

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

In the Matter of the Appeal of:

C. C. MYERS, INC.
3286 Fitzgerald Road
Rancho Cordova, CA 95742

Employer

Dockets. 08-R1D1-952 through 955

**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 taken the petition for reconsideration filed by C.C. Myers (Employer) matter under submission, renders the following decision after reconsideration.

JURISDICTION

Beginning on October 4, 2007, the Division of Occupational Safety and Health (Division) conducted an inspection of Employer's worksite at and around 51 Macalla Road, San Francisco, California. On February 28, 2008, the Division issued four citations to Employer alleging violations of workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.¹

The Employer filed a timely appeal and a three day hearing was held before an Administrative Law Judge (ALJ) of the Board on June 24, 25 and June 30, 2009. At hearing, the Division and Employer were able to stipulate to a resolution of Citation 1, Item 3 and Citation 2. After taking testimony and considering the evidence and arguments of counsel, the ALJ issued a Decision on September 16, 2009. The Decision granted the Employer's appeal of Citation 1, Item 2, while denying the appeals of Citations 3 and 4, sustaining the "serious" classification of the violations.

Employer timely filed a petition for reconsideration of the ALJ's Decision. The Division filed an answer to the petition.

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

ISSUE

Was the ALJ decision correct in finding that Section 1670(b)(15) and Section 1670(e) have been violated? Did the decision correctly sustain the “serious” classification for each citation?

EVIDENCE

The Decision summarizes the evidence adduced at hearing. We summarize that evidence briefly below, focusing on the portions relevant to the issue presented.

Employer at the time of the inspection was contracted to do certain construction work on a portion of the new San Francisco-Oakland Bay Bridge. The Division’s associate safety engineer Chris Kirkham (Kirkham) was assigned to conduct a complaint inspection at the location around 51 Macalla Road, where a group of employees were at work on a tower labeled “Bent 50”. Prior to engaging in the inspection, Kirkham observed the tower from an overlook on Yerba Buena Island, as well as from a Coast Guard parking lot. He was able to capture some of his observations by film and photograph. Kirkham saw, with the aid of his camera and binoculars, one worker walk to the end of an I-beam (a horizontal steel beam), and slide his “beam walker” off the end of the I-beam he was standing on, step over to the next I-beam, and then re-attach the beam walker to the second I-beam. (See Exhibits 5A and 5B, videos.)

The “beam walker” is a proprietary device designed by the Employer at some time prior to 1992, and is two pieces of steel rod, which have been welded and bent to fit over the top flange of an I-beam. The worker using the beam walker wears a body harness, and is attached to the beam walker by a lanyard. The design of the Employer’s beam walker allows the device to slide along the top of the beam when the worker pulls or lifts it via the attached lanyard, which is securely connected by a snaphook. (See Exhibit 7A, photo of beam walker attached to snaphook and lanyard.) The setup is intended to provide the worker with fall protection while working on steel falsework.

Once at the worksite, Kirkham met the Employer’s job superintendent, Dan Hobbs (Hobbs), who took Kirkham up a stair tower to observe the crew working on Bent 50. Kirkham noticed a worker with a snap hook on the beam walker that was open, but did not find out his name. Kirkham asked Hobbs why there were no C-clamps at the end of the beams, to keep the beam walkers from being able to come off the ends of the beams. Hobbs told Kirkham that C-clamps were optional as a beam stop. Kirkham testified that he saw employees come as close to three or four feet to the end of a beam, which were not capped.

Back at the Employer office, Hobbs attempted to demonstrate to Kirkham how the beam walker worked. Exhibit 10 is a short video of Kirkham sliding the beam walker along an I-beam; the beam walker moves in a quick jerking fashion on and off the edge of the beam. Hobbs testified that he threw the

lanyard to demonstrate that the beam walker would not slip off of the end, although Kirkham did not recall this particular experiment. Kirkham testified that the Employer's foreman, Kevin McClain, told him that there was a chance for an accident to occur due to the lack of a C-clamp—for example, if an employee were moving along the beam with the beam walker and had his eye on a nearby crane, he could potentially step off with the beam walker. Kevin McClain did not recall making this statement.

