BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of:	
ROBERT ONWELLER **dba PACIFIC HAULING AND DEMOLITION** **1605 Dupree Way** **Brentwood, CA 94513** Employer	**DOCKETS 14-R1D4-1087 and 1088** **DECISION**

Statement of the Case

Robert Onweller dba Pacific Hauling and Demolition (Employer) is a demolition sub-contractor. Beginning September 9, 2013, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Sabino Deguzman, conducted an accident inspection at a place of employment maintained by Employer at 2315 Broadway Avenue, Oakland, California (the site). On February 27, 2014, the Division cited Employer for two violations of Title 8, California Code of Regulations: §342(a), failure to report a serious injury to the Division; and §1735(d)(4), failure to detect the hazard of an inadequately braced wooden beam during demolition operations and failure to prohibit its employees from working where such a hazard existed.[1]

Employer filed timely appeals of both citations, contesting the existence of the violations, the classifications of the violations, and the reasonableness of the proposed penalties. Employer also asserted the affirmative defense that it lacked knowledge of the hazardous condition and exercised reasonable diligence to discover the hazardous condition.

This matter was heard by Kevin J. Reedy, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at Oakland, California on January 23, 2015. Robert E. Onweller, III, owner, represented Employer. Corey Friedman, Staff Counsel, represented the Division. The parties presented oral and documentary evidence. The parties were allowed to submit post-hearing briefs. The matter was submitted for decision on February 27, 2015.

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

Issues

1. Did Employer, or any person acting on behalf of Employer, promptly report a serious injury to the Division?

2. Did Employer, during demolition operations, fail to inspect the working area as work progressed to detect hazards resulting from weakened or deteriorated floors or walls, or loosened materials?

3. Did Employer permit its employees to work where such hazards existed, without correction by shoring, bracing, or by other means?

4. Did Employer provide sufficient evidence to warrant a reduction in penalties based on a claim of financial hardship?

Findings of Fact

1. Employer is a demolition sub-contractor.

2. Proforma Construction (Proforma) was the general contractor at the work site.

3. First responder, Oakland Fire Department, promptly reported to the Division the injury of Roberto Alvarado (Alvarado), an employee of Robert Onweller, III, (Onweller) on the day of the accident, September 3, 2013.

4. As a result of his injuries, employee Alvarado received treatment at the hospital for a period greater than 24 hours.

5. Neither Employer nor general contractor Proforma reported the injury of Alvarado to the Division.

6. The roof center support beam became unstable during demolition operations as the result of inadequate vertical and horizontal bracing.

7. Employer failed to conduct inspections during the demolition process to detect hazards associated with the loosened center beam.

8. Prior to the accident Employer was aware that the roof beam at issue was not adequately supported.

9. Employer permitted its employees to work in an area where they were exposed to the hazards associated with an inadequately secured overhead beam.

10. Onweller's income has decreased substantially since the accident.

Analysis

1. Employer failed to report the serious injury to the Division. The violation of §342(a) is established.

Section 342(a), under "Reporting Work-Connected Fatalities and Serious Injuries," in relevant parts, provides the following:

> Every employer shall report immediately by telephone or telegraph to the nearest District Office of the Division of Occupational Safety and Health any serious injury or illness, or death, of an employee occurring in a place of employment or in connection with any employment.
>
> Immediately means as soon as practically possible but not longer than 8 hours after the employer knows or with diligent inquiry would have known of the death or serious injury or illness. If the employer can demonstrate that exigent circumstances exist, the time frame for the report may be made no longer than 24 hours after the incident.
>
> Serious injury or illness is defined in section 330(h), Title 8, California Administrative Code.

Section 330(h) provides the following:

> "Serious injury or illness" means any injury or illness occurring in a place of employment or in connection with any employment which requires inpatient hospitalization for a period in excess of 24 hours for other than medical observation or in which an employee suffers a loss of any member of the body or suffers any serious degree of permanent disfigurement, but does not include any injury or illness or death caused by the commission of a Penal Code violation, except the violation of Section 385 of the Penal Code, or an accident on a public street or highway.

