

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

In the Matter of the Appeal of:

WEBCOR CONSTRUCTION, INC.  
dba WEBCOR BUILDERS  
951 Mariners Island Boulevard  
San Mateo, CA 94404

Employer

Docket No. 06-R1D1-2095

**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 this matter under submission, renders the following decision after reconsideration.

**JURISDICTION**

Beginning on March 1, 2006, the Division of Occupational Safety and Health (Division) conducted an accident inspection at a place of employment in San Francisco, California maintained by Webcor Construction, Inc. doing business as (dba) Webcor Builders (Employer). The accident at issue occurred on February 15, 2006. On June 9, 2006, the Division issued three citations to Employer alleging violations of workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.<sup>1</sup>

Employer filed timely appeals of each citation. Thereafter administrative proceedings were held, including an evidentiary hearing before an Administrative Law Judge (ALJ) of the Board. At the commencement of the hearing Employer and the Division agreed to resolve Citations 1 and 2 on stated terms, leaving only Citation 3 as the matter in dispute.<sup>2</sup> The parties also entered into other stipulations which will be noted as necessary.

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<sup>1</sup> Unless otherwise specified, all references are to California Code of Regulations, Title 8.

<sup>2</sup> It is the Board's practice to assign a separate docket number to each citation issued to an employer. When an employer appeals more than one citation which was issued following an investigation, the respective dockets are consolidated in a single proceeding. Accordingly, when Employer's appeals of the three citations were initially docketed they were assigned docket numbers 06-R1D1-2093 through 2095, one number for each of the three citations. Because Citations 1 and 2 were resolved at the hearing by agreement of the parties, only the proceeding with the docket number assigned to Citation 3, 06-R1D1-2095 remained unresolved upon filing of Employer's petition for reconsideration.

On January 3, 2008, the ALJ issued a Decision which upheld Citation 3, its classification, and the civil penalty proposed by the Division. Citation 3 alleged a Serious violation of section 1670(a) [employee exposed to fall of more than 7.5 feet not using approved personal fall protection equipment] and proposed a civil penalty of \$18,000.

Employer timely filed a petition for reconsideration pursuant to Labor Code section 6614 and Board Regulation section 390(a). The Division did not answer the petition. The Board took Employer's petition under submission by Order of March 28, 2008.

### **ISSUE**

Whether the Decision was correct in sustaining the violation alleged in Citation 3.

### **EVIDENCE**

The summary and discussion of the evidence in the Decision are incorporated here by reference.

Employer was engaged in constructing a 13-story building in San Francisco. The part of the structure being built at the time of the accident at issue was the building's 30 foot by 22.75 foot (outside dimensions) reinforced concrete central core.

The core's walls were about 3 feet thick. To construct them Employer erected vertical formwork. The formwork consisted of an outer portion and an inner portion, forming a hollow space in which there were clusters of reinforcing rods and into which concrete would be poured to form the core.

On the day of the accident, Employer's four person crew was filling the formwork with concrete. The crew consisted of a foreman, Juan Ramirez, and three others. Ramirez was the employee who was injured in the accident. He and two other crewmembers were standing on the formwork's top surface, approximately 17 feet above the concrete foundation slab. The top portion of the formwork on which Ramirez stood and walked was approximately 5 inches wide. As foreman, Ramirez would at times move from one position on the top of the formwork to another to direct the work or assist the other crewmembers. He was wearing a fall protection harness with a lanyard which could be hooked to one of the lengths of reinforcing rod for fall protection. When he needed to move from one position to another, however, he would unhook the lanyard and was not secured against a fall while so moving. He would re-hook upon arriving at his intended position.

During one such movement along the top of the formwork, while his fall protection lanyard was unhooked, Ramirez slipped and fell 17 to 18 feet onto

the concrete slab in the interior of the core. Ramirez told the Division inspector during a post-accident interview that he suffered a broken pelvis, three broken vertebrae, and a dislocated left arm as a result of his fall. He was hospitalized for three days at San Francisco General Hospital and then spent another 10 days in a nursing facility, being discharged only when he could walk on his own.

The Division inspector who investigated Ramirez's accident also returned to the project site on May 15, 2006 for further observations. At that time he observed and made a video recording of another foreman working on the framework without fall protection at a height of 8 feet above the concrete surface below.

Citation 3 alleged two instances when Employer violated section 1670(a), the first being Ramirez's accident on February 15, 2006, and the second the other foreman's failure to be tied off on May 15, 2006.

