

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

In the Matter of the Appeal of:

MDB MANAGEMENT INC.
6303 Owensmouth Ave., 10th Fl.
Woodland Hills, CA 91367

Employer

Dockets. 14-R4D1-2373 and 2374

**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 decision issued by the Administrative Law Judge (ALJ) under submission on its own motion, renders the following decision after reconsideration.

JURISDICTION

MDB Management, Inc. (Employer) is a construction contractor. On January 24, 2014, the Division of Occupational Safety and Health (Division), through Associate Safety Engineer Victor Copelan¹ (Copelan), conducted a complaint inspection at a place of employment maintained by Employer located at 236 S. Los Angeles Street, Los Angeles, California (the worksite).

On July 21, 2014, the Division cited Employer with two violations of Title 8 of the California Code of Regulations²: Citation 1, Item 1 alleged a general violation of section 1675, subdivision (a) [failure to provide a ladder to gain safe access to an elevated location]; and, Citation 2, Item 1 alleged a serious violation of section 1670, subdivision (a) [failure to use fall protection when an employee was exposed to a fall in excess of 7 ½ feet].

Employer filed timely appeals contesting the existence of the alleged violations, the classification of Citation 2, and the reasonableness of the proposed penalty for Citation 2. Employer also alleged affirmative defenses to the violations.

¹ Copelan was promoted to the position of Acting District Manager at the time of the hearing.

² Unless otherwise specified, all references are to California Code of Regulations, Title 8.

This matter came on regularly for hearing before Dale A. Raymond an ALJ of the Board on June 17, 2015. Ronald E. Medeiros, Attorney from the Robert D. Peterson Law Corporation, represented Employer. Victor Copelan, Acting District Manager, represented the Division. Copelan testified for the Division and Employer did not offer any testimony.

On December 9, 2015, the ALJ issued a Decision in this matter. The ALJ affirmed a violation of Citation 1, Item 1 asserting a violation of section 1675, subdivision (a). The ALJ affirmed Citation 1 as a general violation and assessed a penalty of \$375. The ALJ also affirmed a violation of Citation 2, Item 1 asserting a violation of section 1670, subdivision (a). The ALJ affirmed Citation 2 as a general violation and assessed a penalty of \$375. The ALJ found that the Division failed to meet its burden to establish that Citation 2 was properly classified as serious.

On January 8, 2016, the Board took this matter under submission on its own motion.

ISSUES

1. Did the Division meet its burden of proof in establishing a serious violation on Citation 2?
2. Were the penalties appropriately calculated?

FINDINGS OF FACT

After the Board's independent review and consideration of the entire record in relation to the above-mentioned issues, the Board makes the following findings of fact, consistent with the record:

1. On January 24, 2014, Employer's employee Byron Xocoy (Xocoy) climbed atop a 12 foot high drywall stack working as a rigger.
2. Xocoy did not have, and was not using, any sort of fall protection at the time that he climbed on top of the drywall.
3. Xocoy had a current certification as a rigger.
4. The ALJ correctly calculated the penalties.

DECISION AFTER RECONSIDERATION

DECISION

The Board has reviewed and considered the entire record in this matter. The Board has taken no new evidence. In making this decision, the Board

relies upon its independent review of the entire evidentiary record in this proceeding. The Board has also considered the Division's Answer to the Board's Order of Reconsideration.

1. Did the Division meet its burden of proof in establishing a serious violation of Citation 2, Item 1?

The existence of a violation of Citation 2, Item 1 is not an issue. The issue presented for review is whether the Division met its burden to prove that Citation 2, Item 1 was properly classified as serious. Citation 2, Item 1 asserted a serious violation of section 1670, subdivision (a) [failure to use fall protection when an employee is exposed to a fall in excess of 7 ½ feet³]. The alleged violation description for the citation states:

On and before January 24, 2014 employees of MDB management performed rigging of drywall bundles at twelve feet above grade without a fall arrest, fall restraint or positioning system. MDB Management is responsible for the safety and health [sic] its own employees by contract and actual practice. MDB Management did not ensure that its employees used fall protection while rigging drywall bundles while standing on them.

The hearing in this matter lasted only 24 minutes. Copelan offered the only testimony in support of the citation. Copelan testified that on January 24, 2014 he was assigned to conduct an inspection at 236 South Los Angeles St., Los Angeles, CA. Copelan arrived on site and observed in plain view an employee, later identified as Xocoy, standing atop a stack of drywall that was approximately 12 feet high. The employee was disconnecting rigging from the drywall without using any fall protection.

