

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

In the Matter of the Appeal of:

**ALCAL SPECIALTY CONTRACTING, INC.
1614 MARLBOROUGH AVENUE, UNIT S2
RIVERSIDE, CA 92507**

Employer

Inspection No.

1236516

DECISION

Statement of the Case

Alcal Specialty Contracting, Inc. (Employer), is an insulation contractor. Beginning June 1, 2017, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Paul Grier (Grier), conducted an inspection of a construction site located at 3060 W. Olympic Blvd., Los Angeles, California (the job site) in response to a complaint.

On September 20, 2017, the Division cited Employer for one alleged Serious violation of a safety order, of title 8 of the California Code of Regulations: failure to utilize an approved personal fall arrest or fall restraint system by an employee whose work exposed him to a fall in excess of seven and one-half feet in violation of section 1670, subdivision (a).¹

Employer filed a timely appeal of the citation, contesting the existence of the violation, the classification, and the reasonableness of the penalty. Employer also asserted two affirmative defenses, Independent Employee Action Defense (IEAD), and Logical Time Defense.²

This matter was heard by Jacqueline Jones, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, in West Covina, California, on August 13, 2019 and January 14, 2020. Attorney Steven Thomas Davenport, Jr. of Davenport, Gerstner & McClure represented Employer. Clara Hill-Williams, Staff Counsel, represented the Division. At hearing, the parties stipulated and requested the Appeals Board designate the Court Reporter's transcript of the hearing as the official recording of the hearing. The request was granted pursuant to section 376.7. The matter was submitted for decision on June 8, 2020.

¹ Unless otherwise specified all citations will be to title 8 of the California Code of Regulations.

² Except where discussed in this Decision, Employer did not present evidence in support of its affirmative defenses, and said defenses are therefore deemed waived. (*California Erectors, Bay Area, Inc.*, Cal/OSHA App. 93-503 and 504, Decision After Reconsideration (July 31, 1998); *Central Coast Pipeline Construction Co., Inc.* Cal/OSHA App. 76-1342, Decision After Reconsideration (July 16, 1980).)

Issue

1. **Did Employer fail to ensure employees, whose work exposed them to falls in excess of seven and one-half feet from the unprotected side and edges, leading edges, and through openings, wore approved fall protection equipment?**

Findings of Fact

1. Employer's employees were working at the site on April 13, 2017, in connection with the construction of a seven story apartment building.
2. Warehouse Handler Jose Alatorre (Alatorre) and Installer Demetrious Smith Jr. (Smith) installed insulation into the framing grids for the mechanical pads on the roof at the site without wearing fall protection.
3. Senior Project Manager Barry Jones (Jones) oversaw the construction project at the site and had personal knowledge of the condition of the roof at the site.
4. Employees were not exposed to a fall hazard on April 13, 2017, because the roof joists were sheeted and the parapet walls surrounded the perimeter of the roof.

Analysis

1. **Did Employer fail to ensure that employees, whose work exposed them to falls in excess of seven and one-half feet from the unprotected side and edges, leading edges, and through openings, wore approved fall protection equipment?**

Section 1670, subdivision (a), provides in its relevant part:

- (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 ½ feet from the perimeter of a structure, unprotected sides and edges, leading edges, through shaftways and openings, sloped roof surfaces steeper than 12:1, or other sloped surfaces steeper than 40 degrees not otherwise adequately protected under the provisions of these orders.

Citation 1 alleges:

Prior to and during the course of the inspection including but not limited to on or about 4/13/2017, employees installing insulation in cricket boxes on the uppermost floor of the structure were exposed to a fall greater than 7 ½ feet and were not provided with nor used an approved personal fall arrest, personal fall restraint or positioning system.

The Division has the burden of proving a violation by a preponderance of the evidence. (*ACCO Engineered Systems*, Cal/OSHA App. 1195414, Decision After Reconsideration (Oct. 1, 2019).) “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 inference to be drawn from both kinds of evidence. (*Timberworks Construction, Inc.*, Cal/OSHA App. 1097751, Decision After Reconsideration (Mar. 12, 2019).)

In order to establish a violation of section 1670, subdivision (a), the Division must prove: (1) that an employee did not wear approved personal fall arrest, personal fall restraint, or positioning systems; (2) while exposed to a fall in excess of seven and one-half 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 not otherwise adequately protected under the provisions of the safety orders.

a. Was Section 1670, subdivision (a), applicable to the work performed at the site?

