

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

DAVIS DEVELOPMENT CO.
8780 Prestige Court
Rancho Cucamonga, CA 91730

Employer

Dockets. 10-R3D1 3360 through 3362

**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 ordered reconsideration of the Decision of the Administrative Law Judge (ALJ) and taken the petition for reconsideration filed by Davis Development Company (Employer) under submission, renders the following decision after reconsideration.

JURISDICTION

Beginning on June 2, 2010, the Division of Occupational Safety and Health (Division) conducted an inspection at a place of employment in Tustin, California maintained by Employer. On October 6, 2010 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.¹

Citation 1 alleged a General violation of section 1716.2(j) [failure to provide training in fall protection]. Citation 2 alleged a Serious violation of section 1644(a)(6) [lack of railings on scaffold]. Citation 3 alleged a Serious violation of section 1716.2(e)(1) [lack of fall protection].

Employer filed timely appeals of the citations.

Administrative proceedings were held, including a contested evidentiary hearing before an Administrative Law Judge (ALJ) of the Board. After taking testimony and considering the evidence and arguments of counsel, the ALJ issued a Decision on September 20, 2011. The Decision denied Employer's appeal. The ALJ dismissed the penalty in Citation 2, finding it to be

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

duplicative of the hazard in Citation 3. Total penalties were calculated at \$7635.

The Board ordered reconsideration of the ALJ's decision on its own motion, and Employer timely filed a petition for reconsideration of the ALJ's Decision. The Division filed an answer.

ISSUES

Did the ALJ correctly uphold the serious classifications of Citations 2 and 3?

Was the ALJ's decision regarding the penalty assessment consistent with the Board's decision in *A & C Landscaping, Inc. aka A & C Construction, Inc.*, Cal/OSHA App. 04-4795, Decision After Reconsideration (Jun. 24, 2010)?

EVIDENCE

The Decision summarizes the evidence adduced at hearing in detail. We summarize that evidence briefly below, focusing on the portions relevant to the issue presented.

On June 2, 2010, Robert Salgado (Salgado), at that time an Associate Safety Engineer for the Division, drove by the residential multi-unit townhome construction site where Guillermo Alvarado (Alvarado) was at work on the roof. Alvarado, an employee of Employer, was installing fascia board over wood framing. After taking several photographs of Alvarado at work without a harness, and observing a catch platform scaffold with missing rails, Salgado entered the worksite and had an opening conference with job foreman Jeff Sims (Sims). (Exhibits 2, 3, 4, 5, 6, 7). Sims directed Alvarado to speak with Salgado, although Alvarado was reluctant to do so. Alvarado stated that he had not been provided or asked to wear fall protection on the job site, and that Sims had seen him working during the course of the job without a harness. He also stated that he had not received fall protection training.

At hearing, Alvarado testified that he had worked for Employer for approximately one week, installing fascia board on top of a three story building. He agreed that he was the man in the photos taken by Salgado, and testified that he had not received fall protection training from Employer, although he had long experience in the industry and had received training elsewhere. Alvarado stated that he was not wearing fall protection on the day of the inspection by Salgado because it was not required, and it had not been provided by the foreman. He also testified that he did not have any involvement in building the scaffold as it was not one of his job duties, and that as he recalled, the scaffold looked to be in the same condition at the time of Salgado's visit as it had been before Salgado arrived.

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 Employer's petition for reconsideration and the Division's answer to it.

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 of Labor Code section 6617(a), (c) and (e).

Did the ALJ Correctly Uphold the Serious Classifications of Citations 2 and 3?

Employer in its petition for reconsideration argues that the serious classification of both Citations 1 and 2 was in error as no management official of Employer had actual or constructive knowledge of the alleged violations. The knowledge element of a serious classification requires that the employer either knew, or with the exercise of reasonable diligence, could have known of the violative condition.² (*West Coast Steel*, Cal/OSHA App. 81-0191, Decision After Reconsideration (May 15, 1985).) The ALJ credited the testimony of Sims that he was not aware of the missing railings at the worksite, as they had been in place when he had arrived at the worksite at 7 in the morning. Sims also testified that on the morning of the inspection, Alvarado was not yet at work. When he returned to the jobsite in the afternoon and met the Division's inspector, he was unaware that Alvarado had begun work on the roof without fall protection. The ALJ credited Sims' testimony on this point.

The issue is not whether Sims was actually aware of the violative conditions, but if he could have known of the missing railings, and Alvarado's failure to wear fall protection, through exercise of reasonable diligence. (*Tomlinson Construction, Inc.*, Cal/OSHA App. 95-2268 Decision After

² Labor Code 6432 had been revised, with an effective date of January 1, 2011. We apply the statute as in effect at the time of the citation.

