees, there was no hazard. This argument is without merit. The safety order serves to ensure that there is more than one means of entry and exit to the structure in case of injury or emergent situation. An employer may seek a variance or petition the Standards Board for an amendment to the regulation, but the Appeals Board does not have authority to change the plain language. (*Rudolph & Sletten, Inc.*, Cal/OSHA App. 93-1251, Decision After Reconsideration (Apr. 8, 1998), *Kenneth L. Poole, Inc.*, Cal/OSHA App. 90-278, Decision After Reconsideration (Apr. 18, 1991), Labor Code sections 143 through 143.2, and 8 CCR sections 401 through 427). Under section 1630(c), an Employer may discuss and win approval for alternatives to a construction elevator with the Division, if necessary to the configuration of the structure.⁴ Employer presented no evidence at hearing demonstrating that it had approached the Division regarding alternative means of access to the building.

³ 1630(d) Landings shall be provided for the passenger elevator on or in buildings or structures at the upper-most floor and at intervals not to exceed 3 floors or 36 feet.

⁴ 1630(c) At unusual site conditions or structure configurations, the Division shall permit alternate means of access, consisting of one or more, but not limited to, the following: (1) Use of personnel platforms designed, constructed, and operated as specified by Section 5004 of the General Industry Safety Orders, and only under the conditions permitted by the general requirements of that section. (2) Use of suspended power-driven scaffolds where employees are protected by safety belts secured to independent safety lines by means of a descent control device acceptable to the Division. (3) Use of appropriate vehicle-mounted elevating and rotating work platforms. (4) Use of other means, such as inclined elevators, etc. acceptable to the Division, presented in written form and acceptance granted prior to use.

Employer also argues that the citation is invalid as steps were taken to redesign the structure to make the total height of the building equal less than 60 feet, after the visit by McIver. Employer is correct in stating that the Division must show evidence “that employees came within the zone of danger while performing work related duties, pursuing personal activities during work, or employing normal means of ingress and egress to their work stations.” (*Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (Apr. 24, 2003).) However, the Division has made a showing of exposure on the date of the inspection. While the safety order may no longer have applied to Employer once it redesigned the structure, the evidence preponderates to a finding that on April 16, 2008, Employer’s building was over 65 feet, and lacked the required construction personnel elevator. The Division may issue a citation six months from the date of the occurrence of a safety order; citations in this instance were issued less than two months from the date of the first inspection. Employer has not shown that the condition was abated more than six months before the citation was issued by the Division. (*Los Angeles County, Dept. of Public Works*, Cal/OSHA App. 96-2470, Decision After Reconsideration (Apr. 5, 2002).)

The Board upholds the ALJ’s finding that a violation of section 1630(a) has been established by a preponderance of the evidence.

The citation was classified as general by the Division. The Board affirms the ALJ’s penalty calculation, which provides the Employer with maximum credits for those penalty criteria for which the Division was unable to indicate the basis for its adjustments and credits. (*Plantel Nurseries*, Cal/OSHA App. 01-2346, Decision After Reconsideration (Jan. 8, 2004).) A \$350 civil penalty is assessed.

Citation 1, Item 4

Citation 1, Item 4 alleges a general violation of section 1710(l)(7):
Where skeleton steel is being erected, a tightly planked and substantial floor shall be maintained within two stories or 30 feet, whichever is less, below and directly under that portion of each tier of beams on which any work is being performed.

McIver testified that on the date of his inspection at Employer’s worksite, there was no planking or flooring installed in the structure. Although McIver did not see any employees walk under the area where an employee was working above, he testified that the ground level of the worksite was not roped off or posted as a no entry area. The immediate danger, according to McIver, is the possibility of a falling tool or other object. The planked floor has an obvious benefit in both catching falling objects and shortening potential fall distances. McIver also testified that planking provides structural stability to a building once it has been installed.

Employer argues in its petition that there is no evidence that employees who worked on the ground were exposed to a hazard. The Division, in showing exposure, need not provide proof of an actual employee exposure to the danger in question. In this instance, the Division met its burden by providing credible testimony, which went unrefuted by Employer, that employees had access to a “zone of danger.” (*Benicia Foundry & Iron Works, Inc.*, supra). As the ALJ noted in her decision, Employer’s Exhibits 3A and 3E show materials and equipment located beneath the beams. (Decision, p. 18.) It is reasonable to presume employees were regularly accessing this area, given the placement of these items. Given the lack of postings or warnings, there is little reason to think employees would walk around the perimeter of the foundation, but is reasonable to infer that employees would regularly travel under the beams, where employees are working, exposing themselves to the hazard of falling materials. The Board affirms the ALJ’s finding of a violation of 1710(l)(7).

The citation was classified as general by the Division. The Board again affirms the ALJ’s penalty calculation, which adjusts the penalty by providing maximum credits for criteria which did not have an adequate factual basis in the record. (*Plantel Nurseries*, Cal/OSHA App. 01-2346, Decision After reconsideration (Jan. 8, 2004).) A \$525 civil penalty is assessed.

