BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No.
HATHAWAY DINWIDDIE CONSTRUCTION CO. **811 WILTSHIRE BOULEVARD, SUITE 1500** **LOS ANGELES, CA 90017** **Employer**	**1410726** **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

Hathaway Dinwiddie Construction Co. (Employer) operates a construction business. Employer was the general contractor for the commercial aspects of a construction project, involving a three-story subterranean parking structure, retail shops, and above-grade office structures, at a job site located at 1357 Vine Street, Los Angeles, California (the job site or the construction site). Beginning March 19, 2019, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Christian Nguyen (Nguyen), conducted an inspection of the construction site, pursuant to a report of an accident from a subcontractor at the site, unrelated to this appeal.

While at the site, Nguyen observed and photographed exposed, unguarded rebar in multiple areas of Employer's job site. This included observation and photographs of Employer's employees working in close proximity to exposed rebar, as well as exposed rebar in areas where no employees were present. Employer abated these conditions during the inspection.

On June 26, 2019, the Division cited Employer for an alleged failure to guard all exposed ends of protruding steel rebar so as to protect employees and others from the hazard of impalement. Employer filed a timely appeal.

This matter was heard by Administrative Law Judge (ALJ) Leslie E. Murad II, via Zoom on February 23, 2021, and on May 13 and 14, 2021. Attorney Manuel M. Melgoza of Donnell, Melgoza & Scates, LLP, represented Employer. Victor Copelan, District Manager for the Los

Angeles office, represented the Division. The ALJ's Decision, issued on November 5, 2021, affirmed the citation. Employer timely petitioned for reconsideration. The Division did not file a response.

Along with Employer's Petition for Reconsideration (Petition), the Board received a timely filed Motion to Allow Filing of Amicus Curiae Brief and an Amicus Curiae Brief from the Construction Employer's Association (CEA or Amicus), urging the Board to grant Employer's petition, reverse the ALJ's Decision, and dismiss Citation 1. The Board may allow a party to file an *amicus curiae* brief within the time allowed for the filing of the answer or brief of the party whose position the amicus will support. (§ 393, subd. (e).) The Board both took Employer's Petition under submission and granted CEA's motion to file the amicus brief on January 13, 2022.

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. Issues not raised in the Petition for Reconsideration are deemed waived. (Lab. Code, § 6618.)

ISSUES

1. Did the Division establish that Employer violated section 1712, subdivision (c) (1), by having exposed/uncapped rebar on the job site?

FINDINGS OF FACT

1. An accident occurred on the job site unrelated to any work being performed by Employer. As a result, the Division inspected Employer's job site.

2. While inspecting Employer's job site, Nguyen observed uncapped and exposed rebar.

3. Employer did not guard all exposed ends of rebar projections with protective covers.

4. Employees were exposed to an impalement hazard by the uncapped and exposed rebar.

DISCUSSION

1. Did the Division establish that Employer violated section 1712, subdivision (c) (1), by having exposed/uncapped rebar on the job site?

Section 1712, subdivision (c)(1), provides:

> (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

> 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.

In Citation 1, Item 1, the Division alleges:

> Prior to and during the course of the inspection, including but not limited to March 19, 2019, employees working at grade throughout the construction job site while being exposed to unprotected rebar, were not protected against the hazard of impalement as required.

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 weighted 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. (*Timberworks Construction, Inc.*, Cal/OSHA App. 1097751, Decision After Reconsideration (Mar. 12, 2019).)

In order to establish a violation of section 1712, subdivision (c)(1), the Division must demonstrate that Employer failed to protect employees from exposed protruding reinforcing steel, extending up to six feet above grade or work surface, with protective covers or troughs. Here, there is no dispute that unguarded rebar, extending up to six feet above grade, was present at the job site. To establish the alleged violation the Division therefore had to prove by a preponderance of the evidence that employees were exposed to the hazard of injury from the unguarded rebar.