In the citation, the Division alleges the following:

> On September 3, 2013, the exposing employer did not report immediately, or within 24 hours, to the Division a serious injury of an employee resulting from an accident in the workplace at 2315 Broadway in Oakland.

The elements of the violation are: (1) Employer did not report to the Division (2) a serious injury of an employee resulting from an accident at the workplace.

There are only two issues of law to determine here: 1) may an employer who delegates its reporting obligation to a third party, who fails to make that report, be excused from its duty to report a serious injury, and 2) may an employer rely on a report made by the fire department to satisfy its duty to report a serious injury? It is not in dispute that the injured employee was hospitalized for a period in excess of 24 hours where he received treatment for the injuries sustained at the workplace, thus, making it a reportable serious injury. And it is not in dispute that Employer failed to notify the Division of the serious injury. Proforma supervisor Jim Reidenbach (Reidenbach) said that he would report the injury to the Division. It is not in dispute that Reidenbach failed to report the injury to the Division. And it is not in dispute that the fire department reported the injury to the Division on the day of the accident.

Reidenbach failed to report the injury to the Division after having said he would do so. Section 342(d) allows an employer to satisfy the reporting requirement without its own employees making the phone call. That section specifically states a satisfactory report "may be made by any person authorized by the employers ..." to make such a report. Employer delegated its reporting duty to Reidenbach, who failed to make the call to the Division. As such, under §342 there is no basis for excusing Employer from its duty to report.

The fire department timely reported the injury to the Division. The Appeals Board, citing *Jaco Oil Co.*, Cal/OSHA App. 97-943 Decision After Reconsideration (November 22, 2000), has long held that an Employer cannot meet its obligation to report by relying on the report of a fire fighting agency or other public agency that must report pursuant to section 342, subdivision (b). The rationale for *Jaco Oil Co., supra,* is that the language of the safety order itself requires a report from both employer and a responding fire department or public agency. As such, Employer had an independent duty to report the injury of its employee, and failed to do so.

The Division presented sufficient evidence to demonstrate that Employer failed to report the serious injury to the Division. The Appeals Board, in *Allied Sales and Distribution, Inc.*, Cal/OSHA App. 11-0480, Decision After Reconsideration (Nov. 29, 2012) interpreted Labor Code section 6409.1(b) to require imposition of a $ 5,000 civil penalty when an employer fails to report a serious injury except in extraordinary circumstances. Employer did not provide evidence of any such extraordinary circumstance. Imposition of the full penalty, in the instant matter, would not result in a miscarriage of justice (See *Allied Sales, supra*). The proposed $5,000 penalty is therefore sustained.

2. Employer failed to inspect and detect the hazard of an inadequately braced wooden beam during demolition operations, and permitted its employees to work where such hazards existed,

without correction by shoring, bracing, or by other means. The violation of §1735(d)(4) is established.

Section 1735(d)(4), under "Demolishing Buildings," provides the following:

> During demolition, continuing inspections shall be made as the work progresses to detect hazards resulting from weakened or deteriorated floors or walls, or loosened material.
>
> Employees shall not be permitted to work where such hazards exist until they are corrected by shoring, bracing, or other effective means.

In the citation, the Division alleges the following:

> On or about 9/3/13, at a multi-employer jobsite, the exposing employer, (Pacific Hauling and Demolition) did not detect the hazard of an inadequately braced/secured wooden beam during the progression of the demolition of the building or take action to prevent the exposure to the hazard. The beam which measures 19 feet long by 15 inches wide by 10 inches high fell from a height of approximately 20 feet onto an employee resulting in serious injuries.

The elements of the violation are: (1) Employer failed to inspect and detect the hazard of an inadequately braced wooden beam during demolition operations (2) and permitted its employees to work where such a hazard existed, without correction by shoring, bracing, or by other means.