Hobbs and Employer witnesses also testified that other fall protection equipment was available for the falsework crew on Bent 50. These devices, which were integrated into the tower and referred to as “yo-yo's” numbered anywhere from two to four on the tower, and were of some uncertain length, according to the various witnesses. It was unclear from testimony how available the yo-yos were, or what the Employer policy, if any, was on using the yo-yos in conjunction with the beam walkers.

After examining the proprietary beam walker system, Kirkham requested that Hobbs gather a couple of the crew members for Kirkham to interview; Hobbs brought the foreman of the falsework crew, Kevin McClain, and his brother, Shawn McClain. Kevin McClain was an 11 year veteran foreman with the employer, and said his job responsibilities included responsibility for safety and fall protection training. Kirkham asked Kevin McClain if he could inspect the fall protection gear that he had been wearing on the job that day, and Kirkham testified that Kevin McClain brought back his harness and double-legged lanyard. Kirkham inspected the equipment, which was presented as evidence at hearing (Exhibit 15). Each lanyard has a short “arm” and two long arms, with the short arm ending in a snaphook that attaches to the worker's body harness. On each longer arm is a larger hook, which opens only when a button on the side is pushed intentionally, and snaps shut when the button is released. This is the hook that attaches to whatever anchoring device the worker is utilizing while elevated on the falsework. These “snaphooks” are defined at Section 1504 as:

A connector comprised of a hook-shaped member with a normally closed keeper or similar arrangement, which may be opened to permit the hook to receive an object and, when released, automatically close to retain the object.

As Kirkham tested the release buttons on Kevin McClain's lanyard, he found that the two large snaphooks, instead of snapping closed when the button was not being pushed, were remaining open, similar to what he had seen on Bent 50, where the worker's snaphook was open when it should have been closed and secured. The small snaphook performed properly. Kirkham confiscated the lanyard, and wrote in the notes that he was taking contemporaneously that Kevin McClain had, upon providing the lanyard, agreed that the harness was the one he had used on Bent 50 that day, and that he had been up on the tower “a lot” that day. Kevin McClain, at hearing, testified that although he recalled one of the snaphooks failing the test

Kirkham had performed on them, had brought three sets of lanyards from his truck, and was not sure which set he had used on Bent 50 that day. However, the set confiscated by Kirkham was initialed “KM”.

Kevin McClain also testified that in practice the falsework crew was not concerned about the hook opening to its maximum width—the hooks would generally be opened only wide enough to be slipped over the handle of the beam walker. Kevin McClain stated at hearing that the team would test the snaphooks in the morning, but the methods of testing were not elaborated upon. He also noted that as long as the snaphooks would close and stay shut around the approximately 3/8” tube-shaped handle of the beam walker, it would be considered usable, but a snaphook that was found in a locked open position would be disposed of.

After interviewing Kevin McClain, Kirkham met with Shawn McClain, who had been with the Employer for three years, and was a leadman on the falsework crew. Shawn McClain also provided his personal fall protection equipment to Kirkham, and answered that he had been working on Bent 50 for most of the day. Again, testing of the snaphooks revealed one sticky hook that would not close automatically when the button was released. (Exhibit 9B.) When asked by Kirkham, Shawn McClain stated that they did test their equipment, but he had never seen that particular test that Kirkham was performing before. Shawn McClain clarified at hearing that he always tests his equipment before using it, and also explained that the snaphooks did not need to be opened fully when used in conjunction with the beam walker equipment. He did not recall making a statement to Kirkham about not being familiar about the test, a statement which Kirkham had memorialized in his notes.

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 Employer’s petition for reconsideration and the Division’s answer to it.

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). We address the arguments by each citation.