Under longstanding Board precedent, exposure may be demonstrated in two different ways. First, the Division may establish actual exposure by showing that an employee was actually exposed to the zone of danger created by the violative condition, i.e., that the employees have been or are in the zone of danger. (*Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (April 24, 2003).) "The zone of danger is that area surrounding the violative condition that presents the danger to employees that the standard is intended to prevent." (*Id*.) Actual exposure neither means nor requires an actual injury; it simply means proof that employees have been or are in the zone of danger. (*Dynamic Construction Services, Inc.*, Cal/OSHA App. 14-1471, Decision After Reconsideration (Dec. 1, 2016).) Actual exposure is often proven, as here, through a Division inspector's direct observation of an employee's presence in a zone of danger, or worker testimony to that fact. (*Benicia Foundry & Iron Works, Inc*., *supra*, Cal/OSHA App. 00-2976.) Here, the zone of danger was the area around the exposed rebar where an employee might fall or trip, and become impaled on the rebar.

In addition to demonstrating actual employee exposure to the hazard, "the Division may establish the element of employee exposure to the violative condition without proof of actual exposure by showing employee access to the zone of danger based on evidence of reasonable predictability that employees while in the course of assigned work duties, pursuing personal

activities during work, and normal means of ingress and egress would have access to the zone of danger." (*Dynamic Construction Services, Inc*., *supra*, Cal/OSHA App. 14-1471, citing *Benicia Foundry & Iron Works, Inc*., *supra*, Cal/OSHA App. 00-2976.) That is, the Division may establish employee exposure by showing the area of the hazard was "accessible" to employees such that it is "reasonably predictable by operational necessity or otherwise, including inadvertence," that employees "might be" in the zone of danger. (*Id.*) However, the Board has also clarified that "reasonable predictability" of access requires "some consideration of the 'likelihood' of employee access to make sure that exposure determinations were not made solely on tenuous theoretical or hypothetical possibilities." (*Id*.)

The Division's evidence consisted of numerous photographs taken by Nguyen at the job site, and Nguyen's testimony of his personal observations at the job site. These fall into two categories. First, Nguyen testified that he observed and photographed two of Employer's employees working in close proximity to uncapped rebar. Second, Nguyen testified that he observed and photographed exposed rebar in areas where no employees were present, but which were accessible to employees.

Employer's Petition primarily asserts that the ALJ erred in crediting the evidence presented by the Division over Employer's evidence to find employee exposure to the hazard addressed in the safety order. Specifically, Employer, as well as Amicus, asserts the ALJ erred in crediting Nguyen's testimony, and supporting photographic evidence, over the testimony of Nicholas Tracy (Tracy), Employer's on-site Senior Superintendent. (Petition pp. 2-3, 6-8, 9-16; Amicus Brief pp. 5-9, 10-11, 12.) These two witnesses gave directly conflicting testimony on many points.

The ALJ's Decision made no explicit findings regarding the witnesses' credibility; the ALJ merely weighed the parties' evidence and found the Division's evidence to be stronger. However, Employer and Amicus argue that the ALJ erred in finding Nguyen's testimony more credible than Tracy's. The Board has reviewed the record, including all exhibits, in this matter and concludes that the Division's evidence had more convincing force and greater probability of truth than Employer's.

Additionally, Employer argues that the Division misinterpreted language in Employer's internal safety reports (Exhibit 56) in finding the violation. (Petition, pp. 7-8, 17-18.) However, the ALJ's Decision did not rely upon, or even mention, the disputed safety reports. Rather, the ALJ relied upon the Division's direct evidence.

a. Were Employees Actually Exposed To The Hazard Of Impalement By Protruding And Unguarded Rebar?

We turn first to the issue of whether the Division's evidence established that Employer's employees were actually exposed to the hazard of uncapped rebar.

In the first such instance, Nguyen testified that Exhibits 14 and 15 show an employee, wearing an orange Hathaway Dinwiddie vest, working in a trench, which Nguyen estimated to be about two and a half feet deep at the point where the employee is standing (HT

5/14/21, pp. 44, 46). It should be noted that although this employee was depicted working in a trench, Employer does not argue that the safety order was not violated because the employee was not working "at grade or at the same surface" as the exposed rebar.[1] Rather, Employer argues that the rebar was "well over the height of employees' heads, and was not required to be capped." (Petition, p. 11.)

