

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

BLF, INC.
dba LARRABURE FRAMING
16161 Ventura Blvd, Suite 102
Encino, CA 91436

Employer

Docket Nos. 03-R4D3-4428 and 4429

**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

On May 1, 2003, the Division of Occupational Safety and Health (Division) conducted a complaint-based inspection of a place of employment maintained in California by BLF, Inc. dba Larrabure Framing (Employer).

On October 31, 2003 the Division issued two citations to Employer alleging serious violations of occupational and health standards codified in California Code of Regulations, Title 8.¹ Citation 1 alleged a violation of section 1669(a) [fall protection]; Citation 2 alleged a violation of section 1675(a) [no ladder for access or egress to elevated location]. Civil penalties of \$8,100 were proposed for each violation.

Employer timely filed appeals of both citations.

Administrative proceedings were held, which included an evidentiary hearing before an Administrative Law Judge (ALJ) of the Board. After completion of the hearing the ALJ rendered her Decision on March 12, 2007. The Decision sustained the violation alleged in Citation 1 as serious but reduced the penalty proposed due to failure of the Division to support its penalty calculations. The Decision also granted Employer's appeal as to Citation 2.

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

Employer timely petitioned for reconsideration of the Decision as to Citation 1. The Board took the petition for reconsideration under submission by Order of May 31, 2007. The Division filed an Answer to the Order.

EVIDENCE

We summarize here the evidence regarding Citation 1 briefly. We also incorporate by reference the more detailed statement of the evidence contained in the Decision.

The Division received a complaint alleging that workers were not using required fall protection at the subject worksite, a residential development. In response the Division sent one of its employees to investigate. The inspector, the Superintendent for the project's general contractor, and a representative of Employer, a subcontractor on the project, conducted a partial walk through of the site. During that walk through the inspector observed one of Employer's employees unhook his fall protection and move to a portion of the structure which was 19 feet three inches above the next lower surface, a balcony. The employee did not work at that point; rather he proceeded to another area where he was not exposed to a fall.

The structure in question was being framed at the time of the inspection, and the employee was walking on top of a stud wall on the third story, which wall would eventually be the base of the roof.

ISSUES

Whether the alleged violation was proved.

Whether the serious classification was proved.

FINDINGS AND REASON FOR DECISION AFTER RECONSIDERATION

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 substantial evidence in the record as a whole, and that the evidence and findings of fact support the Decision.

1. Proof of Violation.

Employer contends in its petition that the Decision was issued in excess of the ALJ's powers; the evidence does not justify the findings of fact; and the findings of fact do not support the Decision. (See Labor Code section 6617(a), (c), and (e).)

Employer argues that the Division inspector did not testify that he observed the employee in a position where he was not using fall protection and was at a point where the distance to the level below was over fifteen feet.

After review of the record, including the recording of the hearing, we disagree. There is substantial evidence in the record showing that one of Employer's employees walked along a portion of the structure under construction from which he could have fallen more than 19 feet while he was not attached to a fall protection device.² As the Decision recognized, the employee's exposure to the hazard was "brief"; it was also real.

The cited safety order, 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 evidence shows that the employee in question was working at a location covered by the safety order, at an elevation more than 15 feet above the floor level below, and that there was no fall protection in use. Thus a violation of section 1669(a) was established. Employer put on no evidence to counter the Division's proof.³

Although not required to do so, the ALJ also considered whether section 1669(c) applied. That portion of the safety order provides that where work is of short duration, as was the case, and where the hazards associated with rigging and installing fall protection devices equals or exceeds the actual hazard involved in the work, an employer may suspend the requirements "provided adequate risk control is recognized and maintained under immediate, competent supervision." As the Decision pointed out, however, Employer did not produce any evidence that it was in compliance with the alternative established by section 1669(c), and thus it was properly held not to apply.

2. Proof of Serious Classification

The Division has the burden to prove each element of a violation, including any element(s) supporting a serious classification, by a preponderance of the evidence. (*Jerlane, Inc. dba Commercial Box and Pallet*, Cal/OSHA App. 01-4344, Decision After Reconsideration (Aug. 20, 2007);

² The employee was wearing a fall protection harness and lanyard; the lanyard was, however, not attached to any portion of the structure, and so offered no protection.

³ At the close of the Division's case Employer rested without putting on evidence.

Cambro Manufacturing Co., Cal/OSHA App. 84-923, Decision After Reconsideration (Dec. 31, 1986); *Howard J White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (Jun. 16, 1983).)

Labor Code section 6432(a), in pertinent part, states that a “serious violation’ shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a violation[.]” In this context, “substantial probability” refers to the probability of serious injury or death occurring assuming an accident occurs as a result of the violation. (Labor Code section 6432(b).) The Division's evidence, *inter alia*, must at a minimum show the types of injuries that would more likely than not result from the condition which forms the basis of the violation. (*MV Transportation, Inc.*, Cal/OSHA App. 02-2930, Decision After Reconsideration (Dec. 10, 2004), citing *Findly Chemical Disposal, Inc.*, Cal/OSHA App. 91-431, Decision After Reconsideration (May 7, 1992).)

In turn, in pertinent part Labor Code section 6302(h) states “ [s]erious injury or illness’ means any injury or illness occurring in a place of employment which requires inpatient hospitalization for a period in excess of 24 hours for other than observation or in which an employee suffers loss of any member of the body or suffers any serious degree of permanent disfigurement[.]”

We agree with the ALJ’s conclusion in her Decision that the Division met its burden of proof. The inspector testified concerning the types of specific injuries more likely than not to result from a fall of 19 feet, and his testimony was based on his experience and training, each of which were also described. (*MV Transportation, supra.*)

DECISION

For the reasons stated above, we affirm and reinstate the ALJ’s Decision.

CANDICE A. TRAEGER, Chairwoman
ART R. CARTER, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: JANUARY 21, 2011