

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 14-R4D7-2442

DECISION

Statement of the Case

Security Paving Company, Inc. (Employer) is a public road construction contractor. Beginning June 3, 2014, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer Daniel Pulido, conducted a complaint inspection at a place of employment maintained by Employer at the overpass on Renfro Road and Westside Parkway, Bakersfield, California (the site). On July 21, 2014, the Division cited Employer because a ladder was not used to give access to an elevated working level.

Employer filed a timely appeal contesting the existence of the alleged violation, its classification, and the reasonableness of the proposed penalty. Employer alleged multiple affirmative defenses.

This matter came on regularly for hearing before Dale A. Raymond, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at Bakersfield, California on May 14, 2015. Eugene F. McMenamin, Attorney, from Atkinson, Andelson, Loya, Rudd & Romo, P.C., represented Employer. Efren Gomez, District Manager, represented the Division. The parties presented oral and documentary evidence and the matter was submitted on May 14, 2015. The ALJ extended the submission date to May 22, 2015 on her own motion.

Exhibits received and testifying witnesses are listed on Appendix A. Certification of the Record is signed by the ALJ. Unless otherwise specified, all section references are to Sections of Title 8, California Code of Regulations.

Issues

1. Did Employer provide a ladder for access to an elevated working level?
2. Was the violation properly classified as serious?

Findings of Fact

1. On January 27, 2014, in performance of his assigned duties, Carpenter Hilario Garay (Garay) climbed up wooden formwork to a height of approximately 24 feet.
2. The formwork had wood cross members nailed to it for the purpose of enabling employees to climb up the formwork. The cross members were more than one foot apart. Some of the cross members were more than two feet apart. Employer referred to this structure as a “job-built ladder.”
3. Employer’s job-built ladder is a fixed ladder, but it is not a ladder as described in Section 1675.
4. A serious injury is a realistic possibility in the event of an accident caused by the violation of section 1675.

Analysis

1. Did Employer provide a ladder for access to an elevated working level?

Section 1675 states as follows:

Ladders.

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

Section 3277 states as follows:

Fixed Ladders.

- (a) All fixed ladders shall be approved as defined in Section 3206 of the General Industry Safety Orders.
- (b) Definitions. [...]

Cleats. Cleats are ladder crosspieces of rectangular cross section placed on edge on which a person may step in ascending or descending. [...]

Fixed Ladder. A fixed ladder is a ladder permanently attached to a structure, building, or equipment. [...]

Ladder. A ladder is an appliance usually consisting of two side rails joined at regular intervals by crosspieces called steps, rungs, or cleats, on which a person may step in ascending or descending. [...]

(d) Specific Features [...]

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

Section 1675 has four elements: (1) access to elevated locations (2) must be by ladder (3) as described in section 3277, (4) unless permanent or temporary stairways or suitable ramps or runways are provided.

Garay was employer's employee. He accessed a location that was about 24 feet above ground level on January 27, 2014 to perform his job duties. There were no permanent or temporary stairways or ramps or runways. The first and fourth elements of the safety order were met. A ladder described in section 1675 is required.

To access the top of the formwork, Garay climbed the side of the formwork. He used a structure fabricated on the job that was attached to the formwork. Garay stepped on cleats that he had installed for the purpose of ascending and descending the formwork. 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 structure¹.

¹ "Structure" is defined in section 1504(c) as "That which is built or constructed, an edifice or building of any kind, or any piece of work artificially built up or composed of parts joined

Therefore, the ladder meets the definition of “fixed ladder” found in section 3277, subdivision (b).

The third element requires the ladder to comply with the requirements of section 3277 where there is a fixed ladder. One of those requirements is that the cleats be no more than 12 inches apart measured from the top of the cleat². Here, the cleats were approximately two feet apart measured from the top of the cleats³. Thus, the ladder was not as described in section 1675 and did not meet the third element of the safety order.⁴

Therefore, the third element not being met, the Division established a violation of section 1675.

As an affirmative defense, Employer alleged that its ladder was a permissible job-built ladder and it was not cited for the cleats being too far apart on a job-built ladder. Construction Safety Orders (CSOs) take precedence over General Industry Safety Orders (GISOs). Only CSOs cover job-built ladders, so they take precedence over the GISOs for ladders. Following this logic, Employer argued that CSO 1676 for job-built ladders takes precedence over GISO 3277 on ladders to which GISO 1675, subdivision (c) refers.

