

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

EKEDAL CONCRETE, INC.
220 Newport Center Drive, #11-288
Newport Beach, CA 92660

Employer

Dockets 13-R3D1-0131 through 0133

**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 Ekedal Concrete, Inc. (Employer) under submission, renders the following decision after reconsideration.

JURISDICTION

Beginning on July 17, 2012, the Division of Occupational Safety and Health (the Division) conducted an accident inspection at a place of employment controlled by Employer in Newport Beach, California. On December 26, 2012 the Division cited employer for three violations of workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.¹ Citation 2 alleges a Serious, Repeat and Willful violation of section 1712 subdivision (c)(1) [failure to ensure that employees working at grade or at the same surface as exposed to protruding steel anchor bolts were protected against the hazard of impalement]; Citation 3 alleges a Serious, Accident Related, and Willful violation of section 3276 subdivision (e)(16)(C) [failure to ensure that portable step ladder was not used as single ladder or in a partially closed position].

Employer filed timely appeals of the citations.

Administrative proceedings were held, including a contested evidentiary hearing before an Administrative Law Judge (ALJ) of the Board. After taking

¹ Unless otherwise specified, all references are to California Code of Regulations, Title 8. Citation 1, Item 1 alleges a Regulatory violation of section 342 subdivision (a). Citation 1, Item 2 alleges a General violation of section 1509 subdivision (a). Citation 1, Item 3 alleges a General violation of section 4650 subdivision (d). The Employer's Petition for Reconsideration does not discuss Citation 1; the Board affirms the ALJ's Decision as to this Citation and associated penalties.

testimony and considering the evidence and arguments of counsel, the ALJ issued a Decision on May 1, 2015.

The Board granted the Employer's timely filed petition for reconsideration of the ALJ's Decision on July 22, 2015. The Division filed a response to the petition for reconsideration on July 9, 2015.

ISSUES

1. Is the ALJ's Decision untimely and therefore invalid?
2. Is section 1712 subdivision (c)(1) unconstitutionally vague?
3. Was a violation of section 1712 subdivision (c)(1) demonstrated by a preponderance of the evidence by the Division?
4. Was a violation of section 3276 subdivision (e)(16)(C) demonstrated by a preponderance of the evidence by the Division?

FINDINGS OF FACT

1. Employer had a policy of capping all anchor bolts over 6 inches at its jobsites. Several anchor bolts were observed on June 27, 2012 in walking/working areas in an uncapped state. These bolts were approximately 4 to 4.5 inches tall, and constituted an impalement hazard, should an employee fall on an uncapped bolt.
2. Employee Ascension Castro (Castro), suffered a serious injury to his back and leg when he fell from an A frame portable ladder at a job site on June 27, 2012.
3. Castro was hospitalized for five days as a result of his fall and injuries.
4. Castro was using the A frame ladder in a closed position, leaned against a wall, when his feet slipped through the rungs and he fell.
5. Pete Ekedal (Ekedal) was present at the worksite when Castro used the ladder in a closed position, and fell from the ladder.

DECISION AFTER RECONSIDERATION

Is the ALJ's Decision untimely and therefore invalid?

Employer argues that the ALJ erred by extending the submission date. In its petition, Employer suggests that the ALJ's memory of the hearing was impacted by the passage of time, resulting in a fatally flawed decision.

Although the Board has addressed this argument in prior Decisions and Denials, we respond to it again here.

The Board's regulations require the Board to create an official record of the hearing, and such a record was made of these proceedings. (Section 376.7.) Even if the ALJ's memory of the proceedings faded with time, the official record is available for all parties, including the ALJ, to review. In *Treasure Island Media, Inc.*, Cal/OSHA App. 10-1093, Decision After Reconsideration (Aug. 13, 2015), the Board explained that an ALJ has authority to extend the submission date under both the Labor Code and the Board's regulations. The Board explained the impact of such an extension as follows:

First, the ALJ exercised her authority under our regulations to extend the date of submission. (§ 385, subd. (a).) Second, the thirty day time period stated in Labor Code section 6608 for issuing a decision is directory, not mandatory. (*CA Prison Industry Authority*, Cal/OSHA App. 08-3426, Denial of Petition for Reconsideration (Nov. 08, 2013) citing *California Correctional Peace Officers' Assn. v. State Personnel Board* (1995) 10 Cal.4th 1133, 1145; *Irby Construction*, Cal/OSHA App. 03-2728, Decision After Reconsideration (Jun. 8, 2007), writ denied Imperial County Superior Court (Apr. 2008).) Third, it follows, therefore, that the Board did not act in excess of its powers in issuing the Decision. More to the point, there is no logical or causal connection between the time when the ALJ's Decision was issued and the question of whether, given the record of this proceeding, the Division met its burden of proof. The administrative record remains unchanged, and its contents are the basis on which we decide whether the Division met its burden.

