

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

In the Matter of the Appeal of:

SECURITY PAVING COMPANY, INC.  
13170 Telfair Avenue  
Sylmar, CA 93314

Employer

Docket No. 14-R4D7-2442

**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 Security Paving Company, Inc. (Employer).

**JURISDICTION**

Beginning June 3, 2014, the Division of Occupational Safety and Health (Division), through Associate Safety Engineer Daniel Pulido (Pulido), commenced an inspection at a place of employment maintained by Employer in Bakersfield, California.

On July 21, 2014, the Division issued a serious citation to Employer. The citation alleged a violation of California Code of Regulations, title 8, section 1675, subdivision (a) [failure to use a ladder to access an elevation]<sup>1</sup>. Section 1675, subdivision (a), states:

(a) General requirements. Except where either permanent or temporary stairways or suitable ramps or runways are provided, ladders described in this section shall be used to give safe access to all elevations.

The citation described the violation as follows:

On or about January 27, 2014 an employee fell approximately 20 feet from formwork attached to a column during bridge construction. The employee climbed up the side of the formwork

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

using a harness and lanyard and was removing one of the coil rods near the top of the column when he fell. A ladder was not used for safe access to the working level for the removal of the coil rods.

Employer timely appealed the citation and thereafter administrative proceedings were held before Administrative Law Judge (ALJ) Dale A. Raymond, including a duly-noticed contested evidentiary hearing. Employer was represented by Eugene McMenamin, of Atkinson, Andelson, Loya, Ruud, and Romo, a Professional Corporation. The Division was represented by Efren Gomez, District Manager.

On June 17, 2015, the ALJ issued a Decision (Decision) which upheld the citation. Employer timely filed a petition for reconsideration. The Division did not answer the petition.

### **ISSUE**

Did the ALJ err when she affirmed the citation asserting a serious violation of section 1675, subdivision (a) [failure to use a ladder to access an elevation]?

### **EVIDENCE**

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

Employer is a public road construction contractor. Hilario Garay (Garay) worked for employer as a carpenter. In January of 2014, Employer constructed concrete columns for an overpass in Bakersfield, California. Garay's job was to build, and then remove, the wooden formwork surrounding the concrete columns. The wooden formwork was used to shape the concrete for the column as it was poured and set. The formwork was in excess of twenty-four feet high. The formwork and column were set on a base that was approximately four feet high.

The wooden formwork was held together against the pressure of the concrete with the use of, without limitation, coil-rods, nuts, plates, and bolts. The coil-rods extended from one side of the column to the other. The coil-rods were embedded in the concrete via PVC pipe pathways to help enable their extraction after the concrete had set.

On January 27, 2014, Garay was removing the coil-rods near the top of the column as part of the formwork stripping process. To access the coil-rods, he climbed the wooden formwork. The formwork had wooden cross-members, or cleats, nailed to it to permit employees, such as Garay, to ascend and

descend. The cross-members were regularly greater than one foot apart in vertical distance.

Garay testified that removing the coil-rods was difficult and physically demanding work. In order to remove the coil-rods, Garay needed to loosen the apparatuses, which held the coil-rods in place. He would then extract the coil-rods using both hands. He would have to arch his back away from the column, using both hands to pull the coil-rods out of the column. Garay stated he utilized a position hook to tie-off to the formwork when he extracted the coil rods so both his hands could remain free.

Employer required employees to use fall protection equipment, including lanyards, when working on the formwork. Employees were provided lanyards to tie off. Employees were also provided a positioning device.

While removing one such coil rod, despite an attempt to utilize his positioning device, Garay fell in excess of 20 feet from the wooden formwork. Garay did not suffer a serious injury or illness, as that term is defined, due to the fall.

**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 contends the Appeals Board acted in excess of its powers, the evidence does not justify the findings of fact made by the ALJ, 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 ALJ's Decision upholding the citation was based on a preponderance of the evidence in the record as a whole and appropriate under the circumstances.

