

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

In the Matter of the Appeal of:

**DAVIS DEVELOPMENT COMPANY, INC.
8780 Prestige Court
Rancho Cucamonga, CA 91730**

Employer

Inspection No.
1226084

**DENIAL OF PETITION FOR
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code hereby denies the petition for reconsideration filed in the above-entitled matter by Davis Development Company, Inc. (Employer).

JURISDICTION

The California Division of Occupational Safety and Health (Division) issued two citations to Employer alleging violations of occupational safety and health standards codified in California Code of Regulations, title 8.¹ The Division cited Employer on August 20, 2017, and Employer timely appealed. Administrative proceedings before an administrative law judge (ALJ) of the Board followed, including a duly-noticed and contested evidentiary hearing. After completion of the hearing the ALJ issued a decision (Decision) on December 17, 2019 upholding the alleged violations and imposing civil penalties.

Employer timely filed a petition for reconsideration.

The Division did answer the petition.

ISSUES

Was the ALJ correct in holding Employer had violated the workplace safety requirements as alleged in the citations?

**REASON FOR DENIAL
OF
PETITION FOR RECONSIDERATION**

Labor Code section 6617 sets forth five grounds upon which a petition for reconsideration may be based:

¹ References are to California Code of Regulations, title 8 unless specified otherwise.

- (a) That by such order or decision made and filed by the appeals board or hearing officer, the appeals board acted without or in excess of its powers.
- (b) That the order or decision was procured by fraud.
- (c) That the evidence does not justify the findings of fact.
- (d) That the petitioner has discovered new evidence material to him, which he could not, with reasonable diligence, have discovered and produced at the hearing.
- (e) That the findings of fact do not support the order or decision.

Employer's petition asserts that Decision was issued in excess of the ALJ's authority, the evidence does not justify the findings of fact, and the findings of fact do not support the Order.

The Board has fully reviewed the record in this case, including the arguments presented in the petition for reconsideration. Based on our independent review of the record, we find that the Decision was based on a preponderance of the evidence in the record as a whole and appropriate under the circumstances.

Employer is a construction company which, as relevant here, was building multi-family homes in Walnut Creek, California. The Division started an investigation of the worksite on April 20, 2017 after receiving a report of a serious injury to one of Employer's employees at the site. During the Division's investigation of that incident, the inspector saw unprotected two-inch diameter reinforcing rod or bar (rebar) projecting about 36 inches above the surface on which employees were working. After completing the inspection, the Division issued two citations to Employer. Citation 1 alleged that Employer had failed to implement its Injury and Illness Prevention Program (IIPP) as required by section 1509, subdivision (a). Citation 2 alleged that Employer had failed to cap or protect the ends of the projecting rebar as required by section 1712, subdivision (c).

Section 1509 is the Construction Safety Orders provision which requires employers to establish, implement and maintain an effective IIPP, and does so by incorporating the provisions of section 3203 by reference. Citation 1 alleged, and it is undisputed, that Employer, believing that the 2-inch diameter rebar did not constitute an impalement hazard, did not cover their ends or investigate whether its belief was correct. The evidence offered by the inspector was that the rebar did present an impalement hazard. The ALJ held that "Employer's failure to identify and correct [the rebar hazard] based on its unsupported belief that the two-inch rebar is too wide to penetrate a human body constitutes a failure . . . to effectively implement its IIPP[.]" (Decision, p. 6.) Similarly, the Decision sustained the violation alleged in Citation 2, reasoning that the two-inch rebar presented an impalement hazard and the ends were not protected, as the inspector testified.

The petition argues that the Division's evidence rested entirely on speculation and conjecture. (Petition, p. 3.) It continues by contending that the inspector had experience (as a paramedic) with an impalement injury caused by an object one or one and a half inches in diameter, not 1.75 as stated in the Decision, and thus no experience with two-inch diameter objects. The petition also argues, citing dictionary definitions, that impalement means penetration of the body by a "sharp" or pointed object, and that two-inch diameter rebar is neither. Further, Employer argues, based on dictionary definitions, that impalement means the object piercing the body must pass *through* the body, not merely penetrate it. Thus, according to Employer, there was no hazard to recognize in its IIPP or to guard against. (§§ 1509, 1712, respectively.)

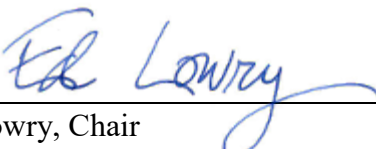
We start with Employer’s definitional argument. Employer’s argument about the definition of “impalement” is not persuasive. Webster’s 3d New International dictionary (1981, p. 1131) defines “impale” as “to pierce or pierce through.” That dictionary also defines “impalement” as “a piercing or piercing through with a pale, spike, or other pointed thing (as for fixing in position or *by an accidental fall*)[.]” (*Id.*) (Emphasis added.) These definitions contradict Employer’s contention that the penetration must involve a complete passage through the body. To penetrate into the body is, by definition, to impale or cause an impalement. In addition, accepting Employer’s suggested interpretation would leave unregulated the many accidents which involve the penetration into, but not complete passage through a worker’s body, of an object like rebar of smaller diameter than two inches. Such an outcome cannot be sanctioned under California law. (*Carmona v. Division of Industrial Safety* (1975) 13 Cal.3d 303, 313.) And, Employer tacitly acknowledges that protection of smaller than two-inch diameter rebar is required, and does not contend all such rebar or similarly sized projections would pass completely through a victim’s body, or that harm is only caused by passage completely through a body.

Further, Employer’s position that two-inch diameter rebar, because of its bluntness, does not present a hazard is contradicted in section 1712 itself. Section 1712, subdivision (d) requires protective covers to be four inches square or, if round, have a minimum diameter of 4.5 inches. We infer from those dimensions that projections of smaller size are considered impalement hazards, construing section 1712, subdivision (c) in the context of the entire section. (*Jauregui v. City of Palmdale* (2014) 226 Cal.App. 4th 781, 805, citing *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.)

DECISION

For the reasons stated above, the petition for reconsideration is denied. The ALJ’s Decision and associated penalties are affirmed.


OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD



Ed Lowry, Chair



Judith S. Freyman, Board Member



Marvin P. Kropke, Board Member



FILED ON: **03/03/2020**