Section 1502 (Application) of the Construction Safety Orders states in relevant part:

- (a) These Orders establish minimum safety standards whenever employment exists in connection with the construction, alteration, painting, repairing, construction maintenance, renovation, removal, or wrecking of any fixed structure or its parts.
- (b) At construction projects, these Orders take precedence over any other general orders that are inconsistent with them, except for Tunnel Safety Orders or the Pressurized Worksite Standards in Article 154 of the General Industry Safety Orders.

Here, Employer conceded at hearing and in its closing brief that employees were on the roof installing insulation into mechanical pads as part of a construction project. Applicability of the safety order is not at issue as clearly the work being performed was construction in accord with Section 1502 of the Construction Safety Orders.

b. Did employees of Employer fail to wear fall protection?

The Division's case turns largely upon the credibility of its key witness, Warehouse Handler Jose Alatorre (Alatorre), since its investigation occurred after completion of the roof of the building. Alatorre and Installer Demetrious Smith Jr. (Smith) both testified that they were assigned on April 13, 2017, to install thermal insulation into mechanical pads (sometimes called cricket boxes) on the roof of a seven story apartment building, the site. (Depicted in Exhibit 4.)

Both Alatorre and Smith testified that they did not wear fall protection while working on the roof that day. The first prong is therefore established in that an employee did not wear approved personal fall arrest, personal fall restraint, or positioning systems.

c. Were the employees of Employer exposed to the hazard of a fall greater than 7.5 feet?

The Division bears the burden of proving employee exposure to a violative condition addressed by a safety order by a preponderance of the evidence. The Division may demonstrate employee exposure by showing that an employee was actually exposed to the zone of danger or hazard created by a violative condition. (*Benicia Foundry & Iron Works, Inc., supra*, Cal/OSHA 00-2976.) Actual exposure is established when the evidence preponderates to a finding that employees actually have been or are in the zone of danger created by the violative condition. (*Dynamic Construction Services, Inc.*, Cal/OSHA App. 14-1471, Decision After Reconsideration (Dec. 1, 2016).

In determining whether exposure exists, the Appeals Board fully considers all of the evidence placed in the record by the parties. (*Home Depot USA, Inc. dba Home Depot #6683*, Cal/OSHA App. 10104901, Decision After Reconsideration (Jul. 24, 2017).)

The Division argued that Alatorre and Smith worked on top of the seventh floor of a large apartment building standing on unsheathed open rafters or joists and subject to falling through an opening without fall protection exposing employees to a fall of a minimum of 10 to 12 feet in places as demonstrated by Exhibit 8. Employer argued that Alatorre and Smith worked on top of the seventh floor of a large apartment building standing on roof joists that were sheathed and that parapet walls were up³ as demonstrated by Exhibit C and as a result not exposed to any fall hazard.

Alatorre testified that they had to walk across open roof joists approximately 30 feet, without fall protection to access "cricket boxes" into which they installed R-19 insulation on the

³ A low wall along the roof of a building. The record does not reflect the height of the wall.

east end of the building.⁴ Alatorre testified that he and Smith carried insulation across openings of framed joists on the roof with falling depth of seven and a half feet or more without fall protection.

Alatorre testified that both he and Smith were exposed to a fall in excess of seven and one-half feet or more. Alatorre also testified that both he and Smith were exposed to joists with openings that were unsheathed and without floors below the openings and that the openings were large enough for a man to fall through.

Associate Safety Engineer Grier testified that Alatorre gave him the photos depicted in Exhibits 8A-8E. According to Grier, Alatorre said that he re-created the conditions on a different date at the site to represent the alleged hazards that he faced on April 13, 2017. Alatorre and Grier provided inconsistent testimony in that Alatorre testified the he took the photographs of the site depicted in Exhibits 8A-8E on the day of the incident, April 13, 2017, with his cell phone. Grier testified that Alatorre initially told him that on April 13, 2017, none of the floors had been put in for about seven floors below him and then later amended that statement by saying that some of the floors were installed below the roof level. At hearing, on cross examination, District Manager Victor Copelan (Copelan) and Grier both conceded that the issue was whether there was exposure to a fall hazard through openings. Section 1504 defines an “opening” as “An opening in any floor or platform, 12 inches or more in the least horizontal dimension.”

Alatorre testified that he had previously not received fall protection training from Employer. Employer, however, produced evidence that Alatorre received prior fall protection training. (Exhibit A). Employer’s Vice President, Bill Giordanengo testified that all of Employer’s new hire insulation employees must take and pass a series of online safety training courses, including a fall protection course. Alatorre’s testimony lacks credibility as his recollection appears to be unreliable and inconsistent.