Reconsideration (Feb. 18, 1998).) The Board has stated that the knowledge element, found in Labor Code 6432, is designed "to encourage employers to conduct reasonably diligent inspections for violative conditions. so that the hazard associated with that condition can be timely corrected or, otherwise, face the prospect of a serious violation and heightened civil penalty." (*Andersen Tile Company*, Cal/OSHA App. 94-3076 Decision After Reconsideration (Feb. 16, 2000), citing *Lift Truck Services Corp.*, Cal/OSHA App. 93-384, Decision After Reconsideration (Mar. 14, 1996).) On the day of inspection, Sims had an assistant foreman on site responsible for walking the jobsite and ensuring that employees were performing their work appropriately and safely. As the ALJ found, presumably this assistant foreman assigned Alvarado to work on the roof, and had an opportunity to see that Alvarado was working without fall protection, as was plainly visible from the street. Similarly, the missing rails were also visible and near the area where Alvarado was at work, as seen in the photographs submitted into evidence by the Division.

The ALJ correctly found that the Employer did not meet its burden to establish the defense of lack of Employer knowledge.

Was the ALJ's decision regarding the penalty assessment consistent with the Board's decision in *A & C Landscaping, Inc. aka A & C Construction, Inc.*, Cal/OSHA App. 04-4795, Decision After Reconsideration (Jun. 24, 2010)?

Employer also contends in its petition for reconsideration that one of the Citations, either Citation 2 or Citation 3, should have been dismissed in its entirety as duplicative. This is a misstatement of prior Board Decisions After Reconsideration. We have held that only one penalty may be assessed against an employer for multiple violations concerning a single hazard or piece of equipment, but that an employer may be issued more than one citation alleging the existence of numerous violations concerning that same hazard or piece of equipment, or even the same act. (*Pace Arrow*, Cal/OSHA App. 78-1016 Decision After Reconsideration (Nov. 19, 1984), citing *Strong Tie Structures*, Cal/OSHA App. 75-856, Decision After Reconsideration (Sep. 16, 1976), *Western Plastering, Inc.*, Cal/OSHA App. 79-032 Decision After Reconsideration (Dec. 28, 1983).) Where the two safety orders cited pertain to a single hazard and a single form of abatement will eliminate the hazard, the Board will eliminate what constitutes a duplicative penalty. (*A & C Landscaping, Inc.*, supra).

In this instance, the ALJ found that the hazard addressed by both citations is the same—namely, a fall from the 27 foot roof of the building under construction. It is undisputed by the parties that on the day of the inspection, two employees, Alvarado and his nephew, were working on the roof area installing fascia board, and were exposed to a fall hazard. While the hazards to both citations may be the same, under the Board's analysis in *A & C*

Landscaping, Inc., not only must a single hazard be shown, but a single form of abatement must also eliminate the hazard in both violations. Section 1644(a)(6) relates to railings on sides and ends of scaffolding; had the railing been restored, the fall hazard from the roof where perimeter catch platform scaffolds were absent would still exist. The abatement required by section 1716.2(e)(1), the fall protection system requirement, is not met simply by the installation of guardrails on the scaffolds, as the scaffolding had at least one significant gap, but requires employees to wear fall protection while working on certain sections of the roof. (See, *Vance Brown, Inc.*, Cal/OSHA App. 00-3318, Decision After Reconsideration (Apr. 1, 2003).

The situation is comparable to the facts in *Western Plastering Inc.*, which involved two citations, one for a violation where a scaffold plank was slanted, and another for a scaffold that was less than 10 inches wide. Although there was presumably a hazard of falling in both violations, “correcting the unsafe conditions described in Citation No. 2 would not correct those described in Citation No. 3, and vice versa.” (*Western Plastering Inc.*, Cal/OSHA App. 79-032, Decision After Reconsideration (Dec. 28, 1983).) The same logic applies here. Sims testified that crews on the job were instructed to wear fall protection lanyards and harnesses in those areas where the perimeter catch platform scaffolds were not available. His instructions indicate that there were areas on the worksite where the catch platforms did not provide adequate fall protection.

Given the different abatement requirements of the two violations, the Board finds that the penalties for both Citation 2 and Citation 3 must be affirmed. The penalties of \$7,310 were stipulated to as having been correctly calculated by the parties, and are affirmed in each instance.

ART CARTER, Chairman
ED LOWRY, Board Member
JUDITH S. FREYMAN, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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