1) Citation 3: Serious Violation of Section 1670(b)(15)

Section 1670(b)(15) requires that “Personal fall arrest systems shall be inspected prior to each use for wear, damage, and other deterioration, and defective components shall be removed from service.” The analysis is assisted with a definition of “defect” from section 1504: “Any characteristic or condition which tends to weaken or reduce the strength or the safety of the tool, machine, object, or structure of which it is a part.” As discussed above, the term snaphook itself has a specific statutory definition.² If a snaphook no longer automatically closes when the button is released, it has been damaged in such a way that one of its core functions is weakened, and will be found to have a defect under Section 1504.

The ALJ ruled in favor of the Division, finding that Kirkham’s specific testimony, including the lengthy contemporaneous notes, establish that Kevin McClain and Shawn McClain had used the lanyards on October 4, the day they provided them to Kirkham. We agree with the ALJ’s reasonable finding that Shawn McClain and Kevin McClain did likely conduct some inspection of their lanyards prior to going to work on Bent 50, but neglected to test the snaphooks by pulling them back wide and releasing the button. (Decision, p.14). This inference comports with Shawn McClain’s remark to Kirkham that he was unfamiliar with the test Kirkham was conducting, and the testimony of both Shawn and Kevin McClain that the snaphooks are opened only to a certain point to fit over the steel rod handle of the beam walker.

The Board has consistently held that an inspection must not be cursory, but should be conducted under the ordinary meaning of the term—“it requires a careful and critical examination or scrutiny sufficient to determine compliance with regulations or detect defects.” (*Tutor-Saliba-Perini*, Cal/OSHA App. 97-3209, Decision After Reconsideration (Apr. 24, 2003).) Because the McClains’ morning examination of the equipment did not turn up the defect, while Kirkham’s inspection quickly located three defective devices, the ALJ’s conclusion that the Employer violated Section 1670(b)(15) is proper. The Employer’s employees, including a foreman charged with safety concerns, failed to conduct meaningful inspections of personal fall arrest equipment for Kevin McClain and Shawn McClain, and subsequently failed to remove defective components from use.

The Employer contends that even if the snaphooks were used in their defective state, they did not expose employees to a potential fall hazard. (Employer Petition, p. 13-14.) This argument lacks merit. As the Board has explained in *Southern California Edison*, Cal/OSHA App. 89-445, Decision After

² “A connector comprised of a hook-shaped member with a normally closed keeper or similar arrangement, which may be opened to permit the hook to receive an object and, when released, automatically close to retain the object.”

Reconsideration (March 14, 1991), “[a]ll the Division need prove is that a condition or practice proscribed by a safety order exists... The Standards Board already determined that the condition constitutes a hazard by promulgating the safety order.” The purpose of the snaphook is to connect the worker to his or her fall protection equipment; therefore, it is reasonable to conclude that a defective snaphook exposes an employee to a potential fall hazard.

Under section 6432(a), a “serious violation” exists where “there is a substantial probability that death or serious physical harm could result from a violation.”³ The parties have stipulated that a worker who was to fall from a height of 130 feet-- or the height the Bent 50 falsework crews were working at on October 4, 2007-- would stand a substantial probability of serious injury or death, as defined by the labor code. (Decision, p. 25.) The first prong of a serious violation is met.

Section 6432(b) also requires employer knowledge; “a serious violation shall not be deemed to exist if the employer can demonstrate that it did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.” The ALJ in *Pierce Enterprises*, Cal/OSHA App. 00-1951, DAR (March 20, 2002), summarized the ways in which employer knowledge may be established: by showing that (1) the employer knew or should have known of the hazard; (2) the employer failed to exercise any supervision over its employees to ensure adequate safety; (3) the employer failed to ensure that its employees complied with its safety rules; or (4) the violation was foreseeable. The Employer had notice of the violative condition through crew foreman Kevin McClain, whose job included safety responsibilities, and held a supervisory role over Shawn McClain. We uphold the classification of Citation 3 as serious and the corresponding penalty.

2) Citation 4: Serious Violation of Section 1670(e)

Section 1670(e) requires that “[l]anyards shall be secured to a substantial member of the structure or to securely rigged lines.” The Division’s citation alleged:

During work on the bridge column falsework, lanyards were connected to horizontal beams with mobile anchorage connector “walkers.” In and prior to October 2007, lanyards were not always secured to the beam in such a way that the “walkers” would not accidentally pass the end of the beam.