Citation 2

The Division cited Employer for an alleged violation of section 1709(b)(1), which states: [t]russes and beams shall be braced laterally and progressively during construction to prevent buckling or overturning. McIver testified that during his visit to Employer’s worksite, he did not see any bracing or guywire, with the exception of the north end of the structure. He inquired with site supervisor, Lozano, as to what the Employer’s plan was for installation of both bracing and guy wiring. McIver admitted that he had encountered other steel construction projects which did not need visible bracing due to the particular construction method used by the contractor. However, McIver testified that Employer’s site supervisor was unable to provide a sequence of erection plan to demonstrate that Employer was installing bracing laterally and progressively, or that the construction was structurally sound despite the absence of such bracing. Rather, McIver testified that the erection sequence provided by Lozano was generic and not site specific; it was for a different sized building, among other discrepancies. (Div. Ex. 5.) He noted the document was drawn up several years prior to the beginning of erection of Employer’s Rancho Cordova project, and did not provide specific information on how the building was properly stabilized to prevent collapse. McIver testified that he raised the stability issue with Employer in part because he was visibly able to see the building moving when the wind blew.

Lozano testified that there were seismic bracing plates installed on each column. He also pointed out tubular bracing, visible in photos introduced by both parties, which is also connected to the columns, and provides stability. Ayers also testified regarding the bracing of the building. He explained that bracing plates were used on the project, as well as moment frames and bracing frames.⁵ In Ayers' opinion, the combination of construction methods and bracing devices used were sufficient to provide structural stability. Neither Ayers nor Lozano specifically discussed lateral bracing, either why it was not necessary on the project, or which elements of the design served to function as the lateral bracing.

It is the Division's burden to prove a violation of a safety order. (*Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (Jun. 16, 1983).) In Division's Exhibit 3, a series of photographs taken during the course of McIver's investigation, it is clear that employees are working on the steel structure in areas which do not have any visible bracing or guywire installed. McIver testified that the visible bracing and guywiring appeared to be in the portion of the structure that was largely complete. Lozano on cross-examination, admitted there were no guywires on the south end of the structure, but there was guywire on completed portion of the building.

Employer was unable to provide a copy of a site specific engineering plan to demonstrate that it was safe for employees to work on these areas which were not laterally guyed or braced. Although Employer was not required to provide a site specific engineering plan, by introducing the specific plan into the record, Employer may have been able to rebut the Division's credible testimony, which established that the building did not meet the requirements of § 1709(b)(1), and was bolstered with photographic evidence. (See, *California Erectors, Bay Area, Inc.*, Cal/OSHA App. 91-1191 Decision After Reconsideration (Nov. 2, 1994).)

The Division was able to prove a violation of § 1709(b)(1). The parties stipulated to a general penalty with a citation of \$700, which the Board affirms.

Citation 3

Citation 3 is an alleged violation of § 1710(f)(1)(D): [a]ll columns shall be evaluated by a competent person to determine whether guying or bracing is needed; if guying or bracing is needed, it shall be installed. The Division and Employer dispute whether Employer had a competent person, as defined by

⁵ Moment connection: A connection between two members which transfers moment from one side of the connection to the other side and maintain under application of load the same angle between the connected members that exist prior to the loading. Also, a connection that maintains continuity. (Construction Dictionary, National Association of Women in Construction, 1991).

section 1504 of the Construction Safety Orders, evaluate the columns of the steel structure to determine if guying or bracing was needed.⁶

The Division presented evidence that on the date of the inspection, Employer's representative, Lozano, was unable to answer questions regarding the guying or bracing of the building. Lozano presented himself as the Employer's competent person, but had not been provided with any training in the elements of construction safety orders relevant to Employer's work. As in the Decision After Reconsideration *James M. Blessing*, while Lozano is clearly an experienced steelworker and foreman, he did not have knowledge of the safety orders that is required to place an employee in the position of competent person. (*James M. Blessing, Jim Blessing Contractor & Equipment Rental*, Cal/OSHA App. 93-2101, Decision After Reconsideration (Jun. 10, 1997).) When asked to explain the erection plan and bracing, Lozano provided the erection sequence, which he explained to McIver was the same one they always used. He admitted during cross-examination that he was not aware if there was an engineering plan or drawings for the buildings. He had no information on stress load capabilities for the materials with which the steel structure was being constructed. The Division's inspector also testified that he requested training records from Employer, none of which included materials related to guying and bracing.

