

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

In the Matter of the Appeal of:

WEBCOR BUILDERS
1133 Columbia Street, Suite 101
San Diego, CA 92101

Employer

Docket No. 02-R3D2-2834

**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 Webcor Builders (Employer) under submission, makes the following decision after reconsideration.

JURISDICTION

Commencing on January 18, 2002, the Division of Occupational Safety and Health (the Division) through Associate Cal/OSHA Engineer Mike Martinka (the Inspector) conducted an accident inspection at a place of employment maintained by Employer at 421 West B Street, San Diego, California (the site). On June 14, 2002, the Division issued a citation to Employer for an alleged general violation of section 1670(a) [personal fall protection] of the occupational safety and health standards and orders found in Title 8, California Code of Regulations¹ with a proposed civil penalty of \$550.

Employer filed a timely appeal contesting the existence and classification of the alleged violation, and the reasonableness of both the abatement requirements and the proposed civil penalty, and alleging affirmative defenses.

On May 21, 2004, a hearing was held before an Administrative Law Judge (ALJ) of the Board, in San Diego, California. Ronald E. Medeiros, Esquire, of the Robert D. Peterson Law Corporation, represented Employer. Raymond Towne, Staff Counsel, represented the Division. On June 2, 2004, the ALJ issued a decision denying Employer's appeal.

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

On June 30, 2004, Employer filed a petition for reconsideration. The Division filed an answer on August 4, 2004. The Board took Employer's petition under submission on August 19, 2004.

EVIDENCE

The Board has taken no new evidence and relies upon its independent review of the record, including the tape recording of the hearing and the exhibits in making this decision.

The Division cited Employer for failing to ensure adequate fall protection to an employee working at the leading edge of a forming table. Employer was utilizing a process for concrete floor construction in which plywood is laid across joists and beams to create a forming table. The forming table is then covered with concrete. Once the concrete hardens creating the floor the plywood is either removed or "flown out".

The Inspector testified for the Division that he issued this citation as a result of an accident inspection at Employer's construction site. The inspection was commenced the day following the accident, at which time the Inspector took pictures of the site. On the day of the accident Employer was constructing the tenth floor of a twelve story building at the site. The injured employee (Misita) was not wearing any fall protection while he was "installing plywood between the forming tables." (fn. 2, infra, Narrative Summary [Exhibit 4].) Misita stepped on a wooden carrier joist at which time he either slipped or the joist was not sufficiently supported causing him to fall through the framing and to the concrete floor below, a distance of greater than 7 ½ feet. (fn. 2, infra, Citation) Misita received bruises to his left hand, left hip, and left knee as a result. The joist involved was 3.75 inches in width and along with similar wood joists supported unmeasured I-beams and the forming tables.²

² The following is demonstrative of the pertinent documentary evidence presented by the Division regarding the activity performed by Misita at the time of the accident (emphasis added):

Citation 1- Item 1: Section 1670(a)...The employer failed to ensure adequate fall protection, for an employee *working at the leading edge of a forming table*. Fall distance was greater than 7 ½ feet to the floor below.

Narrative Summary: EE1, an apprentice carpenter, was *installing plywood between the forming tables on the 10th floor*. He stepped on a loose carrier joist and fell through the framing, to the floor below. The fall distance was approximately 8 1/2 [sic] feet. The employee received bruises to his left hand, hip and knee...EE1 was constructing, setting, and removing these forming tables. On the day of the accident EE1 was working on the forming table on the 10th floor. While working, he stepped on one of the wood joists that make up the table support. The joist measured to be 4 inch nominal in width (3.75 inches). His foot slipped off and he fell to the next floor below, a fall distance of approximately 8 feet 4 inches. He received bruises to the left side of his body. The most serious was an injury to his thumb.

The Inspector received accounts of the accident from Employer's supervisors and a consistent conversation with Misita. On the day of the accident, it was also reported by the San Diego Police Department.

Employer cross-examined the Inspector, but presented no evidence or witnesses.

ISSUE

Did the Division establish a violation of section 1670(a)?

FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

The burden of proof is on the Division to show by a preponderance of the evidence that a cited safety order was violated. (*Lone Pine Nurseries*, Cal/OSHA App. 00-2817, Decision After Reconsideration (Oct. 30, 2001), at 4; *Howard J. White, Inc./Howard White Construction, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983), at p. 2.) "Preponderance of 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 inferences to be drawn from both kinds of evidence. (*Spaich Brothers, Inc. dba California Prune Packing*, Cal/OSHA App. 01-1630, Decision After Reconsideration (Feb. 25, 2005), at p. 6.)

Employer was cited for a violation of section 1670(a)³, alleging that Employer failed to ensure adequate fall protection to Misita while working at the leading edge of a forming table. The Division did not present any evidence as to the location of Misita immediately preceding his fall, which would

Employer's Report of Occupational Injury or Illness, ¶ 34 Specific activity employee was performing when event or exposure occurred: *Placing plywood between flying form tables.*

Employer's Report of Occupation Injury or Illness, ¶ 35 Sequence of events: Carpenter was working on *installing plywood between forming tables; when he stepped on a carrier joist*, that was not supported sufficiently, and it gave way and he fell approximately (8) eight feet below.

Accident Report, ¶31 Accident Description: He was in the process of *installing plywood between forming table & when he stepped on a carrier joist that was not supported sufficiently*, it gave way & he fell approx 8' below.

³ Section 1670(a) provides:

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 7:12, or other sloped surfaces steeper than 40 degrees not otherwise adequately protected under the provisions of these Orders.

establish that Misita was working at the leading edge of a forming table prior to his accident.

