

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal
of:

BEST CONTRACTING SERVICES, INC.

19027 South Hamilton Avenue
Gardena, Ca. 90248

Employer

DOCKET 12-R3D3-3786

DECISION

Background and Jurisdictional Information

Employer is a Construction company. Beginning June 6, 2012, the Division of Occupational Safety and Health (the Division) through Associate Cal/OSHA Engineer David Swanston, conducted a complaint inspection at 21800 Main Street, Grand Terrace, California (the site). On December 6, 2012, the Division cited Employer for the following alleged violation of the occupational safety and health standard and order found in Title 8, California Code of Regulations¹:

<u>Citation</u>	<u>Section</u>	<u>Classification</u>	<u>Penalty</u>
1, Item 1	1513(a) [failure to keep work area reasonably clear of debris]	General	\$280

Employer filed a timely appeal contesting that the safety order was not violated.

This matter was regularly set for hearing before Jacqueline Jones, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at Riverside, California on December 4, 2013. David Donnell, Esq. of Robert D. Peterson, Law Corporation, represented Employer.

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

Joel Foss, Senior Safety Engineer, represented the Division. The parties presented oral and documentary evidence. Closing arguments were made on December 4, 2013. The matter was submitted for Decision on that day and resubmitted for Decision on December 10, 2013, by Order of the undersigned ALJ.

Law and Motion

At the hearing, the parties stipulated that the proposed penalty was calculated in accordance with the Division's policies and procedures. The parties also stipulated that abatement has taken place. Employer requested and was given a standing objection to hearsay.

Docket 12-R3D3-3786

Citation 1, Item 1, General, § 1513(a)

Summary of Evidence

The Division cited Employer for failure to ensure that the work area and passageways on the roof of the Theater Building at the site were kept reasonably clear of lumber with protruding nails and other debris. The Division offered the following without objection: jurisdictional documents, Exhibit 1; colored photograph of pile of lumber and debris, Exhibit 2; and photograph of roof, Exhibit 3. Employer offered the following without objection: Document Request Sheet, Exhibit A, and Exhibit B an email from Darrell Gallacher, Risk Manager and Safety Director for Employer to David Swanston dated June 13, 2012. Good cause having been found, all of the Employer and Division Exhibits were received into evidence.

David Swanston (Swanston) testified that he is an Associate Safety Engineer for the Division. He has worked for the Division for fourteen years. Swanston was assigned the task of investigating a complaint on June 6, 2012. Swanston and Acting District Manager Joel Foss (Foss) arrived at the site on that day². The site was a theater building undergoing construction at a high school. On arrival Swanston met and spoke with the Superintendent for the General Contractor (Vanir Construction Management Inc.) Sean Nelson (Nelson). Swanston and Foss also spoke to the Roofing contractor³. The Employer, a Subcontractor was not present when the Division arrived on the site. Nelson gave Swanston consent to inspect. Swanston, Foss, Nelson and the Roofing contractor (hereinafter the group) went to the roof of the theater building because a complaint had been called into the Division regarding an

² The record does not indicate what specific time Swanston and Foss arrived at the site. The record does indicate that the arrival was after the work day had concluded.

³ The name of the Roofing Contractor was not provided.

alleged lack of fall protection for workers on the roof of the theater building. An extension ladder that was on site was used by the group to get from the ground level up to the main roof level. Nelson told Swanston and Foss that the extension ladder was the only access to the roof.

Swanston testified that the Theater building had 3 roof lines, a main roof level that was flat and 2 secondary roof lines that were sloped to the north and south sides at a minimum 4 feet above the main roof level. Swanston took the photograph depicted in Exhibit 2. In an area depicted in Exhibit 2, Swanston observed a pile of lumber with nails protruding and debris. Swanston described Exhibit 2 as the main flat roof, an area that the group gained access to from the extension ladder. Swanston testified that although he was able to walk through the area depicted in Exhibit 2 without having to step over lumber, he did notice a pile of debris that was within 6 feet of the lumber pile with the nails protruding from said lumber. Exhibit 3 is a photo that Swanston also took of the site as he was standing on the main flat roof. Swanston described the area depicted in Exhibit 3 as a sloping roof. On June 6, 2012, Swanston observed the following items on the sloping roof: fall protection equipment, a rope tied around a skylight, roof type brackets, nails, a caulking gun, other tools used for roofing project, bottle water, boxes of screws, roofing material and fall protection harnesses lying out on the roof.