Furthermore, Employer's CEO, Ayers, implicitly contradicted Lozano's assertion that Lozano was designated as competent person on this job; he stated that he considered himself to be a competent person, but did not claim responsibility as the competent person at this particular jobsite. (Decision, p. 24.) The testimony in total establishes that Lozano considered himself to have overall responsibility for safety, as well as for the site in general, including questions of guying and bracing. However, Lozano was not provided the information or training needed to appropriately evaluate the vertical columns and determine whether guying or bracing was needed. The Division's evidence establishes that there was not a competent person evaluating the columns at the worksite. While Employer's usual plan of erection may well be structurally sound, the safety order requires evaluation of the columns, and if necessary, guying or bracing, so as to prevent structural collapse. Employer need not have an engineer on site to meet the requirement of the safety order, but a competent person should be able to provide an explanation as to the methodology he or she used to arrive at the conclusion that bracing and guying is not required.

The Division has shown a violation of section 1710(f)(1)(D). The parties stipulated to a penalty of \$700, which the Board upholds.

Citation 6

⁶ Section 1504: Competent Person. One who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them.

Citation 6 alleges a violation of section 1710(q)(2), failure to provide training in fall protection to all employees.⁷ As part of the Division's inspection, McIver made a document request for Employer's training records and Injury and Illness Prevention Program. He discussed Employer's training program with Hall, Employer's safety manager, and came to the conclusion that Employer's program was deficient in the area of fall protection training. Employer's training did address the need to tie off at 6 feet when doing non-connecting work, at 30 feet when doing connecting work, or when in the aerial basket.

The documents in evidence, as well as the testimony of McIver, establish that Employer did not meet the requirements of section 1710(q)(2). Employer did not call its safety and accident prevention responsible person, Kevin Hall, who may have been able to supplement the sparse training records and written program of Employer. The unrebutted testimony of McIver establishes that Employer's training program did not address several essential elements of 1710(q)(2). (See, *Cranston Steel Structures*, Cal/OSHA App. 98-3268, Decision After Reconsideration (Mar. 26, 2002).) For example, training on fall hazards specific to steel erection, proper use and maintenance and inspection of fall protection equipment, and training on preventing falls through or into holes and openings in walking and working surfaces or walls are required by the section. Employer's foreman was not aware of the requirements of § 1710(q)(2), and Employer's records have no evidence that anything but the most basic training was provided. A violation is shown by a preponderance of the evidence in the record.

The Division alleges a serious violation of the standard, which may be shown by proving that there was "a substantial probability that the violation could result in serious physical harm or death." (Labor Code Section 6432(a).)⁸ "Substantial probability" refers not to the probability of an accident occurring, but rather, assuming the accident or exposure does occur, to the probability that the result will be death or serious physical harm. The Division has the burden of showing that the outcome that would result would more likely than not be death or serious physical harm. (*Mascon, Inc.*, Cal/OSHA App. 08-4278, Denial of Petition for Reconsideration (Mar. 4, 2011).)

In the failure to train context, the Division may present evidence of a "specific hazard that endangers an employee and the probable consequences of

⁷ Section 1710(q)(2): Fall hazard training. The employer shall provide a training program for all employees exposed to fall hazards. The program shall include training and instruction in the following areas: (A) The recognition and identification of fall hazards in the work area; (B) The use and operation of guardrail systems (including perimeter safety cable systems), personal fall arrest systems, positioning device systems, fall restraint systems, safety net systems, and other protection to be used; (C) The correct procedures for erecting, maintaining, disassembling, and inspecting the fall protection systems to be used; (D) The procedures to be followed to prevent falls to lower levels and through or into holes and openings in walking/working surfaces and walls; and (E) The fall protection requirements for structural steel erection.

⁸ Labor Code section 6432 was amended effective January 1, 2011. The rule is applied as it was in effect at the time of the violation.

an accident related to the failure to instruct about the hazard.” (*Mascon, Inc., supra*, citing *Blue Diamond Materials, A Division of Sully Miller Construction*, Cal/OSHA App. 02-1268, Decision After Reconsideration (Dec. 9, 2008).) McIver testified that he based the serious classification on the hazard of an employee falling due to lack of training on the hazards associated with working on steel structures. He considered the hazard to the employee he saw working on the steel structure on the first day of the investigation, Munoz, who was at a height of about 48 feet. In testimony, he stated the basis for the serious classification was substantial probability of death or serious injury if an employee were to fall from the steel structure, and discussed falls he had investigated. McIver testified to having investigated 10 fatalities at less than 48 feet, and had never investigated any case where an employee had fallen more than 30 feet without sustaining serious injuries.

As discussed in *Pacific Telephone Co. dba AT&T*, failure to train creates a lack of knowledge, which may prove to have serious or fatal consequences. While Employer’s workers did have minimal training on fall protection, the Division has shown that Employees were not fully trained in how to recognize and avoid fall hazards or maintain and inspect fall protection equipment. Assuming an accident or injury caused by an employee’s lack of training on the dangers particular to steel erection, the fall which would result would more likely than not result in a serious injury or death to an employee. (*Pacific Telephone Co. dba AT&T*, Cal/OSHA App. 06-5052, Denial of Petition for Reconsideration (Aug. 11, 2011).)

The Board therefore upholds the serious classification and finds the Division’s penalty calculation to be appropriate. A \$6300 penalty is assessed.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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