On September 3, 2013, Employer was tasked to peel off roof planks and joists, and remove air ducts, as part of demolition operations. At issue is the stability of a roof beam, which was supported on one end by a vertical column, and was supported at the other end by wooden braces (Exhibit 3, photos 1 and 5).[2] The beam weighed over 600 pounds, and was connected to wooden joists, which ran perpendicular to the beam.

Employer succeeded in removing all the joists until a point 10 to 15 feet from the air ducts. Cagle, using a Gradall[3], lifted the air ducts off the roof and placed them on the ground, as directed by Onweller. Onweller then left the area, whereupon Reidenbach told Cagle to remove the rest of the roof. Cagle served as Employer's foreman when Onweller was not present. As Cagle used the Gradall to remove the joists around the braced beam, he saw the beam lift

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[2] There was conflicting testimony as to the number of braces supporting the beam. Alvarado testified that this Exhibit accurately depicts the bracing during demolition. Cagle testified that he believed that two of the wooden braces depicted in this exhibit had been removed prior to commencement of work by Employer.

[3] A Gradall is an industrial forklift with an overhead boom.

up, opening gap of eight or nine inches between the wooden braces and the beam. Cagle told Reidenbach that an unsafe condition existed. Reidenbach told Cagle to proceed with the operation. Cagle was concerned that there would be nothing to prevent the beam from moving horizontally once the joist were gone. Cagle did not believe that the wooden braces alone could hold up the beam and suggested that more support was need. No additional supports were added, and no inspections of the beam were conducted. Cagle placed one of the air ducts directly under the still-intact center beam to protect the workers in case the beam came down. The area under and near the unstable beam was not taped off. Over two hours later, when Cagle and Alvarado were in the area near the beam picking up tools and equipment, the beam fell on Alvarado, and the air duct.

Onweller questioned the stability of the beam prior to commencement of demolition. Employer presented no evidence that the beam and the braces attached thereto were inspected for stability prior to the start of its demolition work. Cagle, during demolition operations, and while serving as foreman, determined that the beam was not properly supported. No inspections of the beam were done during the two and one-half hours between the time Cagle realized that the beam was unstable and the time the beam came crashing down on Alvarado. The Appeals Board has consistently held employers accountable for the acts and knowledge of their foremen. In *Greene and Hemly, Inc.,* Cal/OSHA App. 76-435, Decision After Reconsideration (April 7, 1978), the Board held that foreman's knowledge of a violative condition could be imputed to his employer even though upper management had no actual knowledge. Both Onweller and Cagle recognized the hazard associated with dangers associated with an unstable center beam over the work area, and no efforts were made to correct the stability of the beam by shoring, bracing, or other effective means. Employer failed to keep employees away from the zone of danger, and as such, exposed its employees to the hazards §1735(d)(4) was designed to address. Therefore, the Division, by a preponderance of the evidence, established a violation of §1735(d)(4).

3. The Division provided sufficient evidence to establish the Serious and classification and the Accident-related characterization.

The Division presented sufficient evidence to prove the Serious violation, along with the Accident-related characterization. Labor Code §6432(a) creates a rebuttable presumption of a serious violation if there is "a realistic possibility of death or serious physical harm" that results from the hazard created by the violation. If serious physical harm actually results from the citation hazard, the realistic possibility standard has been satisfied because it is no longer a possibility but an actuality. Further, a violation is characterized as accident-related if is a "serious violation . . . [that] caused death or serious injury . . ." Regulation §336(d)(7).

The inadequately braced center beam, weighing over 600 pounds, fell from 20 feet above, landing on Alvarado. Alvarado was rendered unconscious when the beam struck him, and sustained a dislocated shoulder, an injury to a disc in his back, and a tendon injury, all of which required in excess of 24 hours of hospitalization. Alvarado, as the result of being struck by a falling beam, sustained a Serious injury, as defined in §330(h). Because Alvarado suffered a serious injury resulting from the hazard created by the violative condition, the presumption of a Serious violation, pursuant to §6432(a), applies. And the same evidence supports the Accident-related characterization.