On June 7, 2012, Swanston and Foss revisited the site and spoke to Employer's Foreman, Roberto Anaya (Anaya) and Employer's Risk Manager and Safety Director, Darrell Gallacher (Gallacher). Swanston testified that on June 7, 2012, the debris pile of lumber depicted in Exhibit 2 was still present along with the roofing materials. Swanston did not recall what Anaya or Gallacher said specifically regarding the debris pile. Swanston was told that the employees had used the roofing materials on June 6, 2012, during the working hours. Swanston testified that either he or Foss told Anaya and Gallacher that the debris was a concern because of the nails protruding from the lumber and that employees could fall on the debris while accessing the higher roof depicted in Exhibit 3 and accessing the flat roof. According to Swanston there were no guard rails and no caution tape around the debris pile.

According to Swanston the area depicted in Exhibit 3 was not an isolated area but rather appeared to be an actively traversed area. Swanston testified that this area (meaning the route described going from the flat roof to the sloped roof) was the only way to access the roof depicted in Exhibit 3. On June 7, 2012, Swanston requested documents regarding the site, pursuant to Document Request Sheet (Exhibit A). Gallacher provided documents pursuant to the request on June 13, 2012, via e-mail. Swanston testified that Gallacher

replied via email to the Document Request Sheet indicating that 4 employees were working on the roof on June 6, 2012.

On cross examination, Swanston testified that he did not see roofers on the roof on June 6, 2012, because by the time of the inspection Swanston believed that the roofers had finished their work for the day. During the return site visit on June 7, 2012, Swanston did not see roofers on the roof. Swanston testified that he received Employer's Response to the Request for documents which stated the following:

"There were a total of 10 employees working on the project on Wednesday June 6th. The 4 employees that were working on the Theater roof were: Salvador Rodriguez, Roberto Gonzalez, Roberto Anaya Jr and Ceasar Rodriguez"

Swanston testified that he did not contact the 4 employees and never determined the work hours for the 4 employees. Swanston testified that he documented on his Cal/OSHA 1B form that Gallacher told him that the 4 employees were working on the theater roof of the southern roof line shown on Exhibit 3 on June 6, 2012. In his elemental analysis notes on his Cal/OSHA 1 B form Swanston testified that he wrote that Gallacher admitted that there had been 4 employees working on the higher sloped roof on June 6, 2012 and utilized both of the ladders adjacent to the pile of debris and these ladders were the only access to the higher sloped roof. According to Swanston, the 4 employees worked only on the Southern portion of the roof. Swanston does not know when the debris pile was created. He testified that there was no other evidence of exposure to the debris pile before June 6, 2012. Swanston did not ask Employer if there was any training on avoiding debris piles. Swanston did not see any other roof hatches or roof access patch on the Southern roof area. Swanston conceded that the photos that he took pursuant to this investigation did not depict every square inch of the roof area.

Joel Foss (Foss) testified that he has worked for the Division for 24 years including working as a Senior Safety Engineer for Region 3, the Division's Enforcement Unit. He has taken 80 hours of Federal classes on Construction safety. He has taught safety classes for new hires for the Division on construction safety, and construction hazards. Prior to working for the Division, Foss was an apprentice carpenter and worked in construction for 9 years and 9 months. Foss testified that on June 6, 2012, he was the Acting District Manager for the San Bernardino District office when a complaint came in that men were working on a building at height of 20 feet without fall protection. Foss considered this as an imminent hazard and requested Swanston to accompany him to the jobsite. When Foss and

Swanston arrived it was late in the day and the roofers were gone from the site. An opening conference was held with Superintendent Nelson and the group headed to the roof. Nelson said that the route to the roof was the only way available to go to the roof. Foss testified that the route consisted of going from the flat roof depicted in Exhibit 2 to the sloped roof depicted in Exhibit 3 and the route required using the ladder which was near the debris pile. There was an aerial device at the site and Foss inquired if that device was available to go to the roof. Nelson told Foss and Swanston that the aerial device was only used to bring up equipment.