The ALJ thus did not err in extending the submission date.

Citation 2

Is section 1712 subdivision (c)(1) unconstitutionally vague?

Citation 2 alleges a Serious, Willful, and Repeat violation of section 1712, subdivision (c)(1). The ALJ affirmed the serious and willful classifications, but dismissed the repeat classification.² The regulation reads as follows:

- (c) Protection from Reinforcing Steel and Other Similar Projections.
- (1) Employees working at grade or at the same surface as exposed protruding reinforcing steel or other similar projections, shall be

² Neither party disputes the ALJ's dismissal of the Repeat classification of Citation 2; it is therefore final as a matter of law.

protected against the hazard of impalement by guarding all exposed ends that extend up to 6 feet above grade or other work surface, with protective covers, or troughs.

The alleged violative description states:

On July 17, 2012, the employer failed to ensure that employees working at grade or at the same surface as exposed protruding steel anchor bolts located less than 6 feet above the working surface, were protected against the hazard of impalement. As a result, on July 17, 2012, the Division identified 3 steel anchor bolts protruding approximately 4-4.5 inches in length [sic] above the concrete, exposing employees to impalement.

Section 1712, subdivision (c)(1) is a performance standard; in other words, the safety order has no specific instructions for compliance in its terms, so that employers across a variety of workplaces may meet the requirements of the regulation in a way that is suitable to their work. The California Court of Appeal has explained with approval the reasoning behind performance standards: "it would not be feasible to draft detailed plans and specifications of all acts or conduct to be performed or prohibited, and it is not necessary to do so." (*Teichert Construction v. California Occupational Safety and Health Appeals Bd.* (2006) 140 Cal.App. 4th 883, 891.)

Against this background, Employer argues that the safety order is unreasonably vague. Again, in *Teichert Construction*, the Court of Appeal explained how it reviews a regulation for vagueness:

"In considering a vagueness challenge to an administrative regulation, we do not view the regulation in the abstract; rather we consider whether it is vague when applied to the complaining party's conduct in light of the specific facts of the particular case." (*Teichert Construction v. California Occupational Safety & Health Appeals Bd.* (2006) 140 Cal.App.4th 883, 890-891).

Here, the Employer finds it unreasonable to encompass steel anchor bolts in the phrase "other similar projections," and argues that the standard does not cover anchor bolts. It cites industry practice in support of this position. Industry practice, which may be out of step with the safety regulation for any number of reasons, is not a defense to a violation, nor in and of itself evidence that the safety order is unclear. (See, *Lusardi Construction Company, Cal/OSHA App. 86-1400, Denial of Petition for Reconsideration* (May 31, 1989).)

The Division rebuts Employer's argument that the safety order cannot reasonably be said to cover anchor bolts with photographs and testimony showing similarities between rebar projections and anchor bolts, noting that

they are made of the same materials, are of approximately the same circumference, and may cause similar impalement injuries. (Ex. 7.) The Board also considers the rulemaking record for section 1712 when considering Employer's vagueness argument. (See, Ex. 24 (Final Statement of Reasons, California Occupational Safety and Health Standards Board); *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 29-30 [In interpreting a statute, look first to plain language, which governs. Only when the language is susceptible to more than one reasonable construction do we turn to extrinsic aids, including legislative history.]) In 2003, The Occupational Health and Safety Standards Board (Standards Board) made certain amendments to section 1712. As part of the rulemaking procedure, comments from the public were received by the Standards Board. A commenter asked the question "at what length rebar or similar projections need to be covered, i.e., what constitutes an impalement hazard" and the Standards Board responded as follows:

[T]he Board believes that in accordance with the proposal, the length at which rebar or similar projections would need to be covered is determined by whether or not the projection constitutes an impalement hazard. The Board recognizes that the regulation cannot possibly identify each and every worksite impalement hazard and, being a performance-based standard, gives discretion to the employer to make this determination. The Board also notes that employers needing assistance in making this determination can contact Cal/OSHA Consultation Services.