4. Employer failed to carry its burden of proof to establish any affirmative defense.

Employer asserts on its appeal form that, according to §334(c)(2)[4] the serious violation should not be upheld based on Employer's lack of knowledge of the violation, and that Employer could not, with reasonable diligence, have known of the violation. Section 334(c)(2) states:

> Notwithstanding subdivision (c)(1), 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.

Employer, on its appeal form, states that Employer was specifically instructed by Reidenbach, the foreman of general contractor Proforma, to demolish the ceiling joists at the demolition site. Reidenbach was overseeing and specifically instructing all demolition operations at the site. Employer goes on to state that a previous subcontractor had demolished a wall and had "inadequately braced/secured" the wooden beam at issue. After Onweller questioned the stability of the previously placed brace, Reidenbach insisted that the stability and structure was secure and instructed Onweller to proceed with demolition.

Lack of knowledge of a violation is an affirmative defense which requires that the Employer demonstrate that even with reasonable diligence, the Employer could not, and did not, know of the presence of the condition that violates the safety order. (*C.C. Myers, Inc.*, Cal/OSHA App. 08-952, Decision After Reconsideration (Dec. 6, 2013).) Employer is responsible for the safety of its employees, and cannot delegate those duties to another. Through the exercise of reasonable diligence, Employer should have been able to recognize the violation. Onweller questioned the stability of the wooden beam before beginning demolition operations and then relied on the representation of Reidenbach that the beam was secure. In *Southern California Gas Co.*, Cal/OSHA App. 81-0259, Decision After Reconsideration (Sept. 28, 1984) the Board held that the statutory duties relating to employee safety "cannot be

[4] Section 334 was subsequently amended. The references herein refer to § 334 as it existed on the date of the violation, September 3, 2013.

delegated by an employer." Employer had conducted site walkthroughs and held safety meetings. Employer presented no evidence that it had conducted its own inspections at two critical stages of the demolition work: 1) when Onweller, before the commencement of demolition, questioned Reidenbach regarding the stability of the beam, and then relied on Reidenbach's insistence that the structure was secure, and 2) after Cagle observed the beam separate from the support braces on the day of the accident. Reasonable diligence on Employer's part should have included Employer conducting its own inspections of the center beam at both of these critical stages. Such inspections at these two junctures would have made Employer aware of the lack of horizontal and vertical support provided at one end of the beam.

Failure to exercise supervision adequate to insure employee safety is equivalent to failing to exercise reasonable diligence, and will not excuse a violation on the claim of lack of employer knowledge. (*Stone Container Corporation,* Cal/OSHA App. 89-042, DAR (March 9, 1990).) Reasonable diligence includes the obligation by foremen or supervisors to oversee the entire work site where safety and health hazards are present if exposure to an unsafe condition exists (See *A. A. Portanova & Sons, Inc.,* Cal/OSHA App. 83-891, DAR (March 19, 1986), pp. 4-5.). Likewise, a hazard that could have been discovered through periodic safety inspections is deemed discoverable through reasonable diligence. (*Anheuser-Busch, Inc.,* Cal/OSHA App. 84-113, DAR (July 30, 1987); and *Sturgeon & Son, Inc.,* Cal/OSHA App. 91-1025, DAR (July 19, 1994).) A safety inspection would have revealed to Employer that the center beam was not adequately braced and secured. Such an inspection would have revealed the hazard. Employer, therefore, failed to exercise reasonable diligence to ensure worker safety.

Employer failed to inspect the center beam when Onweller noticed that there may have been an issue with support for the beam, and again failed to inspect the center beam when Cagle noticed that there may have been an issue related to support of the beam. Employer failed to exercise reasonable diligence when it twice failed to inspect the beam to evaluate its stability. Employer failed to carry its burden to establish that it had no knowledge of the violative condition. As such, the Serious classification of the citation is upheld.

