

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

In the Matter of the Appeal of:

**TIMBERWORKS CONSTRUCTION, INC.
7031 ROSEVILLE ROAD, SUITE A
SACRAMENTO, CA 95842**

Employer

Inspection No.
1097751

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code issues the following Decision After Reconsideration in the above-entitled matter.

JURISDICTION

Timberworks Construction, Inc. (Employer) is a framing contractor. Beginning October 12, 2015, the Division of Occupational Safety and Health (Division) through Associate Safety Engineer Anthony Galvez (Galvez), conducted an accident inspection at a residential development project maintained by Employer at 9844 Carico Way, Elk Grove, California (the worksite).

On March 21, 2016, the Division cited Employer for four alleged violations of title 8 safety regulations.¹ Citation 1 alleged a general violation of section 1509, subdivision (a) [failure to implement, establish, and maintain an effective Illness and Injury Prevention Program (IIPP)]. Citation 2 alleged a serious violation of section 1509, subdivision (a) [failure to conduct periodic inspections when new conditions or processes are brought into the workplace]. Citation 3 alleged a serious violation of section 1511, subdivision (b), and was withdrawn by the Division at hearing. Citation 4 alleged a serious violation of section 1670, subdivision (a) [personal fall arrest equipment required]. Employer filed a timely appeal and asserted various defenses.

The matter came on regularly for hearing before an Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at Sacramento, California on June 1 and 2, 2017. On October 16, 2017, the ALJ issued a Decision vacating Citations 1 and 2, and affirming Citation 4. The Board took the matter under reconsideration on its own motion on November 2, 2017.

In making this decision, the Board has engaged in an independent review of the entire record. The Board additionally considered the pleadings and arguments filed by the parties. The Board has taken no new evidence.

¹ Unless otherwise specified, all references are to sections of the California Code of Regulations, title 8.

ISSUES

1. Did the Division establish a general violation of section 1509, subdivision (a), referencing section 3203, subdivision (a)(7)(D)?
2. Did the Division establish a serious violation of section 1509, subdivision (a), referencing subdivision (a)(4)(B)?
3. Did the Division establish a serious violation of section 1670, subdivision (a)?
4. Is Citation 4 Properly Classified as Serious?

FINDINGS OF FACT

1. On September 22, 2015, Miguel Garibay (Garibay) was employed by Timberworks Construction, Inc., at a residential development project in Elk Grove, California.
2. On September 22, 2015, Garibay suffered an accident when he fell off a second floor roof. The fall was approximately 19 feet.
3. Garibay was supervised by Mike Remy (Remy) on the day of the accident.
4. Garibay's first language is Spanish, and he did not understand directions given to him by Remy in English regarding his work assignment.
5. Garibay is experienced in the work and had used donkey stands a number of times in the past while working for Timberworks Construction, Inc., and at other employers.

DISCUSSION

- 1. Did the Division establish a general violation of section 1509, subdivision (a), referencing section 3203, subdivision (a)(7)(D)?**
- 2.**

Citation 1 alleges a violation of section 1509, subdivision (a) referencing section 3203, subdivision (a)(7)(D). Section 1509, subdivision (a) states: "Every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program in accordance with section 3203 of the General Industry Safety Orders." In turn, section 3203, subdivision (a)(7)(D) requires the following:

(a) Effective July 1, 1991, every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program (Program). The Program shall be in writing and, shall, at a minimum:
[...]

(7) Provide training and instruction:

[...]

(D) Whenever new substances, processes, procedures or equipment are introduced to the workplace and represent a new hazard[.]

The Division's alleged violative description provided on the face of the citation states:

During an inspection on October 12, 2015 with Timberworks Construction, Inc. at 9844 Carico Way in Elk Grove, CA, the Division determined that an employee injured on September 22, 2015 was not trained specifically on the construction and installation of Donkey Stands [sic] or the hazards and work procedures associated with safely transporting building materials onto elevated roof locations.

