

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal
of:

ATKINSON CONSTRUCTION, LP.
27422 Portola Parkway, Suite 250
Foothill Ranch, CA 92610

Employer

DOCKET 14-R3D1-4111

DECISION

Statement of the Case

Atkinson Construction LP (Employer) constructs bridges. Beginning June 18, 2014, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer Natalie Daleo conducted an accident inspection at a place of employment maintained by Employer at the Interstate 605 and 405 freeway interchange in Seal Beach, California (the site). On December 9, 2014, the Division issued an amended citation to Employer for failure to ensure that all of the beams spanning the 405 freeway were braced laterally and progressively to prevent overturning.

Employer filed a timely appeal which was amended by order issued April 15, 2015. Employer contested the existence of the alleged violation, its classification, and the reasonableness of the proposed penalty¹. Employer alleged 15 affirmative defenses.²

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 West Covina, California on November 19, 2015 and

¹ Unless otherwise specified, all references are to Sections of California Code of Regulations, title 8. Citation 1, as amended, alleges a serious accident-related violation of section 1709, subdivision (b)(1), with a proposed penalty of \$18,000. The original citation, before amendment, alleged a serious violation with a proposed penalty of \$6,750. Employer's motion to dismiss the amended citation was denied.

² Affirmative defenses for which Employer did not present evidence are deemed waived. (See section 361.3 "Issues on Appeal" and *Western Paper Box Co.*, Cal/OSHA App. 86-812, Denial of Petition for Reconsideration (Dec. 24, 1986).) They are not discussed.

January 21, 2016. Robert D. Peterson, Esq., Robert D. Peterson Law Corporation, represented Employer. William Cregar, Staff Counsel, represented the Division. Leave to file briefs was granted and the matter was submitted on February 18, 2016.

Issues

1. Did Employer fail to brace beams laterally and progressively during construction to prevent overturning?
2. Did the Division establish that failure to brace beams laterally and progressively to prevent overturning was the cause of Torres' serious injuries?
3. Did the Division establish a rebuttable presumption that the violation was serious?
4. Did Employer rebut the presumption of a serious violation by demonstrating that it did not, and could not with the exercise of reasonable diligence, know of the existence of the violation?
5. Was the proposed penalty reasonable?

Findings of Fact

1. On June 18, 2014, Employer was engaged in constructing falsework for a bridge it was constructing at the site. Employer was following plans prepared by John Weldon, a registered professional civil engineer.
2. On June 18, 2014, Employer planned to place three 135-foot steel I beams (beams #1, #2, and #3), each weighing approximately 60,000 pounds, across the 405 freeway. The beams were to be placed three inches apart on top of vertical structures called bents, a type of falsework. One bent was on either side of the freeway.
3. Beams #1 and #2 were placed sequentially on top of the bents and at right angles to the bents. Wood blocks were placed between beam #1 and beam #2 and also on the far side of beam #2, next to where beam #3 was to be placed. A C-clamp was placed at either end of beam #1, connecting beam #1 to the bent. The wood blocks were put in place while the beams were on the ground.
4. The beams were not welded to the bents.
5. A crane lifted beam #3 and placed it on the bent.
6. Carpenter Ramon Torres (Torres) was standing on top of a bent to assist in placing the beams.
7. When the crane lifted beam #3 and landed it on the bent, Torres did not have fall protection.
8. When the crane landed beam #3, but still suspended it, Foreman Scott Garrison (Garrison) used a forklift to move beam #3 closer to beam #2.
9. When Garrison moved beam #3, it hit beam #2 or its blocking. This caused beam #2 to overturn and fall on beam #1. Beam #1 then

overturned. Neither the bracing between beam #1 and beam #2 nor the C-clamps prevented beam #1 from overturning.

10. Both beams #1 and #2 were dislodged and fell to the ground.
11. When the beams overturned, the bent moved, causing Torres to fall 27 feet to the ground.
12. Torres suffered serious physical harm³ as a result of his fall.
13. A realistic possibility of serious physical harm exists when beams are not braced to prevent overturning.
14. The engineering plan did not provide for the beams to be braced laterally and progressively during construction to prevent buckling or overturning.
15. Employer had a reasonable opportunity to detect the hazard.
16. The proposed penalty was calculated in accordance with the Division's policies and procedures.

Analysis

1. Did Employer fail to brace beams laterally and progressively during construction to prevent overturning?

The Division cited Employer for a violation of section 1709, subdivision (b)(1), which reads:

General Requirements. Bracing. Trusses and beams shall be braced laterally and progressively during construction to prevent buckling or overturning.