5. The proposed penalty of $10,800 is reasonable.

All serious violations begin with a proposed penalty of $18,000 (§336(c)(1). When an employer commits a Serious violation and the Division has determined that the violation caused a serious injury the penalty may not be reduced, except that the penalty may be reduced for Size as set forth in §336(d)(1). In the instant matter the violation, the Serious classification, and the Accident-related characterization have all been established. On the citation Employer was given the maximum allowable adjustment based on Size, a 40% reduction. Such a reduction results in a penalty of $10,800. Therefore, a penalty of $10,800 is found reasonable and is assessed.

6. Employer failed to provide evidence sufficient to warrant a reduction in penalties based on a claim of financial hardship. Employer provided sufficient evidence to warrant a payment plan.

Prior to the accident, the majority of Employer's income came from contract work with Proforma Construction. After the accident, there have been no contracts with Proforma Construction, which has resulted in a dramatic reduction in Onweller's personal income. Onweller claims that he has a wife and four children and a house payment, that he can barely make ends meet to feed his family, and that his personal finances are creating stress on his marriage. Onweller provided 12 months of bank statements showing his checking account activity. The highest ending balance on any month was $5,231 and the lowest ending balance was $570. Onweller's wife's annual income amounts to $30,000, with the remaining income coming from Onweller's employment. Onweller has no financial reserves, and his contractor's license has expired.

The mandate of the California Occupational Safety and Health Act of 1973 (the Act) is to assure safe and healthful working conditions for all California workers. (Delta Transportation, Inc., Cal/OSHA App. 08-R2D1-4999, Decision After Reconsideration (Aug. 15, 2012), see also, Stockton Tri Industries, Inc., Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).)

The Employer here has not made any showing that a reduction in civil penalties would further the purpose of the Act. Here, Onweller's alleged lack of employment and severely diminished income have little to do with worker safety. A reduction in penalties under such circumstances does nothing to protect employees or to make workplaces safer.

In order to promote the purposes of the Act, "the Division, like other public agencies, including its federal counterpart, justifiably relies on the deterrent effect of monetary penalties as a means to compel compliance with safety standards." (*Delta Transportation, Inc., supra.*) Because of the large number of workplaces which OSHA must regulate, relying solely on workplace inspections is an impractical means of enforcement. "[T]he threat of civil penalties serves as a 'pocket-book deterrence' against violations of occupational safety and health standards." (*Miller/Thompson J.D. Steel, Harris Rebar, a Joint Venture,* Cal/OSHA App. 99-3121, Decision After Reconsideration (Sep. 26, 2001), citing, *Atlas Roofing Co., Inc. v. OSHRC* (5th Cir. 1975) 518 F.2d 990, 1001.)

The grant of financial hardship relief in the present circumstances, given the lack of any showing that it would benefit worker safety, would diminish the deterrent effect of civil penalties. Therefore, the civil penalties are affirmed in their full amount. However, given Employer's current personal

financial circumstances, the Administrative Law Judge asserts discretionary authority pursuant to Labor Code §6602 to fashion relief by allowing payment of the total penalties over 24 months.

Conclusions

In Citation 1, Item 1, the evidence supports a finding that Employer violated §342(a) by failing to report a serious injury to the Division. A penalty of $5,000 is assessed for Citation 1, Item 1.

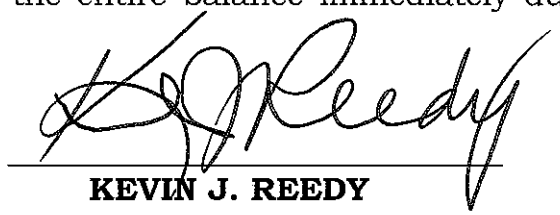
In Citation 2, Item 1 the evidence supports a finding that Employer violated §1735(d)(4) by failing to detect the hazard of an inadequately braced wooden beam during demolition operations, and by failing to prohibit its employees from working where such a hazard existed. A penalty of $10,800 is assessed for Citation 2, Item 1.