The Division has the burden of proving a violation of the cited safety order by a preponderance of the evidence. (*Howard J. White, Inc., Howard J. White Construction, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (Jun. 16, 1983).) "'Preponderance of the evidence' is usually defined in terms of probability of truth, or of evidence that when weighed with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence." (*Lone Pine Nurseries*, Cal/OSHA app. 00-2817, Decision After Reconsideration (Oct. 30, 2001), citing *Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 483, rev. denied).

The Board has interpreted section 3203, subdivision (a)(7) a number of times: in *NDC/Tri-State Staffing*, Cal/OSHA App. 12-0391, Decision After Reconsideration (Oct. 5, 2015) the Board cited with approval the following language from a prior Decision After Reconsideration, *Siskiyou Forest Products*, Cal/OSHA App. 01-1418, Decision After Reconsideration (Mar. 17, 2003), "The purpose of section 3203(a)(7) is to provide employees with the knowledge and ability to recognize, understand and avoid the hazards they may be exposed to by a new work assignment through 'training and instruction.'"

The first element of a section 3203, subdivision (a)(7)(D) violation requires that the Division demonstrate that a new process, procedure, or equipment has been introduced into the workplace. Here, the Division has failed to make this initial showing. Rather, testimony supports the conclusion that donkey stands were not new to the workplace, meaning that the regulation is not applicable to this particular circumstance. The injured employee, Garibay, testified that he had been making and using donkey stands for at least 10 years, for more than one employer. Use of such stands did not constitute a new process or procedure at the worksite.

2. Did the Division establish a serious violation of section 1509, subdivision (a), referencing subdivision (a)(4)(B)?

Citation 2 is an alleged violation of section 1509, subdivision (a) referencing 3203, subdivision (a)(4)(B).² Section 3203, subdivision (a)(4)(B) reads:

(a) Effective July 1, 1991, every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program (Program). The Program shall be in writing and, shall, at a minimum:

[...]

(4) Include procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices. Inspections shall be made to identify and evaluate hazards:

[...]

(B) Whenever new substances, processes, procedures, or equipment are introduced to the workplace that represent a new occupational safety and health hazard[.]

The Division's alleged violative description states as follows:

During an inspection on October 12, 2015 with Timberworks Construction, Inc. at 9844 Carico Wy. in Elk Grove, CA, the Division determined new procedures for loading building materials onto residential roofs were introduced into the workplace but no inspection was made to identify and evaluate the hazards associated with employees transporting building materials onto residential roofs, resulting in an employee falling and sustaining a serious injury.

Again, the Division has failed to meet its burden of proof, and the citation must fail. In *HHS Construction*, Cal/OSHA App. 12-0492, Decision After Reconsideration (Feb. 26, 2015), the Board upheld a 3203, subdivision (a)(4)(B) violation after establishing that the employer had made modifications to an ATV, but failed to evaluate whether the newly modified equipment consisted a new workplace safety and health hazard. Similarly, in *Barrett Business Services, Inc.*, Cal/OSHA App. 12-1204, Decision After Reconsideration (Dec. 14, 2016), the employer failed to identify and evaluate the potential workplace hazards that existed after it sealed off the ventilation system and received numerous complaints from employees of sickness caused by the forklift fumes trapped in the unventilated building. Here, as in Citation 1, the safety regulation requires a showing that "new substances, processes, procedures, or equipment" were introduced. (§3203, subd. (a)(4)(B).) The Division failed to show that the procedures at use here were new; no testimony or evidence supports such an assertion.

Citation 2 was properly vacated by the ALJ.

² The Decision of the ALJ incorrectly cites and analyzes section 3203, subdivision (a)(7)(d).

3. Did the Division establish a serious violation of section 1670, subdivision (a)?

The final citation at issue alleges a serious and accident-related violation of section 1670, subdivision (a). That regulation requires personal fall protection:

(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.

The Division's alleged violative description states:

On October 22, 2015, an employee of Timberworks Construction, Inc. sustained an accident-related serious injury while loading sheathing materials onto the second-story roof at 9844 Carico Way in Elk Grove, California. The employee was exposed to a fall greater than 7 1/2 feet and no approved personal fall arrest or personal restraint or positioning system was worn by the employee standing at the perimeter of the structure.