The Division alleged as follows:

On June 18, 2014, the employer failed to ensure that all of the 135-ft long Grade 50 I-beams spanning across the 405 freeway related to the new bridge construction project (Bridge #1097, Project 1501110), were braced laterally and progressively to prevent overturning as required by this subsection.

Consequently, on June 18, 2014, two of the steel girders (#1 and 2) that were positioned on the falsework rolled over, deflected and fell off the falsework onto the freeway lanes below.

The Division has the burden of proving a violation by a preponderance of the evidence, including the applicability of the safety order. (*Ja Con Construction*, Cal/OSHA App. 03-441, Decision After Reconsideration (Mar.

³ Employer stipulated that Torres's injury was serious and that he suffered serious physical harm within the meaning of section 6432, subdivision (c).

27, 2006); *Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).)

To establish the violation, the Division must prove that either 1) beams were not braced⁴, or 2) beams were not braced laterally and progressively to prevent overturning.

Employer was constructing a bridge across the 405 freeway. As part of the construction, the plan required three 135-foot long steel I beams to be placed on top of two bents⁵ on either side of the freeway. (Exhibits 7A, 7B) The beams were to be placed one at a time at right angles to the bents.

On June 18, 2014, the first two beams were landed at the far edge of the bents⁶. Before beam #3 was landed, Employer installed wood bracing between beam #1 and beam #2 and installed C-clamps on either side of beam #1. Beam #3 was lowered to a place about 8 inches from beam #2, and then needed to be pushed sideways.⁷

Using a forklift⁸, Garrison pushed beam #3 closer to beam #2. When he did so, beam #3 touched the beam #2 or the blocking on beam #2. That caused beam #2 to overturn, hit beam #1 and cause it to also overturn. Both beams fell down.⁹

⁴ The safety orders do not define the term “brace.” “Where a term has been left undefined in the regulations, it must be given a reasonable and common sense interpretation consistent with its apparent purpose and intent; one that is practical rather than technical in nature, and will result in wise policy rather than absurdity.” (*WA Rasic Construction Co. Inc.*, Cal/OSHA App. 13-2951, Decision After Reconsideration (Jan. 29, 2016), citing *Marin Storage and Trucking, Inc. dba Reliable Crane and Rigging*, Cal/OSHA App. 90-148, Decision After Reconsideration (Oct. 25, 1991), citing *United Business Com. v. City of San Diego* (1979) 91 Cal. App. 3d 156,170.) The dictionary may be used to obtain the ordinary meaning of a word. (*Key Energy Services, LLC*, Cal/OSHA App. 13-2239, Denial of Petition for Reconsideration (Dec. 24, 2014) p.3, citing *Stamm Theatres v. Hartford Casualty Ins. Co.*, (2001) 93 Cal.App. 4th 531, 539; *Heritage Residential Care, Inc. v. Division of Labor Standards Enforcement*, (2011) 192 Cal.App. 4th 75, 82.) The National Women In Construction Dictionary of Construction Terms (25th edition) defines “bracing” as “Structural elements, which due to their ability to transmit direct stress, are provided to either prevent bucking of individual members subject to compression, to add rigidity to a structure as a whole, or to resist internal loads.”

⁵ A bent is a type of temporary falsework. The bents were made of steel, 30 feet high and designed to hold the steel beams. The falsework supports the actual bridge that will be built.

⁶ Exhibits 2D, 2E, 2F, 2G. Beam #1 was at the front beam, right at the end of the bent. Beam #2 was the middle beam⁶. Beam #3 was the far beam and furthest to the inside of the bent.

⁷ The beams were to be set three inches apart in their final position.

⁸ Exhibits 2H, 2I

⁹ Exhibit 2H. They landed on the freeway. Employer stipulated that beams #1 and #2 fell to the ground, and that Exhibit 2H is an accurate depiction of the site after they fell. Beams #1 and #2, as shown in Exhibit H, are bent.

Garrison further testified that C-clamps were installed¹⁰ on either side of beam #1, on the bottom, between beam #1 and beam #2. They clamped beam #1 and the bent together¹¹. He testified that they failed to secure beam #1 in place¹² because beam #2 was “too heavy.” The clamps could not withstand the pressure of beam #2 rolling over on it, so it rolled over and fell.