ORDER

Citation 1, Item 1, is sustained and a penalty of $5,000 is assessed for that violation. Citation 2, Item 1, is also sustained and a penalty of $10,800 is assessed for that violation. Therefore, total penalties of $15,800 are assessed for the reasons described herein, and as set forth in the attached Summary Table.

The penalty total set forth in the attached summary table is payable in twenty-four (24) installments. The first payment of $735 is due May 1, 2015, and then $655 each is due on the 1st of every succeeding month until the total is fully paid. One late payment renders the entire balance immediately due and payable.

Dated: March 25, 2015
KR:kav



KEVIN J. REEDY
Administrative Law Judge

NOTE: If you disagree with this decision, you may petition the Appeals Board for reconsideration within 30 days. The petition must comply with the requirements of Labor Code §§6614 through 6619. Please call the Appeals Board at (916) 274-5751 if you need assistance.

APPENDIX A

SUMARY OF EVIDENTIARY RECORD

ROBERT ONWELLER
dba PACIFIC HAULING AND DEMOLITION

DOCKETS 14-R1D4-1087 and 1088

Date of Hearing – January 23, 2015

Division's Exhibits – Admitted

Exhibit Number	Exhibit Description
1.	Jurisdictional documents, part 1 of 2
2.	Jurisdictional documents, part 2 of 2
3.	Photos of center beam, joists, and bracing
4.	Photos of beam, joists, bracing, and A/C units
5.	Photo of fallen beam and fallen braces
6.	Photos showing intact and missing portions of center beam
7.	Statement of Roberto Alvarado
8.	Photos showing dimensions of fallen beam
9.	Statement of Hector R. Santillano
10.	Penalty Calculation Worksheet

Employer's Exhibits – Admitted

A.	Employer's personal checking account statements

Witnesses Testifying at Hearing

1. Roberto Alvarado

2. Charles Cagle

3. Sabino Deguzman

4. Abigail Fabricante

5. David Ferguson

6. Robert Onweller, III

CERTIFICATION OF RECORDING

I, Kevin J. Reedy, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hearing the above-entitled matter, hereby certify the proceedings therein were electronically recorded. The recording was monitored by the undersigned and constitutes the official record of said proceedings. To the best of my knowledge the electronic recording equipment was functioning normally.

Signature

3/25/15

Date

SUMMARY TABLE

DECISION

In the Matter of the Appeal of:

ROBERT ONWELLER
dba PACIFIC HAULING AND DEMOLITION
DOCKETS 14-R1D4-1087 and 1088

ABBREVIATION KEY:

Reg=Regulatory
G=General
S=Serious
ER=Employer
DOSH=Division
W=Willful
R=Repeat

IMIS No. 317201739

DOCKET NO.	CIT. NO.	ITEM NO.	SECTION NO.	TYPE	MODIFICATION OR WITHDRAWAL	AFFIRM	VACATE	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT HEARING	**FINAL PENALTY ASSESSED BY BOARD**
14-R1D4-1087	1	1	342(a)	Reg	ALJ affirmed violation.	X		$5,000	$5,000	**$5,000**
14-R1D4-1088	2	1	1735(d)(4)	S	ALJ affirmed violation.	X		$10,800	$10,800	**$10,800**
					Sub-Total			$15,800	$15,800	**$15,800**
					Total Due					**$15,800**

NOTE: *Please do NOT send payments to the Appeals Board.*
All penalty payments must be made to:

Accounting Office (OSH)
Department of Industrial Relations
P.O. Box 420603
San Francisco, CA 94142

(INCLUDES APPEALD CITATIONS ONLY)

*You will owe more than this amount if you did not appeal ore or more citations or items containing penalties. Please call (415) 703-4291 if you have questions.

***The penalty set forth on this table is payable in twenty-four (24) installments. The first payment of $735 is due May 1, 2015, and then $655 each is due on the 1st of every succeeding month until the total is fully paid. One late payment renders the entire balance immediately due and payable.**

ALJ: KR
POS: 03/25/15