The issue is whether the attachment of the lanyard to the beam walker, combined with the beam walker’s particular method of attaching to the beam, satisfies the requirement of section 1670(e). (Decision, p.22). The beam walkers are attached to the I-beams, but without a beam stop, such as a C-

³ Labor Code Section 6432 was amended in 2010, effective on January 1, 2011. We apply the statute as in effect prior to those changes.

clamp, may readily be maneuvered off of the end of a beam. When the beam walker is no longer connected to the I-beam, it cannot be said that the employee's lanyard is "secured to a substantial member of the structure," as section 1670(e) directs. The Division's inspector testified that he saw one worker take his walker off the end of a beam and reattach it to another beam, while moving atop Bent 50. (Decision, 24.) Kirkham testified that the Employer's foreman stated that there was a potential for a worker to be distracted and travel past the end of the beam, with the beam walker sliding off the end. (Division Petition, p. 10.) A worker's lanyard cannot be said to be secured to a substantial member of the structure when the device it is attached to is itself unsecured and at risk of slipping off the end of the beam.

The ALJ found, and we agree, that a violation of section 1670(e) is present. As discussed above, the parties stipulated that a fall from the Bent 50 height would result in a substantial probability of death or serious injury, making the classification of "serious" proper for Citation 4.

The Employer contends the "serious violation" under section 6432 should not be upheld based on the Employer's lack of knowledge of the violation under Section 6432(b):

notwithstanding subdivision (a), a serious violation shall be deemed not to exist if the employer can demonstrate that it did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

This is an affirmative defense, and the Employer provides no evidence that it was not on notice of the violative condition. The record is clear that the Employer's superintendent, Dan Hobbs, and foreman, Kevin McClain, were both aware of the fact that the beam walker was able to slip on and off of the end of the beam, and that the Employer did not require the use of beam stops, such as the C-clamp. (Tape #5). Hobbs and McClain may not have been well-versed in the particulars of the safety order at issue, but the Board has clearly stated that lack of knowledge of a safety order is not a defense to the serious classification of a violation. (*McKee Electric Company*, Cal/OSHA App. 81-001, DAR (May 29, 1981).) The affirmative defense requires that the Employer demonstrate that even with reasonable diligence, the Employer could not, and in fact did not, know of the presence of the condition that violates the safety order. (*West Coast Steel Company*, Cal/OSHA App. 81-191, DAR (May 15, 1985).) The Employer has not met that burden, and indeed, was warned by the Division in 1992 that its proprietary beam walker would be acceptable to the Division only subject to certain requirements, which included assurance that the device would not slip off the ends of the beam flange, should a worker fall in that direction.⁴ (Exhibit 17). The Employer chose to ignore this advice to its

⁴ The ALJ in his decision considered an estoppel defense based on the letter that the Division sent to the Employer, dated May 26, 1992. The Division concluded that the beam walker would be compliant with Section 1670 subject to the following requirements:

own detriment, and at the time of Kirkland's inspection had not instituted the simple measure of installing C-clamps at the end of beams to ensure that the device would not slip off.

Therefore, we affirm the result of Decision sustaining the serious violation of citation 4 and the corresponding penalty.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: DECEMBER 6, 2013

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1. Each falsework design will need to be evaluated by the Engineer to ensure that the "beam walker" is structurally compatible with the beam sizes and that the device will not slip off the ends of the beam flange if the worker should fall in that direction.
 2. The Engineer should develop quality control, identification and testing procedures for each "beam walker" constructed.
 3. Due to the necessity of a six foot lanyard and attachment at foot level, it is extremely important that workers wear an approved body harness in lieu of a belt while using the "beam walker."
 4. Workers using the "beam walker" must be experienced and well trained in the use of the equipment. Competent supervision must be provided at all times.

The ALJ found, and we agree, that the Employer failed to establish that it met any of the above conditions, with the exceptions of condition 3. The Employer did not raise the estoppel argument in its petition for reconsideration.