Uncontroverted testimony from the injured employee, Garibay, establishes that the roof that Garibay fell from was approximately 19 feet high. Garibay was working on the edge of the structure, where railing had been installed. Prior to the accident, Garibay removed the railing, in order to build a donkey stand on the second story. Garibay also removed his fall protection, and did not put it back once he had removed the guardrail. Garibay explained in testimony that he did not believe he needed to put the fall protection equipment back on because the donkey stand covered the area where the fall hazard was.

The Division established that Garibay was not utilizing personal fall protection during work that exposed Garibay to a fall of over 7 1/2 feet from an unprotected edge; a violation of the safety regulation has been demonstrated. Employer has asserted what is known as the Independent

Employee Act Defense, or IEAD, as an affirmative defense to the violation. The IEAD is an affirmative defense first described by the Board in *Mercury Service, Inc.*, Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980). When established, the IEAD relieves an employer of responsibility for the violation. There are five elements to this affirmative defense, all of which must be proved by an employer in order for the defense to succeed: 1) the employee was experienced in the job being performed; 2) the employer has a well-devised safety program that includes training in matters of safety respective to their particular job assignments; 3) the employer effectively enforces the safety program; 4) the employer has a policy of sanctions which it enforces against those employees who violate its safety program; and 5) the employee caused a safety infraction which he knew was contra to the employer's safety requirements.

As to the first element, Employer has established that Garibay was experienced in the job, which entailed installing sheathing, and moving the sheathing materials to the locations where they are needed. He had been doing the work for about 12 years at the time of the accident. Thus, Employer satisfied element one.

Element two of the IEAD requires that employees be trained in matters of safety respective to the job assignment. Employer entered into evidence records of Garibay's training (Ex. D), including tailgate trainings, and supervisor Mike Remy (Remy) testified that there is always a translator present to ensure that employees who speak Spanish can understand those trainings. The Division rebutted Employer's assertion that the safety program was well-devised, and contended that Employer's safety program was "average" and was lacking training on the specific hazards of building a donkey stand on an elevated location. The Division's inspector also testified that no records of fall protection training were provided to the Division. Here, the Employer entered a number of documents showing various kinds of training, but did not establish that training related to fall protection was provided to Garibay, despite the fact that Garibay's work required exposure to fall hazards. Employer did not establish element two.

The third element requires effective enforcement of the safety program, and element four requires demonstration that the employer has a policy of sanctions that it enforces against employees who violate safety rules. The Board has explained that "enforcement is accomplished not only by means of disciplining offenders but also by compliance with safety orders during work procedures." (*Martinez Steel Corp.*, Cal/OSHA App. 97-2228, Decision After Reconsideration (Aug. 7, 2001).) "While an employer may have a well-defined safety program on paper, an employer must also demonstrate that it effectively enforces that safety program to meet the IEAD. Proof that Employer's safety program is effectively enforced requires evidence of meaningful, consistent enforcement." (*FedEx Freight*, Cal/OSHA App. 12-0144, Decision After Reconsideration (Dec. 14, 2016), citing *Glass Pak*, Cal/OSHA App. 03-0750, Decision After Reconsideration (November 4, 2010) quoting *Tri-Valley Growers*, Cal/OSHA App. 94-3355, Decision After Reconsideration (Sept. 15, 1999).)

Manuel Mercado (Mercado), the Employer's safety manager, testified that he had disciplined and even terminated employees for violations related to the safety policy; the IIPP was entered into the record and contains the disciplinary policy. (Ex.s 10 and K). Mercado also testified that the Employer has a reward system in place as an inducement to employees to follow the safety rules. Elements three and four are met.