In Exhibit 14, the picture is taken from a position looking down into the trench. The left side of the trench appears to be at roughly the employee's waist height, which is consistent with Mr. Nguyen's testimony that the depth of the trench was about two and a half feet deep. Exposed horizontal rebar can be seen protruding on the left side of the trench. There is vertical rebar bent at 90 degree angles facing away from the trench along the left side, and the horizontal rebar appears to be at the same height as the tops of these vertical pieces. Nguyen testified that he estimated the horizontal rebar to be about two feet above the top of the trench. (HT 5/13/21, p. 24.) The horizontal rebar appears to be at the same level as the employee's head. There is a wooden barrier with caution flags on the right side of the trench. Tracy testified that these flags warned of the open trench. (HT 5/13/21, p. 152.) The horizontal rebar appears significantly lower than the string of caution flags on the trench's right side.

Exhibit 15 shows the same employee in the trench from a somewhat closer perspective. The employee's left hand appears to be resting on the left side top of the trench at about waist level. The caution flags on the right side again appear significantly higher than the uncapped horizontal rebar on the left, and the exposed rebar appears to be at the level of the employee's head.

Nguyen testified that he observed the exposed rebar within two feet of the employee shown in Exhibits 14 and 15, and stated that at such a height, the rebar posed a hazard of injury to the employee. (HT 2/23/21, p. 31.) Nguyen alerted Tracy, who was accompanying him on the inspection, to the danger and ordered the employee out of the trench and to stop work, which the employee did. (*Id*. at pp. 33-34.)

Tracy testified that the perspective and angle of these photos made the exposed rebar appear closer to the employee than it actually was. (HT 5/13/21, pp. 202-203.) Tracy testified that the horizontal ends of exposed rebar were, in reality, two to two and a half feet above the employee's head, and over six feet above grade. (*Id*. at p. 202, 208.) Tracy also testified that the area of the trench where the employee was standing was approximately four to five feet deep. (HT 5/23/21, p. 151; Petition, p. 10.)

During the hearing, the ALJ did note that the perspective of the photos might distort the actual distance between the employee in the trench and the ends of the uncapped rebar. (HT 5/13/21, pp. 204-205, 208, 210-211.) Ultimately, however, the ALJ credited Nguyen's testimony over Tracy's. The ALJ determined, based on Nguyen's percipient testimony as well as the photographic exhibits, that the employee in the trench was exposed to the hazard of uncapped rebar. (Decision, pp. 3, 5.) The evidence preponderates to a finding that the exposed rebar was six

[1] Issues not raised in the petition for reconsideration are deemed waived. (Lab. Code, § 6618.)

feet or less above grade. This alone is sufficient to establish exposure and affirm the citation.

In the second instance, Nguyen testified that Exhibit 24 shows an employee carrying a bucket, walking on a parking garage ramp past both covered and exposed rebar. (HT 2/23/21, pp. 48-50.) Exhibit 25 shows a close-up of the exposed rebar in Exhibit 24. (*Id.* at p. 56.)

In Exhibit 24, exposed and capped rebar is seen in the foreground. The employee is walking in the area between the rebar and a wooden railing covered with plastic sheeting. The wooden railing appears to be at about the height of the employee's knees. Exposed rebar is seen protruding, in the lower left foreground of the photo, seemingly into the area near where the employee is walking. However, it is unclear from the photograph how far the employee actually is from the exposed rebar.

Employer again argues that this employee was not exposed to an impalement hazard because he was too far away from the rebar, and that the angle of the photo distorted the apparent distance between the employee and the rebar. Tracy estimated that this employee is, in fact, "walking in the center of the ramp … about 12 feet away" from the exposed rebar. (Petition, p. 12, emphasis in original.)

Again, the ALJ credited Nguyen's testimony over Tracy's and found that Exhibit 24 provided evidence of employee exposure. (Decision, p. 5.) Even if the pictured employee was not in the immediate zone of danger at the time the photo was taken, the Board finds that this employee had reasonably predictable access to the zone of danger.

Employer argues that Nguyen failed to show evidence of the actual distance between the employees depicted in Exhibits 14, 15, and 24, and the exposed rebar, by measuring that distance during his inspection, and failed to interview the employees he photographed. However, Nguyen's testimony was based not just on the photographs but on his personal observations. We agree with the ALJ's finding that the Division's evidence has more convincing force and greater probability of truth than Employer's.