Smith testified that on April 13, 2017, he was installing thermal insulation into mechanical pads on the roof top. According to Smith, the roof area that he and Alatorre worked on had sheathing⁵ which consisted of plywood. Smith testified that “there were no open roof joists” and that “everything was covered with plywood sheets”. Additionally, Smith testified that “there were parapet walls around everywhere we were working”. Smith testified that there was no need for fall protection because there was no exposure to a fall. Smith also testified that he had fall protection in his car.

Grier interviewed Smith on August 30, 2017 and took notes. (Exhibit 3). According to Grier, Smith told him, “We were up on joists,” and “It was scary.” No specific heights or

⁴ During the hearing cricket pads were also called mechanical pads which air conditioning units are placed on.

⁵ Grier testified that sheathing is flat plywood sheets that are placed on top of the rafters that constitute part of the roof.

measurements of openings were noted during the interview. Grier also stated that Smith told him, “You could see all the way down”. Grier’s notes also say that when he asked Smith if there were any problems he wanted to discuss with him. Smith said, “No”. Smith’s testimony and his declaration (Exhibit 5) are consistent. However, Smith’s testimony and declaration are at odds with the notes that Grier made during his interview.

Wilshire Construction, LP (General Contractor) Senior Project Manager Barry Jones (Jones) testified that he oversaw the construction project at the site and his team was responsible for building the project. Jones credibly testified that he was at the site on April 13, 2017. Jones testified that Wilshire Construction, LP keeps track of the status of its building projects on particular days by taking periodic photos and he supervises three staff members who photograph the building projects.⁶ Jones testified that he looked on the computer server from his Employer and located the pictures depicted in Exhibits B and C.⁷

According to Jones, the top photo in Exhibit B depicts the area of the site on March 29, 2017. Jones testified that the top photo in Exhibit B was taken on March 29, 2017. The top photo in Exhibit B is of the roof (the south end of the roof looking east.) Jones testified that the roof was sheeted on March 29, 2017 and the roofing joists that were used to frame the roof were covered by sheeting. According to Jones, the lower photograph on Exhibit B was taken on April 7, 2017, and depicts a man, and behind the man is a parapet wall. Jones credibly testified that a parapet wall is a low wall that is built around the perimeter of a roof typically that extends up above the roof level. The parapet wall is typically built to prevent people from falling. Jones testified that Exhibit C was taken on April 7, 2017. Jones testified that the top photograph on Exhibit C depicts another picture of the roof looking north at the northeast corner of the roof. This is the area where Alatorre and Smith worked on April 13, 2017. Jones testimony was that the roof joists were sheeted and the parapet walls were up on that day in that area. This testimony is credited.

Here, Jones had personal knowledge of the condition of the roof as the Senior Project Manager who was on site during the project and on the day of the alleged violation. Jones testimony was supplemented by the photographs. Jones, produced photographic evidence showing the condition of the roof on the day of the alleged violation. The roof is sheeted in the area where the workers installed the insulation. Additionally, Jones produced photographic evidence showing a parapet wall around the perimeter of the building. The weight of the

⁶ Exhibits B and C were produced due to subpoena duces tecum in response to Employer’s request for records showing the status of the project on or about April 13, 2017.

⁷ In the closing brief, the Division objected to Exhibits B and C, on the ground of authentication and failure to produce photographs during Discovery. The Division was given an opportunity to object to the admission of the photos during the hearing and failed to do so. Jones authenticated the photos by confirming what was depicted and identified that his employee took the picture and how that he retrieved the picture from the Wilson Construction, LP server. There was no testimony regarding when the Employer received the photographs, or the date that Employer became aware of the photographs. The Division’s objection is overruled.

evidence indicates that the employees were not exposed to the risk of falling. The second prong is not established in that there was no exposure to a fall.

The Division did not meet its burden to establish each element of the violation by a preponderance of the evidence. The Division failed to prove a violation of section 1670, subdivision (a). Citation 1 is dismissed.

Conclusions

The Division failed to establish that Employer failed to ensure that employees utilized appropriate fall protection while exposed to falling in excess of 7 and one-half feet from the unprotected side or edge of a structure.

Order

It is hereby ordered that Citation 1 is dismissed.

