

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

In the Matter of the Appeal of:

XL PLASTERING, INC.  
2240 South Susan Street  
Santa Ana, CA 92704

Employer

Docket No(s). 11-R4D1-2236 and 2237

**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 XL Plastering, Inc. (Employer).

**JURISDICTION**

Commencing on May 19, 2011, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On August 23, 2011, the Division issued two citations to Employer alleging violations of occupational safety and health standards codified in California Code of Regulations, Title 8.<sup>1</sup>

Employer timely appealed.

Thereafter administrative proceedings were held before an Administrative Law Judge (ALJ) of the Board, including a duly-noticed evidentiary hearing.

On June 11, 2013, the ALJ issued a Decision (Decision) which sustained the alleged violations, denied Employer's appeals, and imposed civil penalties.<sup>2</sup>

Employer timely filed a petition for reconsideration.

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<sup>1</sup> References are to California Code of Regulations, Title 8 unless specified otherwise.

<sup>2</sup> The ALJ subsequently issued two Amended Decisions on July 3, 2013 and July 9, 2013, making corrections to aspects of the original Decision not raised as issues in Employer's petition for reconsideration. We refer to the Decision, as amended, as the "Decision".

The Division filed an answer to the petition.

**ISSUE**

Was the Decision correct in sustaining the two alleged violations?

**REASON FOR DENIAL  
OF  
PETITION FOR RECONSIDERATION**

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's petition maintains that the ALJ acted in excess of her powers, the evidence does not justify the findings of fact, and the findings of fact do not support the Decision.

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 appropriate under the circumstances.

The citations at issue arose from a fatal accident at a construction site in Beverly Hills, California. The building involved appears to be a single structure housing commercial shops having different street addresses.

Two of Employer's employees attempted to climb onto a scaffold which had been erected on the exterior of a building from the roof of the building. The evidence was that the two men had done so twice earlier that day. On the third attempt, however, one of the two, a foreman, fell approximately 26 feet to the pavement below. He later died from the injuries sustained in the fall. The Division alleged a serious, accident-related violation of section 1637(n)(1) [failure to provide safe access to scaffold] in Citation 1 and a serious violation of section 1670(a) [failure to wear personal fall protection equipment] in Citation 2.

Employer argues that the evidence does not establish the violation alleged in Citation 1 (of section 1637(n)(1)) because there was a safe means of access to the scaffold, although its employees chose to not use that safe means. We do not find Employer's argument persuasive.

First, the evidence established employee exposure to the hazard involved, namely falling from the roof, as the two employees had climbed onto the scaffold twice before the accident, and in fact were making a third attempt to do so when the accident occurred. (*Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (Apr. 24, 2003) [violation established where employees exposed to cited hazard].)

Second the foreman's actions are attributed to Employer. (*Louisiana-Pacific Corporation*, Cal/OSHA App. 82-1043, Decision After Reconsideration (Oct. 21, 1985).) Even if the foreman's putting himself at risk were not a violation, his actions prior to the accident exposed his subordinate employee to the same fall risk, in violation of section 1637(n)(1). (*Benicia, supra.*) In other words, although an alternative means of safe access was available, the actions of the foreman caused the other employee to be exposed both employees to the fall hazard.

As to Citation 2 (lack of fall protection) Employer argues that there was no competent evidence to establish the violation. The essence of Employer's argument is that statements made by Employer's superintendent about the accident were speculative because he was not at the worksite when the accident occurred.

The response to Employer's contention is twofold. First, the fall occurred and the victim was not wearing fall protection at the time. The record is devoid of any suggestion to the contrary, and of course that the victim fell raises the inference that he was not wearing fall protection. Second, after the accident the Division's inspector interviewed not only Employer's superintendent but also the surviving co-worker. Both stated that the foreman and his co-worker were not wearing fall protection. While the statement of the superintendent may have been based on hearsay, and the co-worker's statement is hearsay, hearsay is admissible under Board Regulations when it corroborates other admissible evidence. (Board Regulation § 376.2.) Uncontradicted evidence in the record established that the fall occurred and that the foreman was not wearing fall protection when he fell. Contrary to Employer's argument, a preponderance of competent evidence established that the two employees were not wearing fall protection in violation of section 1670(a).

**DECISION**

For the reasons stated above, the petition for reconsideration is denied.

ART R. CARTER, Chairman  
JUDITH S. FREYMAN, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
FILED ON: August 8, 2013