The Division cited Employer with a violation of section 1675, subdivision (a), which states: “Except where either permanent or temporary stairways or suitable ramps or runways are provided, ladders described in this section shall be used to give safe access to all elevations.” In other words, this section requires that access to an elevated location occur via a ladder unless appropriate ramps, runways, or stairways exist. The section also makes clear that not just any ladder is allowed, the ladder must be as “described in this section[...].” (*Ibid.*)

The evidence supports the ALJ’s finding that Garay was required to access an elevation (i.e. he was required to ascend the formwork) without the aid of stairways, ramps, or runways; therefore, a ladder was required as “described in this section[...].” (See, Section 1675 subdivision (a).) The evidence also supports the ALJ’s finding that Employer failed to provide the prescribed ladder.

Section 1675 refers to only two types of ladders: (1) “portable ladders,” complying with the requirements of section 3276, or (2) “fixed ladders,” complying with the provisions of section 3277 and 3278.<sup>2</sup> And, during the hearing, the Division demonstrated that Employer failed to provide either type of ladder. First, it is undisputed that Employer failed to provide a portable ladder. Second, while the ALJ observed that Employer provided what might generously be viewed as a fixed ladder<sup>3</sup>, the ALJ correctly concluded that it was not a fixed ladder as contemplated in section 1675. Section 1675 subdivision (c) states: “All fixed ladders used in construction shall comply with the provisions of Sections 3277 and 3278 of the General Industry Safety Orders.” And section 3277 subdivision (d)(2) specifies that: “The distance between the top surfaces of rungs, cleats, and steps shall not exceed 12 inches and shall be uniform throughout the length of the ladder.” The evidence at hearing demonstrated that the distance between the cleats or rungs affixed to the formwork exceeded 12 inches—Employer admitted to such a deviation. Thus, the Division established a violation of section 1675 due to Employer’s failure to provide a compliant fixed or portable ladder.

Within its petition, Employer argues that the ALJ erred by considering the cleat spacing issue. Employer appears to characterize the real issue as whether Employer was required to use a portable ladder as a working platform

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<sup>2</sup> Section 1675 states:

(b) All portable ladders used in construction shall comply with the provisions of Section 3276 of the General Industry Safety Orders.

(c) All fixed ladders used in construction shall comply with the provisions of Sections 3277 and 3278 of the General Industry Safety Orders.

<sup>3</sup> At page 3, the ALJ’s Decision states: “The vertical members of the formwork were the ladder rails. Because it had two side rails joined at regular intervals by crosspieces, it meets the definition of “ladder” found in General Industry Safety Order 3277, subdivision (b). The ladder was permanently attached to the formwork by nails. The formwork was a structure. Therefore, the ladder meets the definition of “fixed ladder” found in section 3277, subdivision (b).”

for the work performed by Garay or whether Employer was permitted to use the cleats of a purported job-made ladder as a working platform in conjunction with appropriate fall protection equipment.<sup>4</sup> And Employer argues that a portable ladder was completely out of the question as a working platform in this factual context, requiring that the Division’s citation be vacated. Employer states that the spacing of the cleats on its purported (fixed) ladder had “absolutely nothing to do with why the Division issued the Citation in the first place and had no relation to Garay’s accident.” (Petition p. 7.) However, Employer’s arguments are not persuasive.

The ALJ’s Decision appropriately addressed, and was fully within the boundaries of, the issues actually raised by the citation. The Division issued an access citation. The Division’s citation stated, “A ladder was not used for safe access to the working level for the removal of the coil rods.” Further, the Division’s citation was not limited to demanding or requiring the use of a portable ladder for access. To the contrary, the language of the citation was relatively broad and asserted, in essence, that no appropriate ladder was used—portable or fixed—for access to the working level. When the alleged violation description is read in conjunction with the language of section 1675 subdivision (a), the citation may fairly be construed as asserting that Employer failed use any ladder as “described in this section[...],” whether portable or fixed, to gain access to the elevated portion of the formwork.<sup>5</sup> (See, Section 1675, subdivision (a).)