### **DECISION AFTER RECONSIDERATION**

In making this decision, the Board relies upon its independent review of the entire evidentiary record in the proceeding. The Board has taken no new evidence. The Board has also reviewed and considered the briefs and arguments of the parties.

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

- (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 petitioned for reconsideration on the basis that the Decision was issued in excess of the Board's powers, the evidence does not justify the findings of fact, and the findings of fact do not support the Decision.

Employer argued in its petition that the Decision inappropriately sustained the Citation's accident-related characterization and the associated civil penalty. (Petition, pp. 2, 4.)

Citation 3 alleged a serious, accident-related violation of section 1670(a), which 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 7½ 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.”

The Division has the burden to prove by a preponderance of the evidence each element of an alleged violation. (*Howard J. White*, Cal/OSHA App. 78-741, Decision After Reconsideration (Jun. 6, 1983).) The record in this proceeding contains substantial evidence proving each of the required elements.

The evidence showed that Ramirez was working at a height of at least 17 feet while standing and walking on a surface approximately 5 inches wide at the unprotected perimeter of the core under construction, and that he was not tied off while he walked around the perimeter of the core. Thus the essential elements of a violation of section 1670(a) were established.

Next we must determine whether there was substantial evidence in the record showing the violation was “serious.”

As in effect at the time of the accident at issue, Labor Code section 6432 provided that a violation was “serious” if, assuming an accident were to occur as a result of the violation, there is a substantial probability that the accident would result in serious injury or death.<sup>3</sup> Labor Code section 6302(h) in pertinent part defines “serious injury or illness” as “any injury or illness occurring in a place of employment or in connection with any employment which requires inpatient hospitalization for a period in excess of 24 hours for other than medical observation[.]” As the Decision noted, Employer did not dispute the facts related to Ramirez’s injury accident. (Decision, p. 8.) Employer stipulated to the substantial probability of a serious injury or death resulting from a fall of 17 feet. (Decision, pp. 7, 9-10.) Thus, a serious violation was established.

A serious violation is accident-related if it causes a serious injury. (Labor Code section 6319(d).)

Employer argues that the Division did not prove that Ramirez suffered serious injuries, and thus did not prove the accident-related classification of the violation. The reasoning appears to be that if the injury was not shown to be serious, the violation cannot be classified as serious, and if the violation is not serious it cannot be accident-related under Labor Code section 6319(d).

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<sup>3</sup> Labor Code section 6432(a) was amended in 2010, effective January 1, 2011. We apply the prior law to this event which occurred in 2006.

Employer's argument overlooks its stipulation that a fall of 17 feet was substantially probable to cause a serious injury established the violation as a serious one. Independently, the facts showing that Ramirez was working without fall protection at an elevation of 17 feet or more when he fell, also establish the violation as serious under Labor Code section 6432. Further, it was shown that the violation caused the accident – had Ramirez been properly tied off he would not have fallen 17 feet. The accident-related characterization was thus proved. (See Labor Code section 6139(d).)

Employer also argues that there was no evidence that Ramirez was seriously injured. To the contrary, there was substantial evidence showing that he was so injured. Ramirez was interviewed at his home after his release from the hospital by the Division's inspector. During that interview Ramirez stated that his injuries included a broken pelvis, three broken vertebrae, and a dislocated arm, that he had been in the hospital for 3 days, and then in a nursing facility for 10 days, and had been on medication while so hospitalized. Ramirez did not say his hospitalization was for purposes of observation only, and in view of the extent of his injuries it is reasonable to infer he received treatment for them, including the medication he reported. In addition, since Ramirez was a foreman, his statements regarding his injuries were authorized admissions. (Evidence Code section 1222; *Bill Nelson General Engineering Construction, Inc.*, Cal/OSHA App. 09-3769, Denial of Petition for Reconsideration (Oct. 7, 2011) [foreman's statement an admission admissible against employer].) His statements were also admissible as a statement of his then existing physical state. (Evidence Code section 1250.) In light of the totality of the circumstances, we hold that the evidence established that Ramirez was seriously injured, and thus the accident-related classification was proved.

**Citation 3, Docket No. 06-R1D1-2095**

We affirm the Decision of the ALJ and deny Employer's appeals of Citation 3, and assess a civil penalty of \$ 18,000 for the violation of section 1670(a).

ART CARTER, Chairman  
ED LOWRY, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
FILED ON: MARCH 27, 2012