While the regulation does not define what constitutes a "similar projection" we find that an employer, using good judgment and common sense, may interpret the phrase in the context of the regulation so as to protect employees from the hazard of impalement. This is consistent with the intent of the Standards Board, and requires employer only to cap those projections that are hazardous. The regulation is not so vague and ambiguous as to render it unconstitutional. (See, *Martin J. Solis dba Solis Farm Labor Contractor*, Cal/OSHA App. 08-3414, Decision After Reconsideration (Dec. 30, 2013).)

Was a violation of section 1712 subdivision (c)(1) demonstrated by a preponderance of the evidence by the Division?

As discussed above, Employer appeals the serious and willful alleged violation of section 1712 subdivision (c)(1). At the time of the Division's inspection, several anchor bolts were observed in an uncapped state at Employer's worksite. The anchor bolts were observed by the Division's inspector, Brandon Hart (Hart), and stood at about 4 to 4.5 inches tall. The anchor bolts at issue were on the walking level, and in an area that employees accessed. While the safety order does not specifically name anchor bolts, a reasonable interpretation of the safety order leads to the conclusion that the 4 to 4.5 inch anchor bolts are "similar projections". Both Hart and Division

senior safety inspector Auston Ling (Ling) testified that anchor bolts, made of steel and of a similar circumference as rebar, can create an impalement hazard when located in an area where an employee may fall on to them. A violation of the safety order is established.

Employer argues that it should not be held responsible for the alleged violation, because in a 2010 inspection Carlos Behena (Behena), the construction superintendent who met with Division inspector Miguel Vargas (Vargas) at the jobsite in 2010 was told by Vargas that it did not need to cap projections under 6 inches tall. Division inspector Vargas denied making the statement to Employer. Ling, who had also been present at the inspection, also testified to his recollection of the prior incident, and did not recall any such statement being made to Employer.

Upon review of all relevant testimony and evidence, including review of a 2012 settlement Order, the ALJ ultimately found the testimony of the Division's inspectors to be more convincing than that of Employer's superintendent. The ALJ's credibility finding appears reasonable from the record. The Board generally "will not reverse a fact finding, especially a credibility finding, of an ALJ absent evidence of substantial weight." (*Brent Gausden dba Discount Ceramic Tiles of Riverside*, Cal/OSHA App. 04-3141, Denial of Petition for Reconsideration (Oct. 3, 2008).) We decline to disturb the ALJ's credibility determination here.³

As regards to the serious classification of the citation, both Hart and Ling testified regarding the realistic possibility of serious injury caused by a violation of the safety order. Under Labor Code section 6432, subdivision (a), a rebuttable presumption of a serious violation exists when the Division establishes that there is "a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation."¹³ The Board has interpreted the phrase "realistic possibility" to mean a prediction that is within the bounds of human reason, and not pure speculation. (*HHS Construction*, Cal/OSHA App. 12-0492, Decision After Reconsideration (Feb. 26, 2015).) Were an employee to trip on the anchor bolt, according to their testimony, there is a realistic possibility that he or she would suffer a broken bone or serious injury to an internal organ. If the employee were to land on the protruding anchor bolt head-first, there was a realistic possibility that they would suffer a broken skull, eye wound, or other serious injury. Employer did

³ Were the Board to overturn the ALJ's credibility determination, which it does not, Employer would then need to demonstrate that it meets all prongs of an equitable estoppel defense. "In *Underground Construction Co., Inc.*, Cal/OSHA App. 09-3518 Denial of Petition for Reconsideration (Mar. 22, 2012) the Board described the conditions that must be present for the doctrine of equitable estoppel to apply: 1) the party to be estopped must be apprised of the facts; 2) that party must intend that its conduct shall be acted upon; 3) the other party must be ignorant of the true state of facts; and 4) he must rely upon the first party's conduct to his injury. (Citing, *City and County of San Francisco v Grant Co.* (1986) 181 Cal.App.3d 1085, 1091)." (*Owens-Illinois Glass Container Inc.*, Cal/OSHA App. 09-2021, Decision After Reconsideration & Order of Remand (Jun. 16, 2014).) Employer has not demonstrated that these elements were met.

not rebut the presumption of a serious violation. The Board upholds the serious classification of the citation.