Copelan conducted an opening conference with a representative for Employer. He met with a framing foreman who granted consent to an inspection. The foreman advised Copelan that they had stacked the drywall 12 feet high in several places throughout worksite because they did not have room

³ Section 1670 subdivision states:

(a) Approved personal fall arrest, personal fall restraint or positioning systems shall be worn by those employees whose work exposes them to falling in excess of 7 1/2 feet from the perimeter of a structure, unprotected sides and edges, leading edges, through shaftways and openings, sloped roof surfaces steeper than 7:12, or other sloped surfaces steeper than 40 degrees not otherwise adequately protected under the provisions of these Orders. Note: (1) Requirements relating to fall protection for employees working at elevated locations on poles, towers and other structures are provided in Section 2940.6(b) and (c) of the High Voltage Electrical Safety Orders. (2) Requirements relating to fall protection for employees working on poles, towers, or similar structures are provided in Section 8615(g) of the Telecommunications Safety Orders. (3) Requirements relating to fall protection for employees working in roofing operations are provided in Section 1730 of the Construction Safety Orders.

to stack it at a lesser height. The foreman also admitted that it was their practice to disconnect rigging while standing atop the drywall.

Copelan also interviewed Xocoy and learned that he was a certified rigger. Xocoy also stated it was his practice to climb the drywall stacks without using a ladder.

On these facts we consider whether the Division met its burden to establish a serious violation. The Division has the initial burden of proof to establish a serious violation. Labor Code section 6432, subdivision (a) states:

(a) There shall be a rebuttable presumption that a "serious violation" exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation. The demonstration of a violation by the division is not sufficient by itself to establish that the violation is serious. The actual hazard may consist of, among other things:

(1) A serious exposure exceeding an established permissible exposure limit.

(2) The existence in the place of employment of one or more unsafe or unhealthful practices, means, methods, operations, or processes that have been adopted or are in use.

To meet its initial burden of proof and establish a rebuttable presumption of serious violation, the Division has an obligation to present evidence demonstrating a "realistic possibility that death or serious physical harm⁴ could result from the actual hazard created by the violation." The term "realistic possibility" means that the Division's demonstration must be within the bounds of reason, and not purely speculative. (*Langer Farms, LLC*, Cal/OSHA App. 13-0231, Decision After Reconsideration (Apr. 24, 2015).) The Division cannot meet its burden unless it introduces at least some satisfactory evidence demonstrating the types of injuries that could result and the possibility of those injuries occurring.

Here, Copelan presented evidence as to the existence of a violation of the cited safety order, i.e. he observed an employee working atop a 12 foot tall stack of drywall without any fall protection. However, he did not offer any evidence demonstrating or discussing the types of injuries that could result from the actual hazard or the possibility of those injuries occurring. Thus, the Division failed to meet its initial burden of proof.

It may well be that a realistic possibility of death or serious physical harm exists when an employee is exposed to a fall of 12 feet, but the Board will

⁴ "Serious physical harm" is defined in detail in Labor Code section 6432, subdivision (e).

not make such a finding unless the Division introduces evidence meeting its burden of proof on the subject. We will not assume facts that are not in evidence, or take official notice on our own initiative in order to satisfy the Division's initial burden of proof on a serious violation.⁵ (See *e.g.*, *California Family Fitness*, Cal/OSHA App. 03-0096, Decision After Reconsideration (Mar. 20, 2009).)

We observe that the Division's initial burden to establish a rebuttable presumption of a serious violation could have been easily satisfied in this matter. Indeed, provided Copelan's Division-mandated training was up to date, it would have been a relatively simple matter for Copelan to offer testimony as to the possible serious consequences of the observed violation in order to satisfy his initial burden of proof. The Division's Safety Engineers or Industrial Hygienists are deemed competent to establish each element of a serious violation if their training is up to date. (See, Labor Code section 6432, subdivision (g).)

Since the Division failed to establish that Citation 2 was properly classified as serious, we additionally find that the ALJ correctly calculated the penalties in this matter.

DECISION

The ALJ's Decision is affirmed.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: APR 25, 2016

⁵ Within the Division's Answer, the Division requests that we take official notice that a fall of 12 feet onto concrete carries with it a realistic possibility of serious injury. We reject this request because it is untimely and because we will not assume facts not in evidence. We also decline the Division's motion to reopen the record, given the lateness of the request and the absence of any satisfactory explanation for the Division's failure to present all of the alleged evidence discussed in the Answer during the first hearing.