When Foss arrived at the lower flat roof he noticed that it was surrounded by a parapet wall that led to an upper roof. Foss noticed a big pile of debris with nails sticking out of the lumber. Foss recalled stepping over the rolls of plastic depicted in Exhibit 2. At the time of the inspection, Foss remarked to Swanston that this amount of debris in a work area was unusual. Foss observed the fall equipment, tools and other equipment, fasteners nail bags and water bottle. On June 6, 2012, Superintendent Nelson told Foss that “the workers were working on the sloped roof earlier today” depicted in Exhibit 3. Foss testified that the access to the roof depicted in Exhibit 3 is via 2 ladders and that was their only way of access to the roof depicted in Exhibit 3. Foss testified that working around lumber with nails can be a source of injuries. According to Foss, debris in a construction site can be a direct and immediate hazard to employees.

Findings and Reasons for Decision

The Division proved, by a preponderance of the evidence a violation of §1513(a). The violation is affirmed.

The Division cited Employer for violating § 1513(a), which provides, “During the course of construction, alteration, or repairs, form and scrap lumber with protruding nails and other debris shall be kept reasonably cleared from work areas, passageways, and stairs in and around buildings or other structures”.

The Division has the burden of proving a violation, including the applicability of the safety order, by a preponderance of the evidence. (*Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).) The Division must make some showing that an element of the violation occurred. (*Lockheed California Company*, Cal/OSHA App. 80-889, Decision After Reconsideration (July 30, 1982).)

The Division made the following statements in its closing argument: 1) The citation should not be reclassified to a Notice in lieu because the violation represents a direct and immediate hazard to employees, and⁴ 2) Although this is not a serious hazard it could cause injuries⁵.

The Employer made the following statements in its closing argument: 1) Any exposure prior to June 6, 2012 would be beyond the 6 month statute of limitations⁶, 2) it is unknown whether there was any debris pile on the morning of June 6, 2012, when the four people identified in Exhibit B were present, 3) it is unknown whether the area the workers were in was a work area, 4) the Division did not establish immediate or direct hazard exposure to the 4 employees identified in Exhibit B and 5) verbal and written statements of Gallacher and Anaya are unreliable hearsay because there was no testimony regarding their job duties.

Here, the Division's specific alleged violation description in the citation was this, "The Employer did not ensure that the work area and passageways on the roof of the Theater Building at the site were kept reasonably clear of lumber with protruding nails and other debris. A pile of debris, including lumber with protruding nails, was observed on the main roof at the area where employees utilized two ladders, one to access the higher, sloped roof, and the other to access the ground."

Except for regulatory violations, the Division is required to prove, by a preponderance of evidence that an employee was "exposed to the hazard which the safety order is designed to abate." (*Ford Motor Co.*, Cal/OSHA App. 76-706, Decision After Reconsideration (July 20, 1979).) To find "exposure" there must be reliable proof that employees are endangered by an existing hazardous condition or circumstance. (*Huber, Hunt & Nichols, Inc.*, Cal/OSHA App. 75-1182, Decision After Reconsideration (July 26, 1977).) "There must be some evidence that employees came within the zone of danger while performing work related duties..." (*Nicholson-Brown, Inc.*, Cal/OSHA App. 77-024, Decision After Reconsideration (Dec. 20, 1979).)

In *Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (April 24, 2003), the Board held that: "the

⁴ A reclassification to a Notice in Lieu would not be appropriate here as Labor Code section 6317 provides that a notice may be issued if the violation does not have a "direct relationship" to the health or safety of an employee, or if the violations do not have an "immediate relationship" to the health and safety of an employee, and are general or regulatory in nature.