Garrison was the falsework foreman. As such, he was responsible for the safety of his crew¹³. His statements are attributable to Employer as authorized admissions under Evidence Code section 1221¹⁴ because a foreman is a member of management and authorized to make statements on Employer’s behalf. (*Macco Construction*, OSHAB 84-1106, Decision After Reconsideration (Aug. 20, 1986).) His admissions at hearing are an adequate basis on which to rest findings of fact. (*C & S Battery & Lead*, Cal/OSHA App. 77-0001, Decision After Reconsideration (Oct. 18, 1977).)

Accordingly, it is found that wood blocking and C-clamps were used to brace beams. Touching the blocking on beam #2 with beam #3 was a planned, deliberate event. The fact that the beams overturned establishes that the beams were not laterally and progressively braced to prevent overturning.

Therefore, the Division, by a preponderance of the evidence, established that the beams were not braced laterally and progressively to prevent overturning. As such, the Division has met its burden of proof and the violation of section 1709, subdivision (b)(1) is sustained.

2. Did the Division establish that failure to brace the beams laterally and progressively to prevent overturning during construction was the cause of Torres’ serious injuries?

¹⁰ Carpenter Ramon Torres (Torres) testified that there were no C-clamps. This testimony is not credited because Torres was not in a position to see the C-clamps. Beam #2 was landed before beam #1 was landed. Only three inches separated the beams when beam #1 was landed. Then the C-clamps were installed. Torres would not have been able to see the C-clamps in the place where Garrison described. Garrisons’ testimony on this point is also more credible because Garrison was the Falsework Foreman. He was responsible for installing the C-clamps.

¹¹ The bottom flange of beam #1 was clamped to the top flange of the bent’s beam.

¹² After the accident, Garrison found half of one of the C-clamps. It had been torn in two.

¹³ Exhibit 8 is documentation of the safety talk Garrison gave to his crew at the beginning of the job. Carpenter Ramon Torres signed in.

¹⁴ Evidence Code § 1221 provides that evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof has, by words or other conduct, manifested its adoption or its belief in its truth.

Employer stipulated that Carpenter Ramon Torres (Torres) sustained serious physical harm on June 18, 2014 as a result of his fall. Employer did not stipulate that the violation was the cause of his serious injuries.

A violation is accident-related where there is a causal nexus between the violation and the serious injury. (*MCM Construction, Inc.*, Cal/OSHA App. 13-3851, Decision After Reconsideration (Feb. 22, 2016) p. 11.) In *MCM Construction, Inc.*, *supra*, the Board held that “The violation need not be the only cause of the accident, but the Division must make a ‘showing [that] the violation more likely than not was a cause of the injury. (*Mascon, Inc.*, Cal/OSHA App. 08-4278, Denial of Petition for Reconsideration (Mar. 4, 2011); *Siskiyou Forest Products*, Cal/OSHA App. 01-1418, Decision After Reconsideration (Mar. 17, 2003); *Davey Tree Surgery Company*, Cal/OSHA App. 99-2906, Decision After Reconsideration (Oct. 4, 2002).)” (*Id.* p. 11-12).

When beam #3 was being lowered on to the bent, Torres was standing on top of the bent. He stood between beam #2 and beam #3, holding the end of beam #3¹⁵. The top of the bent on which he stood was 14 inches wide. He had on a fall protection harness, but the harness was not attached to an anchor point.

At hearing, Torres testified that he was shaken off the bent when the beams rolled over. When he was interviewed¹⁶ at the hospital on June 20, 2014, Torres said that when beam #2 fell, he tried to get on to beam #3 (still suspended), but it moved, so he lost his balance and fell. Employer’s accident report¹⁷ stated that when the beams fell, they caused the bent to move. The photographs show that the bents were bent over after the accident.¹⁸

Thus, it is found that Torres fell because the bent shook.

When Garrison moved beam #3 into beam #2, it made beams #1 and #2 overturn, which caused the bent to shake, which caused Torres to fall and suffer serious physical harm. If the beams had been braced to prevent overturning, Torres would not have sustained serious physical harm. Thus, the Division has met its burden of proof by proving a causal nexus between the violation and the serious physical harm suffered. The violation is accident-related.

3. Did the Division establish a rebuttable presumption that the violation was serious?

¹⁵ Exhibit 2G.

¹⁶ The interview was by Daleo.

¹⁷ Exhibit 6

¹⁸ Exhibit 2G.

Labor Code section 6432, subdivision (a) 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 harm¹⁹ 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.

