

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

NIBBELINK MASONRY CONSTRUCTION
CORPORATION
2010 West Avenue K, #823
Lancaster, CA 93536

Employer

Docket Nos. 02-R3D3-1399
through 1401

**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 in the above entitled matter by Nibbelink Construction Corporation (Employer) under submission, makes the following decision after reconsideration.

JURISDICTION

Between December 7, 2001 and December 13, 2001, a representative of the Division of Occupational Safety and Health (the Division) conducted an accident investigation at a place of employment maintained by Employer at 14160 Pipeline Avenue, Chino, California (the site).

On March 15, 2002, the Division issued to Employer three citations, alleging violations of the occupational safety and health standards and orders found in Title 8, California Code of Regulations as follows:¹ a general violation of Section 1509(a) [new employee training] (Citation No. 1); a serious violation of Section 1722(b) [masonry wall not braced] (Citation No. 2); and a serious violation of Section 1637(c) [scaffolds] (Citation No. 3). Civil penalties totaling \$23,225 were proposed for the violations.

Employer filed a timely appeal contesting the existence and classification of the alleged violations, the reasonableness of both the abatement requirements and the proposed civil penalties and asserting affirmative defenses.

On March 11, 2004, a hearing was held before an Administrative Law Judge (ALJ) of the Board.

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

The ALJ issued a Decision on April 7, 2004, which upheld the citations and assessed civil penalties of \$23,225. On May 12, 2004 Employer filed a petition for reconsideration which the Board took under submission by Order dated July 1, 2004. That Order also stayed the ALJ's Decision pending a decision on the petition for reconsideration. The Division filed an Answer to the petition on June 14, 2004.

EVIDENCE

Gustavo Solano, an employee of Employer (Solano) was working as an assistant block worker on December 7, 2001, on the east wall of a structure Employer was erecting. The east wall was the last to be put up, Employer having already erected the north, south and west walls. The process being used to construct the wall involved first building the wall with hollow blocks by cementing them together with mortar, then inserting reinforcing steel bars ("rebar") into the hollow centers in the blocks, and finally using concrete to fill the hollow centers.

Solano and a co-worker were working on a metal pipe scaffold that was 22 to 23 feet high, which was the same height as the east wall. The wall and scaffold were separated by a space of 3 or 4 inches. The scaffold was tied by wires to the rebar protruding from the top of the wall at the 22 foot level. Solano testified, and other evidence corroborated, that the wind was blowing hard that day. While Solano was working at the top of the east wall, it and the scaffold collapsed, seriously injuring him. The lowest 4 or 5 feet of the east wall remained standing after the collapse.

The evidence showed that the grout or concrete pumped into the hollows of the blocks took a day to harden and achieve strength to withstand lateral forces. The portion of the wall which remained standing had been filled at least a day before the accident. The evidence also showed that the blocks which had formed the collapsed portion of the wall were empty, that is had not yet been filled with concrete at the time of the collapse.

ISSUES

1. Did the ALJ make a proper credibility determination regarding Solano's testimony?
2. Was the wall "adequately supported" through its design and/or construction method to prevent overturning or collapse?
3. Did Employer establish the "logical time" affirmative defense?
4. Did the Division prove the serious classification of the two alleged serious violations?

**FINDINGS AND REASONS
FOR
DECISION AFTER RECONSIDERATION**

1. Was the ALJ's Credibility Determination Proper?

The Board has considered the record of this proceeding, including all the evidence in this proceeding and the tape recordings of the hearing conducted by the ALJ. In view of that record we find the ALJ's credibility determination regarding Solano's testimony to be reasonable. As we held in *Jerlane, Inc., dba Commercial Box and Pallet*, Cal/OSHA App. 01-4344, Decision After Reconsideration (Aug. 20, 2007) (p.7), we "adhere to our established rule of deferring to an ALJ's witness credibility determinations barring substantial evidence that the determinations are unwarranted. *Rudolph and Sletten, Inc.*, Cal/OSHA App. 01-478 Decision After Reconsideration (March 30, 2004); *River Ranch Fresh Foods-Salinas, Inc.* Cal/OSHA App. 01-1977, Decision After Reconsideration (July 21, 2003). We see no such evidence here." See, also, *Jeld-Wen Windows & Doors*, Cal/OSHA App. 04-3723, Denial of Petition for Reconsideration (Apr. 16, 2007); *Jerry W. Winfrey dba Jerry's Electrical Service*, Cal/OSHA App. 91-1287, Decision After Reconsideration (July 29, 1993), citing *Lamb v. Workmen's Compensation Appeals Board*, (1974) 11 Cal.3d 274. Accordingly, we affirm the ALJ's credibility finding.