⁵ The facts observed by Swanston and Foss during the inspection and the reasonable inferences drawn from those facts adequately support a finding that an injury could occur to an employee working near debris.

⁶ It appears that the Division is alleging that the exposure was on June 6, 2012. Exposure prior to June 6, 2012, is not alleged by the Division.

Division may establish the element of employee exposure to the violative condition without proof of actual exposure by showing employee access to the zone of danger based on evidence of reasonable predictability that employees while in the course of assigned work duties, pursuing personal activities during work, and normal means of ingress and egress would have access to the zone of danger.” (*Benicia Foundry & Iron Works, Inc., supra.*) The “zone of danger “is that area surrounding the violative condition that presents the danger to employees that the standard is intended to prevent.” (*Benicia Foundry & Iron Works, Inc, supra; Ja Con Construction Systems, Inc., dba Ja Con Construction, Cal/OSHA App. 03-441, Decision After Reconsideration (March 27, 2006).*)

Here, the Division relied upon hearsay statements made to it by 3 different individuals, General Contractor Superintendent Nelson, Employer’s Foreman Anaya and Employer’s Risk Manager Gallacher. Swanston testified that Gallacher told him that the workers had used the roofing materials on June 6, 2012, during the working hours. Gallacher told Swanston that the 4 employees were working on the theater roof of the Southern roof line on June 6, 2012, shown in Exhibit 3. Swanston testified that he prepared a document request form and that Gallacher replied via email that 4 employees were working on the roof on June 6, 2012. Swanston also testified that Employer made no indications that the debris pile was not present when the 4 employees were working on the roof. Neither of the Division witnesses testified that they observed any worker near the debris pile or near the passageway. None of the photographs in evidence show any worker in the work area.

“Hearsay is defined as ‘evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.’ (Evidence Code §1200; *Baldwin Contracting Company, Inc. Cal/OSHA App. 97-2648, Decision After Reconsideration (Dec. 17, 2001).*) Section 376.2 of the Board’s Rules of Practice and Procedure, states, in pertinent part, that: “Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection is timely if made before submission of the case or on reconsideration. Here, Employer made and received a standing objection to hearsay evidence.

Pursuant to Labor Code section 6314, an Employer’s onsite supervisor is entitled to accompany a DOSH inspector on his or her investigation, and thus, the inspector must identify the onsite supervisor before proceeding with the investigation. Evidence Code section 664, creates a presumption that an official duty has been regularly performed.

Here, Swanston and Foss appeared at the work site and met Nelson in the course of conducting an opening conference with the General Contractor's Superintendent on the job site. The record contains enough evidence to establish the foundational fact that Nelson, who assumed the role of management's representative during the Division's opening conference and inspection, was an agent of Employer who was authorized to speak on its behalf concerning the subject matter of any alleged admission. The Board has held that an agent's authority to make an admission need not be expressed, it may be implied. (See *Robinson Enterprises* Cal/OSHA App. 91-1316, Decision After Reconsideration (July 29, 1993), *Parducci Wine Cellars*, Cal/OSHA App. 21, 1024, Decision After Reconsideration (May 26, 1995).) There is no evidence that during the Opening Conference and subsequent inspection, Nelson ever denied that he was the General Contractor's Superintendent. When Employer offers no rebuttal evidence contesting the status of Nelson as the General Contractor's Superintendent, Evidence Code section 413 allows this absence of evidence to be used by the trier of fact in formulating an inference against a party. (*Sherwood Mechanical, Inc.* Cal/OSHA App. 08-4692, Decision After Reconsideration (June 28, 2012).) Having been properly identified as an onsite superintendent, Nelson is properly viewed as a person authorized to make admissions on behalf of Employer that would otherwise be considered hearsay. Thus, Nelson's statements to Foss that the workers were working on the sloped roof earlier today (meaning June 6, 2012) as depicted in Exhibit 3 and that the route to the roof via the ladders was the only way to access both the flat and the sloped roof is an admission that shows employee access to the zone of danger while in the course of assigned work duties. This is an authorized admission and pursuant to Evidence Code section 1222, an exception to the hearsay rule.