Next, the evidence adduced at hearing demonstrated that Employer did indeed fail to use a ladder as “described in this section” to gain access to the elevated portion the formwork. The evidence demonstrated that Garay worked

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<sup>4</sup> The Petition states that this “was really not intended to be an access citation at all; but instead a working level citation. *See generally*, CSO Section 1669. Plainly, the Division adopted the arbitrary position that Garay’s standing on the cleats of the job-made ladder, even while tied off, while performing the unbolting operation was not a permitted methodology since Garay did fall. Instead, the Division adopted the specious claim that the rungs of the portable ladder were the preferred working platform.” (Petition pgs. 5-6.) The Petition further states,

The ALJ mischaracterizes Employer’s primary argument that it did not violate Section 1675(a) because it was not cited for ladder rungs that were too far apart. Instead, Employer argues that it did not violate Section 1675(a) because the work platform that Garay was utilizing to remove the coil rods cannot be done from a portable ladder because it is impossible to perform the work safely and in compliance with safe ladder usage requirements without being tied off to an anchorage point meeting the minimum intended loads required. The only safe method for Garay to access the coil rods was by standing on the cleats of the job-made ladder while at all times tied off with his positioning device system to an anchorage meeting the requirements of CSO 1670(c)(4). (Petition p. 6.)

<sup>5</sup> It is well settled that administrative proceedings are not bound by strict rules of pleading. As long as an employer is informed of the substance of the violation and the citation is sufficiently clear to give fair notice and to enable it to prepare a defense, the employer cannot complain of any purported technical flaws. (*City of Los Angeles: Housing Authority [HACLA]*, Cal/OSHA App. 05-2541, Decision After Reconsideration (Nov. 15, 2011) (citations omitted); *Hypower Inc. dba Hypower Electric Services, Inc.*, Cal/OSHA App. 12-1498, Denial of Petition for Reconsideration (Sept. 11, 2013 (citations omitted).) The Board additionally concurs with footnote 4 in the ALJ’s decision.

at an elevation on the formwork. And the evidence also demonstrated that he did not use an appropriate ladder to gain such access. There was no portable ladder and, as discussed above, there was no appropriate fixed ladder due to the cleat spacing of the fixed ladder as constructed by Employer. Thus, the ALJ's decision was well within the boundaries of the both the citation and the evidence. That the Division's witness also argued that a portable ladder should have been used as a working level does not negate the fact that sufficient evidence exists to demonstrate a violation of section 1675 subdivision (a) due to the failure to provide an appropriate ladder for access.

Employer's petition also stated that it provided Garay a "job-made" ladder as contemplated by section 1676. As correctly noted by the ALJ, "Employer's argument is essentially an argument that a more specific safety order applies." (Decision at p. 4.) Board precedent holds that "[w]hen an employer has failed to comply with the safety order it asserts is more particular or appropriate, it cannot argue the inappropriateness of the cited safety order as a defense." (*Sheedy Drayage*, Cal/OSHA App. 84-518, Decision After Reconsideration (Dec. 24, 1986); *see also*, *Wetsel-Oviatt Lumber Company*, Cal/OSHA App. 94-1462, Decision After Reconsideration (Apr. 12, 2000).) Here, Employer failed to comply with the requirements applicable to "job-made" ladders under section 1676; thus, this defense fails. Section 1676, subdivision (c), in part, provides that for job-built ladders, cleats shall not be farther apart than 12 inches measured from the tops of the cleats. As correctly discussed by the ALJ, "Employer's ladder does not comply with section 1676 because the cleats were farther than 12 inches apart." (Decision at p. 5.)