“Realistic possibility” is not defined in the safety orders. However, the Appeals Board has defined “realistic possibility” to mean a prediction that is within the bounds of human reason, not pure speculation. (*Bellingham Marine Industries, Inc.*, Cal/OSHA App. 12-3144, Decision After Reconsideration (Oct. 16, 2014), citing *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).)

As discussed above, the Torres’s serious injuries were found to be a result of the violation. Failure to brace beams as required by the safety order was an unsafe practice that was in use.

The fact that a serious injuries occurred as a result of the violation is proof that a serious injury from the actual hazard is within the bounds of human reason, and not pure speculation. A serious injury is therefore a realistic possibility in the event of an accident caused by the actual hazard caused by the violation. Therefore, the Division established a rebuttable presumption that the violation was properly classified as serious.

4. Did Employer rebut the presumption of a serious violation by demonstrating that it did not, and could not

¹⁹ Labor Code section 6432, subdivision (e) provides as follows:

“Serious physical harm” as used in this part, means any injury or illness, specific or cumulative, occurring in the place of employment or in connection with any employment that results in any of the following:

- (1) Inpatient hospitalization for purposes other than medical observation.
- (2) The loss of any member of the body.
- (3) Any serious degree of permanent disfigurement.
- (4) Impairment sufficient to cause a part of the body or the function of an organ to become permanently and significantly reduced in efficiency on or off the job, including, but not limited to, depending on the severity, second-degree or worse burns, crushing injuries including internal injuries even though skin surface may be intact, respiratory illnesses, or broken bones.

with the exercise of reasonable diligence, know of the existence of the violation?

Once the Division produces enough evidence to create a presumption of a serious violation, the burden of proof shifts to Employer to rebut the presumption. Section 6432, subdivision (c), provides as follows:

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.

To establish that it could not have known of the violative condition by exercising reasonable diligence, an employer has the burden to establish that the violation occurred under circumstances which could not provide the employer with a reasonable opportunity to have detected it. (*Vance Brown, Inc.*, Cal/OSHA App. 00-3318, Decision After Reconsideration (April. 1, 2003).) If an employer is prevented from detecting the violation, it may be reasonably unaware of the existence of the violation sufficient to reduce the classification. (*Trio Metal*, Cal/OSHA App. 03-0317, Decision After Reconsideration (Feb. 25, 2009).)

Employer raised the issue of lack of Employer knowledge of the violative condition because the blocking was installed according to a plan drafted by a registered professional civil engineer, John Weldon (Weldon).²⁰

The plan called for beam #3 to be placed only three inches from beam #2. It is foreseeable that contact may occur with slightly more force than necessary or intended when placing beam #3. Bracing should prevent overturning for this foreseeable event. Reasonable diligence requires that Employer inquire about whether the plan was designed with lateral and progressive bracing that would prevent overturning during construction. There is no evidence that such an inquiry was ever made.

Weldon testified that bracing consisted of both blocking and banding the beams. The purpose of blocking was to enable the beams to carry the intended load and for lateral stability. Blocking alone was insufficient to provide lateral stability. Banding was required, but it could not be done until all three beams were landed.

The bracing was designed to provide strength and lateral stability after construction so the beams could support the intended load, not so that the

²⁰ Exhibit 7B.

beams would not overturn during construction. Weldon did not testify that the plans provided bracing to prevent overturning while the beams were being placed on the bent. Employer's failure to offer this testimony, although production of the evidence was easily within employer's power to do so, raises the inference²¹ that the evidence, if produced, would have been adverse to its position. (*Shimmick-Obayashi*, Cal/OSHA App. 08-5023, Decision After Reconsideration (Dec. 30, 2013), citing *Shehtanian v. Kenny* (1958) 156 Cal. App. 2d 580.) Thus, the inference is that Weldon knew the bracing was not designed to prevent overturning while the beams were being placed. Reasonable diligence required that Employer make sufficient inquiry to ensure that the plans complied with the safety order requiring progressive and lateral bracing during construction to prevent overturning.

Therefore, Employer failed to establish of lack of Employer knowledge and did not rebut the presumption of a serious classification.

5. Was the proposed penalty reasonable?

Labor Code section 6319, subdivision (c) sets forth the factors which the Director of the Department of Industrial Relations must include when promulgating penalty regulations: size of the employer, good faith, gravity of the violation, and history of any previous violations. (Sections 333-336)

Penalties calculated in accordance with the penalty setting regulations²² are presumptively reasonable will not be reduced absent evidence that the amount was miscalculated, the regulations were improperly applied, or that the totality of the circumstances warrant a reduction. (*Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).)