Employer’s argument is essentially an argument that a more specific safety order applies. It is well established that when an employer defends

together in some definite manner.” The formwork was built from wood parts joined together in a definite manner. Exhibit 3-1, 3-6, 3-7.

² Section 3277, subdivision (d)(2); same as section 1676, subdivision (c) for job-built ladders.

³ Every other crosspiece used as a step or cleat consisted of two 4x4s stacked on top of each other.

⁴ Employer argued that it did not violate section 1675 subdivision (a) because it was not cited for ladder rungs that were too far apart. Employer’s argument is misplaced. Safety orders are interpreted according to the legislative intent. The intent prevails over the letter and the letter is read so as to conform to the spirit of the Act. (*People v. Belton* (1979) 23 Cal.3d 516, 526.) Each sentence of a statute or regulation must be read in the light of the statutory scheme. (*In re Catalano* (1981) 29 Cal.3d 1, 10-11.) The legislature intended ladders described in section 1675 to conform to the safety order sections pertaining to that type of ladder. A contrary interpretation is absurd. The Board has held that if an employer provides an optional safety device, it must comply with all relevant regulations. (See *Southern California Edison*, Cal/OSHA App. 06-2062, Denial of Petition for Reconsideration (June 20, 2008).) The same rationale applies when an employer chooses one of a number of allowable options. This interpretation of section 1675 is consistent with the Appeals Board’s holding that safety orders must be interpreted in a manner that affords maximum protection to workers, citing *Carmona v. Division of Industrial Safety* (1975) 13 Cal.3d 303, 313. (*Anning Johnson Company*, Cal/OSHA App. 06-1975, Decision After Reconsideration (Jan 13, 2012); *Beutler Heating and Air Conditioning*, Cal/OSHA App. 98-556, Decision After Reconsideration (Nov. 6, 2001); *Baldwin Contraction Company, Inc.*, Cal/OSHA App. 97-2648, Decision After Reconsideration (Dec. 17, 2001).)

against a safety order on the grounds that another order more closely addresses the facts, the employer must demonstrate that it complied with the allegedly more applicable safety order. (*Boston-Bergen Metal Products*, Cal/OSHA App. 00-1012, Decision After Reconsideration (Jan. 10, 2000), citing (*Gas and Electric Company*, Cal/OSHA App. 82-1002, Decision After Reconsideration (Dec. 24, 1986); (*The Herrick Corporation*, Cal/OSHA App. 99-786, Decision After Reconsideration (Dec. 18, 2001) p. 6, citing *Wetsel-Oviatt Lumber Company*, Cal/OSHA App. 94-1462, Decision After Reconsideration (Apr. 12, 2000).)

CSO section 1504, subdivision (a)(A) defines “ladder” as follows:

A device other than a ramp or stairway, designed for use in ascending or descending at an angle with the horizontal. A ladder is intended to be stationary while in service and consists of two side pieces called siderails, joined at short intervals by crosspieces called steps, rungs or cleats.

CSO section 1504, subdivision (a)(G) defines “job-built ladder” as follows:

A ladder that is fabricated by employees, typically at the construction site, and is not commercially manufactured.

Under this definition, the ladder in question was a job-built ladder because it was used for ascending and descending, fabricated by employees, and not commercially available. The ladder was at an angle to the horizontal. Thus, it met the definition of “ladder” in CSO section 1504, subdivision (a)(A) and the definition of “job-built ladder” found in CSO 1504, subdivision (a)(G).

CSO 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. The note to section 1676, subdivision (a) defines cleats for job-built ladders as crosspieces used by a person in ascending or descending a ladder. Cleats are also known as steps or rungs.

Employer’s ladder does not comply with section 1676 because the cleats were farther than 12 inches apart. Thus, Employer’s defense fails.

As an affirmative defense, Employer argued that its practice was safer than what was required by the safety order. Employer argued that having cleats two feet apart was safer than having the cleats 12 inches apart because an employee would hit the cleats if they were 12 inches apart. 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. (*City of Sacramento Fire Department*, Cal/OSHA App. 88-004, Decision After Reconsideration (Mar. 22, 1989).)

2. Was the violation properly classified as serious?

Labor Code § 6432 states:

(a) There shall be a rebuttable presumption that a 'serious violation' exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation. The actual hazard may consist of, among other things: [...]

(2) The existence in the place of employment of one or more unsafe or unhealthful practices that have been adopted or are in use.