06/30/2020

Dated:



Jacqueline Jones
Administrative Law Judge

The attached decision was issued on the date indicated therein. If you are dissatisfied with the decision, you have thirty days from the date of service of the decision in which to petition for reconsideration. Your petition for reconsideration must fully comply with the requirements of Labor Code sections 6616, 6617, 6618 and 6619, and with California Code of Regulations, title 8, section 390.1. **For further information, call: (916) 274-5751.**

**APPENDIX A
SUMMARY OF EVIDENTIARY RECORD**

Inspection No.: **1236516**

Employer: **ALCAL SPECIALTY CONTRACTING, INC.**

Date of hearing(s): August 13, 2019 and January 14, 2020

DIVISION'S EXHIBITS

Exhibit Number	Exhibit Description	Status
1	Jurisdictional Documents	Admitted Into Evidence
2	Inspection Report-6 pages	Admitted Into Evidence
3	Field Documentation Worksheet	Admitted Into Evidence
4	Photo-upper and lower	Admitted Into Evidence
5	Declaration of Demetrious Smith	Admitted Into Evidence
6	1 BY Form	Admitted Into Evidence
7	Division's Witness List	Marked for Identification Only
8	A-E-Photos	Admitted Into Evidence
9	Blueprint-Reframing Page	Admitted Into Evidence

EMPLOYER'S EXHIBITS

Exhibit Letter	Exhibit Description	Status
A	Certificate of Fall Protection training with Jose Alatorre listed as participant	Marked for Identification Only
B	Photos with date 3/29/17 and 4/7/17-upper and lower	Admitted Into Evidence
C	Photos 4/7/17 and 4/14/17-upper and lower	Admitted Into Evidence
D	Roof Framing Plan for North Half of Roof	Admitted Into Evidence
E	Click Safety Certificate of Web Based Training	Admitted Into Evidence

F	Aerial picture of the site	Admitted Into Evidence
G	Multi-Product Work Order	Admitted Into Evidence
H	User Detail-User Course Library	Admitted Into Evidence
I	Stipulation to correct August 13, 2019 hearing transcript	Admitted Into Evidence

Witnesses testifying at hearing:

Paul Grier
Jose Alatorre
Demetrius Smith Jr.
Bill Giordanego
Victor Copelan

Associate Safety Engineer
Warehouse Handler
Insulation Installer
Vice President
District Manager

**APPENDIX A
CERTIFICATION OF HEARING RECORD**

Inspection No.: **1236516**

Employer: **ALCAL SPECIALTY CONTRACTING, INC.**

I, Jacqueline Jones, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hear the above-entitled matter, hereby certify the proceedings therein were electronically recorded or recorded by a certified court reporter. If the proceedings were recorded electronically, the recording was periodically monitored during the hearing. Either the electronic recording or the recording made by a certified court reporter constitutes the official record of the proceedings, along with the documentary and other evidence presented and received into evidence during or after the hearing. To the best of my knowledge the recording equipment, if utilized, was functioning normally and exhibits listed in this Appendix are true and correct, and accurately represent the evidence received during or after the hearing.

06/30/2020

Jacqueline Jones

Jacqueline Jones

Date

SUMMARY TABLE

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

In the Matter of the Appeal of: ALCAL SPECIALTY CONTRACTING, INC.	Inspection No. 1236516
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Citation Issuance Date: **09/20/2017**

C I T A T I O N	I T E M	SECTION	T Y P E	CITATION/ITEM RESOLUTION	A F F I R M E D	V A C A T E D	PENALTY PROPOSED BY DOSH IN CITATION	FINAL PENALTY ASSESSED
1	1	1670 (a) (1)	S	ALJ dismissed the citation.		V	\$3,710.00	\$0.00
Sub-Total							\$3,710.00	\$0.00

Total Amount Due* **\$0.00**

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

PENALTY PAYMENT INFORMATION

1. Please make your cashier's check, money order, or company check payable to:
Department of Industrial Relations

2. Write the **Inspection No.** on your payment

3. If sending via US Mail:
 CAL-OSHA Penalties
 PO Box 516547
 Los Angeles, CA 90051-0595

If sending via Overnight Delivery:
 US Bank Wholesale Lockbox
 c/o 516547 CAL-OSHA Penalties
 16420 Valley View Ave.
 La Mirada, CA 90638-5821

Online Payments can also be made by logging on to http://www.dir.ca.gov/dosh/CalOSHA_PaymentOption.html

-DO NOT send payments to the California Occupational Safety and Health Appeals Board-

Abbreviation Key:

G=General	R=Regulatory	Er=Employer	
S=Serious	W=Willful	Ee=Employee	A/R=Accident Related
RG=Repeat General	RR=Repeat Regulatory	RS=Repeat Serious	