However, the Board declines to uphold the willful classification. A willful violation may be established by demonstrating that either:

the employer committed an intentional and knowing, as contrasted with inadvertent, violation, and the employer is conscious of the fact that what he is doing constitutes a violation of a safety law; or, even though the employer was not consciously violating a safety law, he was aware that an unsafe or hazardous condition existed and made no reasonable effort to eliminate the condition. (Section 334, subdivision (e).)

The Division argues that Employer was on notice since the 2010 inspection of its responsibility to cap all projections that constituted an impalement hazard. Employer's witness testified that he had understood the Division's inspector to require only 6 inch or higher projections to be capped, and passed this misunderstanding of the safety order through Employer's entire workforce. Since 2010, Employer has consistently capped anchor bolt projections at or above 6 inches in height. Employer's senior field representative, Matt Arcaris (Arcaris), also testified that he did not believe the shorter, uncapped anchor bolts were dangerous, and thought that the caps were in some instances more of a tripping hazard than the uncapped bolts.

The safety order is a performance standard, as described above, and Employer was responsible for analyzing its worksite and capping any exposed protruding steel that was a possible impalement hazard. However, the Division has not demonstrated that the Employer was intentionally violating the safety order, or was aware that there was an unsafe condition and failed to make a reasonable effort to eliminate the condition. Rather, Employer appears to have had a mistaken belief as to how to comply with the safety order, and also was not aware that its failure to cap the shorter anchor bolts constituted a safety hazard.

The citation is reclassified as serious, and the penalty is lowered from \$32,850 to \$6300.⁴

Citation 3

Was a violation of section 3276 subdivision (e) demonstrated by a preponderance of the evidence by the Division?

Citation 3 alleges a violation of section 3276 subdivision (e)(16)(C):
(e) Care, Use, Inspection and Maintenance of Ladders.
[...]

⁴ See Exhibit 11, Division's proposed penalty worksheet.

(16) Prohibited Uses.

[...]

(C) Step ladders shall not be used as single ladders or in the partially closed position.

The alleged violative description states:

On June 27, 2012, the employer failed to ensure that portable step ladders were not used as a single ladder or in a partially closed position. As a result, on June 27, 2012, an employee fell and suffered a serious injury while using a portable step ladder as a single ladder and in the closed position.

Employer's petition disputes the credibility determinations made by the ALJ in this citation. The injured employee, Ascension Castro (Castro), testified regarding his use of the ladder and his injury. His coworker and Employer's foreman, Sergio Uguidez (Uguidez), was also called to testify as to his recollection of the events. The Division's inspector, Hart, gave an account of his investigation, interviews with witnesses, and his conclusions.⁵ The ALJ found Castro's testimony, supplemented by Hart's testimony, to be more credible than Uguidez's, and concluded that Castro had used the ladder in a partially closed position, in direct violation of the safety order. The Board, as discussed earlier in this Decision After Reconsideration, generally will not disturb an ALJ's credibility findings in the absence of substantial contrary evidence. No such contrary evidence appears in this record. (CA *Transportation*, Cal/OSHA App. 08-2173, Denial of Petition for Reconsideration (Dec. 21, 2011), citing *Garza v. Workmen's Compensation App. Bd.* (1970) 3 Cal.3d 312.)

The Board is in agreement with the ALJ's finding that the weight of the evidence preponderates to a finding that the ladder was closed at the time of Castro's fall. As such, the violation of the safety order is established. Employer also appeals the serious and willful classification of the citation.⁶ In

⁵ While inspector Hart's testimony regarding statements made by Castro and supervisor Pete Ekedal (Ekedal) were hearsay, under the Board's rules of practice and procedure section 376.2: "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection to hearsay evidence is timely if made before submission of the case or raised in a petition for reconsideration. The rules of privilege shall be effective to the extent that they are otherwise required by statute to be recognized at the hearing and irrelevant evidence shall be excluded." Furthermore, statements by Ekedal to the inspector can be classified as party admissions. See Evidence Code section 1222: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if: (a) The statement was made by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement; and (b) The evidence is offered either after admission of evidence sufficient to sustain a finding of such authorization or, in the court's discretion, as to the order of proof, subject to the admission of such evidence." (See also, Evidence Code sections 1220 and 1221.)