Finally, Employer's petition argues that it should not be bound by the 12-inch cleat spacing requirements set forth in section 1676(c) (or section 1675(c)) because its practice of utilizing greater distances between the cleats offers more protection to workers. However, we find this argument unpersuasive. And, in any event, the Board does not have the authority to craft an exception to the safety order based on Employer's assertion that its practice offers a safer alternative. As correctly stated by the ALJ, "If Employer believes a safety order is unreasonable or that its own practice provides greater protection for its employees, Employer's remedy is to petition the Standards Board for a permanent variance pursuant to Labor Code section 143 or to have the safety order repealed or amended." (Decision at p. 5-6, *citing*, *City of Sacramento Fire Department*, Cal/OSHA App. 88-004, Decision After Reconsideration (Mar. 22, 1989).)

Ultimately, for the reasons stated herein, the Board affirms the Decision of the ALJ finding a violation of section 1675, subdivision (a).<sup>6</sup>

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<sup>6</sup> The affirmation of the citation should not be construed as accepting Pulido's assertions in support of the use of a portable ladder as a working level. It merely affirms that the Division established that Employer failed to use a ladder, either fixed **or** portable, as "described in th[e] section[...]" for access to the formwork. (*See*, Section 1675, subdivision (a).) And, although we certainly question much of Pulido's

### **Classification of the Citation**

The Division classified the section 1675, subdivision (a) [failure to use a ladder to access an elevation] citation as serious and the ALJ affirmed the serious classification in her decision. We find no error in the ALJ's decision.

A rebuttable presumption of a serious violation exists when the Division establishes that there is "a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation." (Labor Code section 6432(a).) The term "realistic possibility" means that that it is within the bounds of reason, and not purely speculative. (*Langer Farms, LLC*, Cal/OSHA App. 13-0231, Decision After Reconsideration (Apr. 24, 2015).)

Here, the Division established a realistic possibility of death or serious physical harm. As the ALJ properly concluded, "[t]he hazard created by the violation is a fall of approximately 20 feet." (Decision at p. 6.) And Pulido offered credible testimony, which the ALJ properly credited, that a realistic possibility of death or serious physical may result from a fall of such height.

The burden then shifted to Employer to rebut the presumption of a serious violation. To rebut the presumption, Employer argues that it had a practice and procedure of requiring employees to use fall protection equipment at all times, negating any realistic possibility of death or serious physical harm. However, this argument is not sufficient to rebut the presumption.

The vehicle for rebutting the presumption is set forth in Labor Code section 6432 subdivision (c), which states:

(c) If the division establishes a presumption pursuant to subdivision (a) that a violation is serious, the employer may rebut the presumption and establish that a violation is not serious by demonstrating that the employer did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation. The employer may accomplish this by demonstrating both of the following:

(1) The employer took all the steps a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation, taking into consideration the severity of the harm that could be expected to occur and the likelihood of that harm occurring in connection with the work activity during which the violation

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testimony concerning the propriety of using a portable ladder as a working platform under the specific facts of this case, we need not decide the issue.

occurred. Factors relevant to this determination include, but are not limited to, those listed in subdivision (b).

(2) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered.

And, here, Employer failed to establish that it did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation in this case. Indeed, Employer's testimony indicates that it consciously departed from the cleat spacing requirements incorporated into section 1675.<sup>7</sup>

### **DECISION**

The Decision of the ALJ is affirmed and Employer's petition is denied.

ART R. CARTER, Chairman  
ED LOWRY, Member  
JUDITH R. FREYMAN, Member

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FILED ON: SEP 21, 2015

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<sup>7</sup> In addition we infer that the lack of an appropriate ladder for access would have made it more difficult for employees to adequately utilize their fall protection equipment, further supporting the finding of a realistic possibility of death or serious physical harm. Moreover, Employer was fully conscious of the cleat spacing issue, preventing Employer from rebutting the presumption of a serious violation.