Employer further argues that safety precautions such as curbs and railings eliminated any risk of employee exposure in the area where Nguyen photographed the worker depicted in Exhibit 24. The safety order, however, requires that the employer must provide protection from the impalement hazard by means of protective covers or troughs over the ends of the rebar.

The Division's evidence preponderates to a finding that Employer's employees were exposed to the hazard of uncapped rebar.

b. Did Employees Have Reasonably Predictable Access to The Hazard Of Exposed Rebar In "Stop Work" Areas?

Nguyen also presented photographs of uncapped rebar in areas of the job site where no employees were present at the time of the inspection. We note that the inspection took place in the late afternoon, after most employees had left for the day. Nguyen and Tracy presented

contradictory testimony as to whether employee exposure existed in these areas. Nguyen argues that employee exposure existed in these areas. In contrast, Employer argues that these areas were under a stop work order, and were off-limits to employees. Employer argues that it was not reasonably predictable that employees would access these areas.

Reasonably Predictable Access to The Hazard During Ingress And Egress:

The Division's evidence included photos of a plywood bridge or ramp over an area with unprotected rebar next to and under the bridge. (Exhibits 36, 37, 38, 39.) Nguyen testified that he was told by Tracy during the inspection that employees used this path to travel to other parts of the job site. (HT 2/23/21, p. 63; HT 5/13/21, p. 54.) Nguyen further testified that he and Tracy both walked on the ramp, and there were no barriers or other indicators that the ramp was not to be used. (*Id*.)

Tracy, by contrast, testified that the bridge or ramp was in a stop work area and was not being used by employees. (HT 5/13/21, p. 179.) He stated that he was never with Nguyen in this area of the jobsite. (*Id.* at p. 180.) Tracy also stated no employees used this bridge or ramp. Tracy testified that the stop work order had been issued in January, 2019, however he admitted that he did not give Nguyen this information. (HT 5/13/21, p. 168.) Tracy conceded that he did not tell Nguyen that certain areas of the work site were off-limits to employees. (HT 5/13/21, pp. 168, 230-231; HT 5/14/21, p. 60.)

Exhibit 36 shows wooden planks forming a bridge over an area with a puddle of water. On the left end, the planks are resting on the concrete floor. On the right end, the planks are resting on a concrete platform or slab. There is a puddle of water under the plank bridge in the area of the floor immediately in front of the platform. Numerous pieces of exposed vertical rebar are seen protruding from the concrete floor in the area under and immediately around the bridge. Exhibit 37 shows a slightly different angle of the bridge and exposed rebar. Exhibit 38 depicts a close-up of the exposed rebar protruding vertically next to the bridge planks.

Exhibit 39 depicts another angle of the wooden bridge shown in Exhibits 36, 37, and 38. The bridge planks are seen in the lower left, resting on the concrete platform with water on the floor beneath, with pieces of exposed vertical rebar protruding from the floor next to the planks and in front of the platform area. There is a metal staircase, marked off with red caution tape, in the center of the photo. To the left of the metal staircase, partially obscured by metal scaffolding, the photo depicts a wooden staircase surrounded by a wooden railing. There is not a barrier of any kind between the bridge and the wooden stairs to prevent workers from using the plank bridge to access the wooden stairs.

Regarding Exhibit 39, Tracy testified that there are "portions in this picture that are part of the stop work and then there's portions that aren't." (HT 5/13/21, p. 182.) Tracy testified that the wooden stairs, seen to the right of the metal staircase, were actively used to access the parking levels below. (*Id.* at p. 183.) Nothing indicates what areas depicted are off-limits to employees. The wooden bridge, which Tracy stated was not in use, was accessible to employees during ingress to or egress from the wooden staircase, which Tracy stated was in use. When asked by the ALJ

what would prevent employees from using the bridge to access the stairs, Tracy responded, "We told the employees not to be in that area." (*Id.* at p. 227.)