⁶ Employer points out in its petition that an amended summary table was issued for the ALJ's Decision, reflecting that the violation was not found to be accident-related. We do not discuss the accident-related classification here.

order to establish a rebuttable presumption that a serious violation exists, the Division must demonstrate a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation. (*Orange County Sanitation District*, Cal/OSHA App. 13-0287, Decision After Reconsideration (May 29, 2015).) Hart testified that there was a realistic possibility that using the ladder in a closed position would result in a fall from the ladder, and that such a fall would lead to broken bones, or even death. Employer did not rebut the presumption of a serious violation. A serious violation is established.

A willful violation may be established via one of two tests: "(1) an employer intentionally violated a safety law or (2) an employer had actual knowledge of an unsafe or hazardous condition, yet did not attempt to correct it." (*Rick's Electric, Inc. v. California Occupational Safety and Health Appeals Bd.*, (2000) 80 Cal.App.4th 1023, 1034-1035, *citing*, *National Cement Co.*, Cal/OSHA 91-310, Decision After Reconsideration (Mar. 10, 1993); *see also*, *Tutor-Saliba-Perini*, Cal/OSHA App. 94-2279, Decision After Reconsideration (Aug. 20, 2001).) As the ALJ found, testimony from both Castro and Hart lead to the finding that site superintendent, Pete Ekedal (Ekedal), was in the area at the time that Castro was using the ladder in a closed position, and was handing tools to an employee who then handed the tools to Castro. A supervisor's knowledge of a hazard will be imputed to the employer. (*Levy Premium Foodservice Limited Partnership, dba Levy Restaurants*, Cal/OSHA App. 12-2714, Denial of Petition for Reconsideration (Aug. 25, 2014).) Employer's knowledge of the use of the ladder in an unsafe, closed condition, and failure to correct the unsafe use, establishes a willful violation.

The Board upholds the ALJ's finding of a Serious and Willful violation of section 3276, subdivision (e), and the \$39,375 penalty.

ED LOWRY, Board Member
JUDITH S. FREYMAN, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: MAR 28, 2016

SUMMARY TABLE

DECISION AFTER RECONSIDERATION

In the Matter of the Appeal of:

EKEDAL CONCRETE, INC.
Dockets. 13-R3D1-0131 through 0133

Abbreviation Key:	Reg=Regulatory
G=General	W=Willful
S=Serious	R=Repeat
Er=Employer	DOSH=Division

IMIS No. 315530089

DOCKET	CITATION	ITEM	SECTION	TYPE	ALLEGED VIOLATION DESCRIPTION MODIFICATION OR WITHDRAWAL AND REASON	AFFIRMED	VOIDED	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY ASSESSED BY ALJ	FINAL PENALTY ASSESSED BY BOARD
13-R3D1-0131	1	1	342(a)	Reg	ALJ found the report was late applying size and history credits	x		\$5,000	\$2,250	\$2,250
13-R3D1-0131	1	2	1509(a)	G	ALJ dismissed the violation.		x	\$250	\$0	\$0
13-R3D1-0131	1	3	4650(d)	G	ALJ affirmed the violation.	x		\$420	\$420	\$420
13-R3D1-0132	2	1	1712(c)(1)	SW	ALJ affirmed the Willful classification; but did not find a repeat violation. The Board re-classified the penalty as Serious.	x		\$65,700	\$32,850	\$6,300
13-R3D1-0133	3	1	3276(e)(16)(C)	SARW	ALJ affirmed the violation. The Board upheld the ALJ's findings.	x		\$70,000	\$39,375	\$39,375
Sub-Total								\$141,370	\$74,895	\$48,345

Total Amount Due*
(INCLUDES APPEALED CITATIONS ONLY)

\$48,375

NOTE: Payment of final penalty amount should be made to:
 Accounting Office (OSH)
 Department of Industrial Relations
 P.O. Box 420603
 San Francisco, CA 94142

*You will 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.

POS: 3/28/2015