The next question is whether the pile of debris was at the work area while the workers were on the theater roof. Swanston testified that Gallacher admitted that there had been 4 employees working on the higher sloped roof on June 6, 2012, and workers utilized both of the ladders adjacent to the pile of debris, and these ladders were the only access to the higher sloped roof. Gallacher's statement to Swanston that workers utilized both of the ladders adjacent to the pile of debris and that these ladders were the only access to the higher sloped roof, is also excepted from the hearsay rule by Evidence Code § 1222. Admissions adverse to an employer made by a representative of that employer, are an exception to the hearsay rule and may support a finding of fact. (*Macco Constructors, Inc.*, Cal/OSHA App. 84-1106, Decision After Reconsideration (August 20, 1986).) Although Employer argues that verbal and written statements of Gallacher and Anaya are hearsay because there was no testimony regarding their job duties, the record contains enough

evidence to establish the foundational fact that Gallacher, a Risk Manager and Safety Director, was present during the Division's 2nd day of inspection; and was an agent of Employer who was authorized to speak on its behalf concerning the subject matter of any alleged admission⁷. (See *Robinson Enterprises*, Cal/OSHA App. 91-1316, Decision After Reconsideration (July 29, 1993); *Parducci Wine Cellars*, Cal/OSHA App. 21-1024, Decision After Reconsideration (May 26, 1995).) Thus, the facts observed by Swanston and Foss, and the reasonable inferences drawn from those facts, adequately support a finding that Gallacher was duly authorized to communicate information on Employer's behalf.

Additionally, Exhibit B, was offered into evidence by the Employer and it was received into Evidence. Exhibit B indicates that 4 employees were working on the theater roof. Although Employer argued that any verbal or written statements of Gallacher are unreliable hearsay, Employer has manifested its belief in its truth by offering said statement into evidence with the introduction of Exhibit B. Further corroborating that 4 employees worked on the theater roof on June 6, 2012. Thus, the statement that 4 employees were working on the theater roof is an adoptive admission. This ALJ finds that Exhibit B is an adoptive admission which is an exception to the hearsay rule which may support a finding of fact.

Thus, the Division established that section 1513(a) applies and was violated.

Based on all of the above, The Division has sustained its burden by a preponderance of the evidence. The violation is affirmed.

Decision

It is hereby ordered that the citation is established, modified, or withdrawn as indicated above and set forth in the attached Summary Table.

Dated: January 9, 2014

JJ:ao

JACQUELINE JONES
Administrative Law Judge

⁷ Although Employer argues that there was no testimony regarding Gallacher's job duties it appears that Gallacher was a part of Management for Employer.

SUMMARY TABLE DECISION

In the Matter of the Appeal of:

BEST CONTRACTING SERVICES, INC.
Docket 12-R3D3-3786

Abbreviation Key: Reg=Regulatory
 G=General W=Willful
 S=Serious R=Repeat
 Er=Employer DOSH=Division

IMIS No. 316207844

DOCKET	C I T A T I O N	I T E M	SECTION	T Y P E	MODIFICATION OR WITHDRAWAL	A F F I R M E D	V A C A T E D	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT HEARING	FINAL PENALTY ASSESSED BY BOARD
12-R3D3-3786	1	1	1513(a)	G	ALJ affirms citation	X		\$280	\$280	\$280
Sub-Total								\$280	\$280	\$280

Total Amount Due*

(INCLUDES APPEALED CITATIONS ONLY)

\$280

NOTE: Payment of final penalty amount should be made to:
 Accounting Office (OSH)
 Department of Industrial Relations
 P.O. Box 420603
 San Francisco, CA 94142

*You will owe more than this amount if you did not appeal one or more citations or items containing penalties.
 Please call (415) 703-4291 if you have any questions.

ALJ: JJ/ao
 POS: 01/09/2014