Evidence in the record indicates that Misita was working “installing plywood between the forming tables” when he stepped onto a wooden carrier joist. This evidence leaves open two equally plausible scenarios, neither of which was clarified at hearing by the Division. The evidence can be construed as establishing that the worker was working from a position on top of the beams and joists physically located “between” the two forming tables when he stepped on the joist from which he fell. The evidence could also be interpreted as meaning that the worker was working at a leading edge placing the plywood beyond the leading edge into the area “between” the two forming tables.

Furthermore, the photos presented by the Division were of the construction site generally and did not provide a clear depiction of the exact location, condition, or aftermath of the accident. Nor, was sufficient evidence presented as to where Misita landed that the Board could draw inferences as to the location from which he fell. (See generally *Findly Chemical Disposal, Inc.*, Cal/OSHA App. 91-431, Decision After Reconsideration (May 7, 1992), at 5.) In addition, the Division did not utilize the potential availability of possible evidence incorporated within a reputed police report to help clarify any ambiguities which existed or to supplement the Division’s description of the events.

The inspector’s testimony did not cast any further light on the narrative summary or the photos. It would be speculation to conclude, on the basis of this substantively limited record, that Misita was working at a leading edge when he stepped onto the wooden carrier joist. (See *California Prune Packing, supra*, at 5.) Thus the Board finds that the Division did not meet its burden of proof to establish that Employer violated the cited safety order.

The Board does not rule on Employer’s affirmative defense that it did not violate a more applicable safety order, section 1669(a)⁴, when constructing this type of forming table. Since the Board finds that the evidence does not support a finding of a violation of section 1670(a), the cited safety order, the Board does not reach the issue as to whether section 1669(a) should apply. (*KDI Composit Technology, Inc.*, Cal/OSHA App. 76-884, Decision After Reconsideration (April 1, 1977), at 3 [issue rendered moot because of main findings].)

⁴ Section 1669(a) provides:

When work is performed from thrustouts or similar locations, such as trusses, beams, purlins, or plates of 4-inch nominal width, or greater, at elevations exceeding 15 feet above ground, water surface, or floor level below and where temporary guardrail protection is impracticable, employees shall be required to use approved personal fall protection system in accordance with Section 1670.

The Board finds that the ALJ misapplied the Board's statements in *Beutler Heating and Air Conditioning*, Cal/OSHA App. 98-556, Consolidated Decision After Reconsideration (Nov. 6, 2001). In *Beutler*, the Board stated that, consistent with the requirement to liberally interpret the coverage of safety orders, when two safety orders arguably overlap the employer must follow that order which provides the "most protection" to employees. (*Id.*, at 8, citing *Carmona v. Division of Industrial Safety*, (1975) 13 Cal.3d. 303.) The facts were clear in *Beutler* as to both the activity the worker was engaged in as well as the location of the worker. (*Beutler*, *supra* at 2-4.)

In the present case, the facts are what is unclear, not which of the two safety orders applies to a given set of facts as in *Beutler*. The ALJ applied *Beutler* in a manner which would be inconsistent with existing case law in the State of California. The law of California requires that when evidence is equally susceptible to two reasonable interpretations, one of which leads to liability and one that does not, the trier of fact is bound to choose that interpretation against the party carrying the burden of proof. (*People v. Miller* (1916) 171 Cal. 649, 654; *California Shoppers, Inc. v. Royal Globe Insurance Company*. (1985) 175 Cal.App.3d 1, 45; 31 Cal Jur 3d, Evidence, § 95)⁵ In the instant case where two safety orders are in existence which may apply to alternative factual situations and the evidence is susceptible to two reasonable interpretations, the burden remains on the Division to show by a preponderance of the evidence that the cited safety order was actually violated. There must be sufficient evidence provided by the Division to sustain a violation if it wishes to have the Board make factual findings establishing that violation. Neither *Beutler*, nor *Carmona*, stands for the proposition that the Division can establish a violation without presenting sufficient evidence to sustain the violation.

In bolstering the finding of section 1670(a) being the applicable safety order, the ALJ found that the site condition could also be characterized as an "opening". The Board expressly does not reach a decision on the existence of an "opening" between the two forming tables. Employer was not cited for a section 1670(a) failure to provide fall protection to an employee in danger of falling through an "opening", nor was any evidence of an opening entered into evidence. A statement that the situation was an "opening" in the Division's closing statement is not evidence of the existence of an "opening." (See Cal. Evid. Code §140.) As the existence of an opening was not presented by the Division in either its citation or its case-in-chief, the Board finds that the ALJ did not need to address that issue.

⁵ The statement of law contained in *Miller* is an accepted corollary of the preponderance of evidence standard and is included in standard criminal and civil jury instructions. (CALJIC § 250.2; BAJI 2.60) In *California Shoppers, Inc.*, the court discussed the general rules characterizing the availability of inferences in the fact finding process, including the rule that "[i]f the existence of an essential fact upon which a party relies is left in doubt or uncertainty, the party upon whom the burden rests to establish that fact should suffer, and not his adversary," quoting *Reese v. Smith* (1937) 9 Cal.2d 324, 328.

DECISION AFTER RECONSIDERATION

A violation of section 1670(a) was not established. The ALJ's decision is reversed. Employer's appeal is granted and the civil penalty of \$550 is set aside.

CANDICE A. TRAEGER, Chairwoman
MARCY V. SAUNDERS, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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