We construe the term "working" in section 1712, subdivision (b)(1) to include the full range of activities engaged in by employees "while performing work-related duties, pursuing personal activities during work, or employing normal means of ingress and egress to their work stations." (*Dynamic Construction Services, Inc*., *supra*, Cal/OSHA App. 14-1471, citing *Benicia Foundry & Iron Works, Inc*., *supra*, Cal/OSHA App. 00-2976.) This interpretation, which includes employees traveling to and from their work stations, is in accord with the directive of the California Supreme Court in *Carmona v. Division of Industrial Safety* (1975) 13 Cal.3d 303, 313, that safety orders are to be liberally interpreted for the purpose of achieving a safe working environment. Under this interpretation, the makeshift bridge is evidence that employees had reasonably predictable access to the zone of danger near the uncapped rebar during ingress or egress. The hazard posed by protruding rebar is the same regardless of whether the exposed employee is performing a particular job assignment, moving from one assignment to another, or going to or from his or her job assignment.

Reasonably Predictable Access to The Hazard In Employees' Lunch Area:

Nguyen further testified that he observed unprotected rebar as depicted in Exhibits 6-1, 7, 8, and 41. These Exhibits show rows of exposed rebar protruding from the wall in an area near a group of picnic tables. Nguyen testified that, during the inspection, Tracy described the area as a "lunch break area" and told him that the exposed rebar had been present in that area since January 15, 2019. (HT 2/23/21, pp. 43, 108-109, 156, 160.) This testimony, although denied by Tracy, was supported by Nguyen's field documentation worksheet (Exhibit 63). The field documentation worksheet, which Nguyen consulted and read from during the hearing, was made contemporaneously with his inspection. It states, in relevant part, "Lunch break area with exposed [and] unprotected rebar. Rebar no caps since Jan. 15, [20]19." (*Id*.) Nguyen further testified that Tracy never told him the area was off-limits, and there were no "keep out" signs or other barriers to indicate as such. (HT 2/23/21, p. 191.)

Tracy, by contrast, testified that this area was part of the stop work area and was being used only as storage for the tables. (HT 5/13/21, p. 140.) He also testified that he never told Nguyen the area was in use as a lunch or break area. (*Id.* at 141, 142.)

While the ALJ noted that Employer disputed whether employees were using the tables during their lunch or breaks at the time of the inspection, the ALJ concluded, and we agree, that the rebar near the picnic tables was evidence of employee exposure. (Decision, p. 5.) The area was accessible to employees. Nguyen testified that he was able to enter the area during his inspection without being made aware that the area was off-limits. "[E]mployee exposure may be established by showing the area of the hazard was 'accessible' to employees such that it is reasonably predictable by operational necessity or otherwise, including inadvertence, that employees have been, are, or will be in the zone of danger." (*Dynamic Construction*, *supra*, Cal/OSHA App. 14-1471.) Here, the presence of the picnic tables, considered along with the absence of any signage, markings, or other warnings indicating these areas are off limits, make it

reasonably predictable that employees would enter the area, exposing them to the hazard of uncapped rebar. Indeed, even if the area was only being used to store the tables, the exposed rebar would have been present at the time employees placed the tables in the area for storage. It is therefore reasonably predictable that employees would enter the area, exposing them to the hazard of uncapped rebar.

The Division's evidence indicates a reasonable likelihood that employees could access the stop work areas, inadvertently or otherwise, and thus come within the zone of danger in the vicinity of the exposed rebar. Amicus, CEA, argues that employee exposure cannot be established when a hazard exists in the workplace, but no employee is exposed to the hazard, and no employee is likely to come into contact with the danger zone. However, that is not the situation here. The Division presented extensive photographic evidence, and percipient witness testimony, establishing that not only did the hazard exist, but Employer failed to take sufficient measures to ensure that employees would be unlikely to come into contact with the hazard. Employer failed to offer "substantial evidence contradicting the Division's case." (*Shea Kenny JV*, *supra*, Cal/OSHA App. 07-3218.) Our finding is limited to the facts of this particular matter and should not be construed to apply broadly to all areas on job sites where work is not actively underway.

DECISION

For the reasons stated, Citation 1, Item 1 is affirmed.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

/s/ Ed Lowry, Chair
/s/ Judith S. Freyman, Board Member
/s/ Marvin P. Kropke, Board Member

FILED ON: 07/11/2022