Labor Code section 6302, subdivision (h) and section 330, subdivision (h) defines a "Serious injury or illness" to include the loss of any member of the body occurring in a place of employment or in connection with any employment. Labor Code section 6432, subdivision (e) defines "serious physical harm" to include the loss of any member of the body.

The Appeals Board has defined "realistic possibility" to mean a prediction that is within the bounds of human reason, not pure speculation. (*Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (September 27, 2001), citing *Oliver Wire & Plating Co., Inc.*, Cal/OSHA App. 77-693, Decision After Reconsideration (April 30, 1980).) The evidence must not lead to impossibility, must be within human reason and logic, must not be speculative, and thus based on actual events and circumstances that are proven to exist. (*Oliver Wire & Plating Co., Inc. supra.*)

The violation was failure to provide a ladder that complied with sections 1675 and 3277 to access an elevated location. The hazard created by the violation is a fall of approximately 20 feet. Associate Safety Engineer Daniel Pulido's opinion⁵ that serious injury or death is a realistic possibility as a result of a fall of about 20 feet is found credible and is accepted.

⁵ Pulido's opinion was based upon his working for the Division, which included accidents involving falls. He did a total of about 100 inspections as an intern and about 280 inspections during his last six years as an Associate Safety Engineer for the Division. All of his accident inspections involving falls over 15 feet resulted in serious injuries. The injuries

The realistic possibility of a serious injury combined with existence of the actual hazard caused by failure to use a ladder to access an elevated location comes within the definition of “serious” set forth in section 6432. Therefore, the Division met its burden to establish a rebuttable presumption that a serious violation exists. As Employer provided no evidence to rebut the presumption, the presumption stands.

Accordingly, violation was properly classified as a serious violation.

Employer stipulated that the \$9,000 proposed penalty was calculated properly in accordance with the Director’s policies and procedures.

Conclusion

Therefore, Employer’s appeal is denied. Citation 1, Item 1, is affirmed, and the proposed \$9,000 penalty is assessed.

Decision

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

It is further ordered that the penalty indicated above and set forth in the attached Summary Table be assessed.

Dated: June 17, 2015

DALE A. RAYMOND
Administrative Law Judge

DAR:ml

consisted on fractures and death. Pulido has a Bachelor of Science degree in Electrical Engineering. Pulido’s opinion was based upon a reasonable evidentiary foundation consisting of his education and training. See *Wright & Associates, Inc.*, Cal/OSHA App. 95-3649, Decision After Reconsideration (Nov. 29, 1999.)

APPENDIX A

**SUMMARY OF EVIDENTIARY RECORD
SECURITY PAVING COMPANY, INC...
Docket 14-R4D7-2442**

Date of Hearing: May 14, 2015

Division's Exhibits--Admitted

Number	Description
1	Jurisdictional Documents
2	Form C-10, Proposed penalty worksheet
3	Seven photographs from Employer taken Jan. 27, 2014
4	Eight photographs taken by Pulido on June 3, 2014
5	Form 1BY, Notice of Intent to Issue Serious Citation

Employer's Exhibits—Admitted

Letter	Description
A	Cal/OSHA 1B excerpt
B	Pocket Guide for the Construction Industry
C	Pocket Guide--Ladders
D	Photograph of lanyard and positioning hook

Witnesses Testifying at Hearing

1. Hilario Garay
2. Daniel Pulido
3. Michael Brooks
4. Mitchell Colvin

CERTIFICATION OF RECORDING

I, Dale A. Raymond, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hear the above matter, hereby certify the proceedings therein were electronically recorded. The recording was monitored by the undersigned and constitutes the official record of said proceedings. To the best of my knowledge, the electronic recording equipment was functioning normally.

DALE A. RAYMOND

Signature

June 17, 2015

Date

SUMMARY TABLE DECISION

In the Matter of the Appeal of:

SECURITY PAVING COMPANY, INC.
Docket 14-R4D7-2442

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

IMIS No. 316982149

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
14-R4D7-2442	1	1	1675(a)	S	ALJ affirmed violation	X		\$9,000	\$9,000	\$9,000
Sub-Total								\$9,000	\$9,000	\$9,000

Total Amount Due*

(INCLUDES APPEALED CITATIONS ONLY)

\$9,000

NOTE: *Please do not send payments to the Appeals Board.*

All penalty payments 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: DR/ml
 POS: 06/17/15