2. Was the Wall Adequately Supported?

Employer was charged with violating section 1722(b), which states in full:

All masonry walls over eight feet in height shall be adequately braced to prevent overturning and to prevent collapse unless the wall is adequately supported through its design and/or construction method to prevent overturning or collapse. The bracing shall remain in place until permanent supporting elements of the structure are in place.

The Division has the burden to prove each element of a violation by a preponderance of the evidence. *Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983). The ALJ found, and we agree, that the wall was not adequately braced. In fact, there was no evidence that the wall was braced at all. When the Division provides evidence that an element of a violation, as to which it bears the burden of proof, was more likely than not to have occurred and an employer does not present any evidence that the element did not occur or did not exist, it can be found the Division has met its burden as to such element. *Gaehwiler Construction Company*, Cal/OSHA App. 76-580, Decision After Reconsideration (Oct. 16, 1980).

In its petition for reconsideration Employer argues that the wall was designed or constructed in a manner intended to prevent overturning or

collapse. No evidence in support of this theory was presented at hearing.² The evidence was that the wall was being constructed of hollow cement block, which after being mortared together and having reinforcing bars placed in the hollows was then filled with grout or cement. The evidence was that there were no supports or braces to prevent the wall from collapse while it was being built. Moreover, Employer did not offer any evidence of how the wall was designed, or how the method of construction was supposed to “prevent overturning or collapse” until all elements were in place and the mortar and cement had “set” or hardened adequately to hold everything in place.³ Without evidence to support a contention, it will be rejected. *The Herrick Corporation*, Cal/OSHA App. 03-3222, Decision After Reconsideration (Oct. 12, 2005); *San Luis Rey Mushroom Farms*, Cal/OSHA App. 90-549, Decision After Reconsideration (Jan. 23, 1991). Thus, there is no basis upon which to rest a finding to support Employer’s contention that the wall was designed or constructed in a manner to prevent overturning.

3. Did Employer Establish the “Logical Time” Affirmative Defense?

The “logical time defense” is an affirmative defense where an employer has the burden of proof. It is a defense the Board has made available⁴ which provides that “[t]he requirements of any safety order will not begin to apply until the necessary and logical time has arrived for an employer to make provisions to correct the violation and abate the hazard.” *JSA Engineering, Inc.*, Cal/OSHA App. 00-1367, Decision After Reconsideration (Dec. 3, 2002) citing *Nicholson-Brown, Inc.*, Cal/OSHA App.77-024, Decision After Reconsideration (Dec. 20, 1979). *Cf.*, *Roland Associates Construction*, Cal/OSHA App. 90-668, Decision After Reconsideration (Jan. 6, 1992).

Section 1722(b) requires bracing of a masonry wall which is more than eight feet high unless other adequate provision is made to prevent collapse. Here the wall was over twenty feet high when it collapsed, the evidence shows there was no bracing of any kind, and there is no evidence of special construction or design methods to provide inherent support. In this case the logical time to comply with the safety order by some means arrived when the height of the wall exceeded eight feet. No bracing was done by any means nor was there any showing that the wall’s design method of construction would “prevent overturning or collapse.” Employer did not establish the logical time defense.

4. Did the Division Prove the Violations Were Serious?

The Division’s burden to prove by a preponderance of the evidence each element of its case includes proving that a violation was serious. *Cambro Manufacturing Co.*, supra. A violation is serious under Labor Code section

² Employer called no witnesses and introduced no evidence at the hearing.

³ There was testimony that the grout took a day to harden.

⁴ The federal Occupational Safety and Health Review Commission has an analogous affirmative defense.

6432 if there is a substantial probability that death or serious injury could result from a violation, unless an employer shows that it did not, and could not with reasonable diligence, know of the violative condition.

The ALJ found, and we agree, that the Division met its burden of proof as to both alleged violations. There was substantial evidence that a fall from a height of more than 20 feet is likely to result in serious injury or death. See, *Western Pacific Roofing Corp.*, Cal/OSHA App. 96-528, Decision After Reconsideration (Oct. 18, 2000); *John Jackson Masonry*, Cal/OSHA App. 77-765, Decision After Reconsideration (Dec. 13, 1978); *Obayashi Corporation*, Cal/OSHA App. 98-3674, Decision After Reconsideration (June 5, 2001). Each of the violations alleged here involved the substantial risk of such harm.

DECISION AFTER RECONSIDERATION

The Board affirms the ALJ's Decision upholding all three violations and assessing civil penalties totaling \$23,225.

CANDICE A. TRAEGER, Chairwoman
ROBERT PACHECO, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: December 20, 2007