All serious violations begin with a base penalty of \$18,000. Where a serious violation causes a serious injury, the only downward penalty adjustment allowable is for size. (Labor Code section 6319, subdivision (d); *Dennis J. Amoroso Construction Co., Inc.*, Cal/OSHA App. 98-4256, Decision After Reconsideration (Dec. 20, 2001).)

In *M1 Construction*, Cal/OSHA App. 12-0222, Decision After Reconsideration (July 31, 2014), the Board held that if the Division introduces the proposed penalty worksheet and testifies that the calculations were completed in accordance with the appropriate regulations and procedures, it

²¹ Reasonable inferences can be drawn from the evidence introduced at a hearing. (*Mechanical Asbestos Removal, Inc.*, Cal/OSHA App. 86-362, Decision After Reconsideration (Oct. 13, 1987).)

²² Sections 333-336

has met its burden to show the penalties were calculated correctly, absent rebuttal by the Employer.

Daleo testified that the penalty setting regulations were followed to calculate the \$18,000 penalty for an accident-related serious violation. The only allowable reduction was for size. Since Employer had over 100 employees, no reduction was allowable.

Therefore, a penalty of \$18,000 is found reasonable and is assessed.

Conclusion

The evidence supports a finding that Employer violated section 1709, subdivision (b)(1), by failing to brace beams laterally and progressively during construction to prevent overturning. Employer did not rebut the presumption of a serious violation by establishing that it did not know, and could not have known of the violation by the exercise of reasonable diligence. The Division established the causal nexus between the violation and the serious physical harm, and thus established the serious classification. The proposed penalty is reasonable and correctly calculated. Therefore, Employer's appeal is denied.

Order

Citation 1, Item 1, and the proposed \$18,000 penalty are affirmed.

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

Dated: March 17, 2016

DALE A. RAYMOND
Administrative Law Judge

DAR:ml

APPENDIX A

**SUMMARY OF EVIDENTIARY RECORD
ATKINSON CONSTRUCTION LP
Docket 14-R3D1-4111**

Dates of Hearing: November 19, 2015 and January 21, 2016

Division's Exhibits

Exhibit Number	Exhibit Description	Admitted
1	Jurisdictional Documents	Yes
2A-2H	Photographs	Yes
2 I	Photograph	No
2J-2L	Photographs	Yes
3	Cal-OSHA Form 36(S)—Accident Report	Yes
4A-4L	Photographs	Yes
4M	Photograph	No
5	Document Request Sheet	Yes
6	Incident Investigation Report Form	Yes
7A	Engineering Drawings—5 pages	Yes
7B	Complete Copy of Engineering Drawings	Yes
8	Employer's Written Work Plan	Yes
9	Notice of Intent to Classify Citation as Serious Cal/OSHA Form 1BY	Yes
10	Proposed Penalty Worksheet Cal/OSHA Form C-10	Yes

Employer's Exhibits

Exhibit Letter	Exhibit Description	Admitted
A	Field Documentation Worksheet—6 pages	Yes
B	Field Documentation Worksheet—2 pages	Yes
C	Field Notes—2 pages	Yes
D	Documentation Worksheet—3 pages	Yes
E	Natalie Daleo Deposition	Yes
F	Notice of No Accident-Related Violation	Withdrawn

Witnesses Testifying at Hearing

1. Ramon Navarro Torres
2. Natalie Daleo
3. Scott Garrison
4. Brian DeTinne
5. John Weldon

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

March 17, 2016
Date

SUMMARY TABLE DECISION

In the Matter of the Appeal of:

ATKINSON CONSTRUCTION, LP.
Docket 14-R3D1-4111

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

IMIS No. 317368084

DOCKET	CITATION	ITEM	SECTION	TYPE	MODIFICATION OR WITHDRAWAL	AFFIRMED	VACATED	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT HEARING	FINAL PENALTY ASSESSED BY BOARD
14-R3D1-4111	1	1	1709(b)(1)	S	ALJ affirmed	X		\$18,000	\$18,000	\$18,000
					Sub-Total			\$18,000	\$18,000	\$18,000

Total Amount Due*

\$18,000

(INCLUDES APPEALED CITATIONS ONLY)

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: DAR/ml
POS: 03/17/16