Employer's IEAD defense ultimately fails based on elements two and five. The Board has stated in *UPS*, Cal/OSHA App. 07-3322, Decision After Reconsideration (Mar. 27, 2012):

When the record lacks evidence that the employee actually knew of the safety requirement that was violated, the fifth element fails. (*Paso Robles Tank, Inc.*, Cal/OSHA App. 08-4711, Denial of Petition for Reconsideration (Nov. 2, 2009).) The fifth element has been satisfied with admissions by the employees that they knew of the safety rule prior to violating it. (*Chicken of the Sea International*, Cal/OSHA App. 01-281, Decision After Reconsideration (Feb. 23, 2003).) Evidence an employee received the safe practices manual, and was present for general safety discussions at tailgate meetings, is by itself insufficient to show a specific employee was actually aware of a specific safety rule in order to satisfy element five of the IEAD. (*Pacific Coast Roofing, Corp.*, Cal/OSHA App. 95-2996, Decision After Reconsideration (Oct. 14, 1999).)

Accordingly, the ALJ properly found that this element fails, as Garibay's uncontroverted testimony is that he was not aware of the requirement to wear fall protection during the course of the work he was completing at the time of the accident. Because Employer failed to establish the requirements of the IEAD, the Board upholds the violation.

4. Is citation 4 properly classified as serious?

The Division has classified citation 4 as serious. As the ALJ states in the Decision, Labor Code section 6432 creates a "rebuttable presumption" that a serious violation exists where the Division is able to demonstrate that "a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation." Here, evidence establishes that there is a realistic possibility of death or serious physical harm from the actual hazard of falling 19 feet off of the top of a building under construction and onto the ground.

Once the rebuttable presumption has been established, Labor Code section 6432 includes the opportunity for an employer to rebut the presumption of a serious violation. It states:

If the division establishes a presumption pursuant to subdivision (a) that a violation is serious, the employer may rebut the presumption and establish that a violation is not serious by demonstrating that the employer did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation. The employer may accomplish this by demonstrating both of the following:

(1) The employer took all the steps a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation, taking into consideration the severity of the harm that could be expected to occur and the likelihood of that harm occurring in connection with

the work activity during which the violation occurred. Factors relevant to this determination include, but are not limited to, those listed in subdivision (b).

(2) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered.

Labor Code section 6432, subdivision (b)(1) includes a list of factors that relevant to weighing if an employer has rebutted the presumption:

(A) Training for employees and supervisors relevant to preventing employee exposure to the hazard or to similar hazards.

(B) Procedures for discovering, controlling access to, and correcting the hazard or similar hazards.

(C) Supervision of employees exposed or potentially exposed to the hazard.

(D) Procedures for communicating to employees about the employer's health and safety rules and programs.

(E) Information that the employer wishes to provide, at any time before citations are issued, including, any of the following:

(i) The employer's explanation of the circumstances surrounding the alleged violative events.

(ii) Why the employer believes a serious violation does not exist.

(iii) Why the employer believes its actions related to the alleged violative events were reasonable and responsible so as to rebut, pursuant to subdivision (c), any presumption established pursuant to subdivision (a).

(iv) Any other information that the employer wishes to provide.

Employer attempts to rebut the presumption through Remy, who testified that he instructed Garibay not to work at all on the house from which he ultimately fell. However, the ALJ found that the testimony fell short, and the Board is in agreement with that finding. Supervisor Remy, who does not speak Spanish, left the conversation with injured employee Garibay without being sure that Garibay had understood his direction not to work on the house where the accident would occur. Remy did not seek out the assistance of an interpreter or otherwise act to ensure that employee Garibay understood this important instruction.

Moreover, according to the testimony of Garibay, at least two or three hours elapsed from the time of the conversation between Garibay and Remy and the accident. During that time, no supervisor noticed that Garibay was at work in an area that was unsafe, despite the fact that he was in plain view in a home that did not yet have sheathing. The lack of training on proper use of fall protection equipment, as well as the failure of supervision, support the ALJ's conclusion that the presumption of a serious violation was not rebutted by the employer. The citation is properly classified as serious.

DECISION

The Decision of the ALJ is affirmed, for the reasons discussed above.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

Ed Lowry, Chair
Judith S. Freyman, Board Member



FILED ON: 03/12/2019