

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

MATAROZZI-PELSINGER BUILDERS, INC.
1286 Sanchez Street
San Francisco, CA 94114

Employer

Docket No. 01-R1D1-1400

**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 taken the petition for reconsideration filed in the above entitled matter by Matarozzi-Pelsinger Builders, Inc. (Employer) under submission, makes the following decision after reconsideration.

JURISDICTION

Between February 14, and March 31, 2001, a representative of the Division of Occupational Safety and Health (the Division) conducted an accident investigation at a place of employment maintained by Employer at 2480 Broadway Street, San Francisco, California (the site).

On April 5, 2001, the Division issued a citation to Employer alleging a serious violation of section 1632(b) [unguarded floor opening] of the occupational safety and health standards and orders found in Title 8, California Code of Regulations¹ with a proposed civil penalty of \$10,800.

Employer filed a timely appeal contending that the proposed civil penalty was unreasonable.

On February 6, 2002, a hearing was held before Bref French, Administrative Law Judge (ALJ) of the Board, in San Francisco, California. Fred Walter, Attorney, represented Employer. Michael Frye, Compliance Safety Engineer, represented the Division.

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

At the hearing Employer moved without objection from the Division to expand the scope of its appeal to include that the safety order was not violated and that the classification was incorrect. The motion was granted.

On June 5, 2002, the ALJ issued a decision denying Employer's appeal.

On July 8, 2002, Employer filed a timely petition for reconsideration and a motion to file a supplemental petition after Employer received a copy of the record of the proceedings. The Division filed an Answer to the petition on August 9, 2002 and a Notice of Non-Opposition to Motion for Leave to File Supplemental Petition for Reconsideration on August 15, 2002.

On August 23, 2002, the Board issued an Order Taking Petition for Reconsideration Under Submission.

On March 18, 2003, Employer filed a "Supplemental Petition for Reconsideration." On April 22, 2003, the Division filed an Answer in Opposition to Supplemental Petition for Reconsideration.

EVIDENCE

Employer was cited for failing to ensure that a floor opening was covered and secured from accidental displacement.

Michael Frye (Frye) testified for the Division that as a safety engineer for the Division he conducted an accident investigation on February 14, 2001, after a report by the San Francisco Fire Department that an employee of Employer had fallen through a floor opening on February 9, 2001. During an opening conference at the site where Employer was remodeling a mansion residence, Frye spoke to Hank Strohbeck (Strohbeck), who identified himself as the site superintendent for Employer. Strohbeck stated that he was at the jobsite when the injured employee Daire Lyne (Lyne), was assigned by Employer's foreman, Lawrence Jermaine (Jermaine), to put in three pieces of wood 2 inches by 4 inches (2 by 4's) for fire blocking in a wall between a stairwell and a dumb-waiter floor opening on the second floor of the residence. Strohbeck stated that the opening had been covered, but that the covering was not marked with any words. After Lyne fell through the opening, Employer looked for the covering but could not find it.

According to Strohbeck, there were no guardrails or boards blocking entry into the area when Lyne was working there. Strohbeck told Frye that Lyne had been standing in front of the corner on the north part of the wall and that after putting in "maybe one fire block", he fell through the opening. Frye subsequently interviewed various subcontractors and they all denied being on

the 2nd floor on the afternoon of Lyne's accident. Employer's employees denied removing the covering.

When Frye measured the floor opening with a tape measure, it measured 25 inches by 26 inches. The fall distance from the edge of the opening to the wooden surface below was 11 feet, 9 inches. Frye cited Employer for a violation of section 1632(b) and classified the violation as serious. Based on his experience investigating fall accidents for five years with Cal/OSHA and having worked for the State Compensation Insurance Fund for ten years as a health and safety representative, Frye opined that it was substantially probable that an uncontrolled fall of 11 feet, 9 inches would result in death, or, compounded fractures, spinal injuries or internal injuries. He believed that Employer should have been aware that the floor opening was not covered since foreman Jermaine had assigned the work to Lyne shortly before the accident.

Lyne testified for the Division that on February 9, 2001, he was employed by Employer as an apprentice carpenter. On the morning of February 9, 2001, Lyne had been sheet rocking under a stairwell on the second floor level. After lunch, at approximately 1:00 p.m., Lyne asked Strohbeck and Jermaine what work he should do next. Strohbeck and Jermaine went with him to the stairwell where Jermaine told him to keep putting up sheetrock but to first put in two fire blocks in the stairwell. At 1:15 p.m., while he was under the stairs putting fire blocks between the studs, he fell through a dumb-waiter hole in the floor next to the stairwell. As a result, he was hospitalized for 10 to 13 days for six fractured vertebrae in his neck, and had surgery to removed two disks, which were replaced with a steel plate.

From Employer's Monday morning safety meetings, Lyne was aware that floor openings have to be "covered and placed securely" but he had "no reason" to remove any floor covering since he was "not working on the floor." The opening next to the stair well had not been covered because the hole was occasionally used to hand materials up through it to workers on the second floor. He observed this once when he was "building out a header by the hole." Usually materials were passed through an opening behind the hold between the dumb-waiter hole and the exterior wall. Nails could not be nailed into the top of the floor because there was an interior heating system in pipes under the floor.

On cross-examination, Lyne identified a floor plan of the second floor. He first stated that there appeared to be a wall on the south side of the dumb-waiter hole, however, he did not recall that it was in place when he was putting the fire blocks in the stairwell. If there had been a vertical sheetrock wall there, he would not have fallen through the floor opening. Although the dumb-waiter opening would have been visible from that location, he did not recall seeing an opening when he was assigned the fire blocking installation job. Had

he seen an uncovered opening, he would have covered it. In August or September, Strohbeck had been “going off about open holes” on the third floor level so Lyne nailed a cover over an eight foot by four foot hole on the third floor.

Lyne stated that he was with Jermaine and Strohbeck for “two to three minutes—no more than 5 minutes” when he was given the assignment. He measured the length between the studs for two fire blocks and cut several 2 by 4’s from scrap wood on the floor in the master bedroom. He was not sure if he took two cut pieces back to the studs and measured them to bevel the pieces. Lighting conditions were normal. Lyne had “no trouble seeing.” He stated that as a result of his fall, he has some short term memory loss and his “mind is not so great” regarding “timeframes.”

Strohbeck testified for Employer that on February 9, 2001, he was employed by Employer as the project superintendent at the residence where Employer was working as the general contractor. Strohbeck supervised the work of the heating/ventilation and electrical subcontractors on site. He and Jermaine, who was Employer’s framing foreman, were responsible for “keeping track of dangerous areas” such as around floor openings, which areas were checked twice daily, once in the morning and once in the afternoon.

The dumb-waiter shaft has a 2 foot by 2 foot opening in the pantry of the kitchen, which shaft goes from the basement to the attic. All of the subcontractors used the shaft and the slot—the “chase” through the floor framing—behind the exterior wall to bring various pipes and wires up through the residence. The dumb-waiter shaft was used mostly to bring up heating and ventilation ducts. He recalled looking up at the dumb-waiter opening through the ceiling of the kitchen pantry from the floor below around 4:00 p.m. on February 8, 2001, while talking to the plumbing subcontractor about bring materials up to the second floor. At that time, which was the last time Strohbeck saw the dumb-waiter opening before the accident, the hole was “definitely covered.” He was not sure if the covering was “nailed down”.

Strohbeck identified Exhibit B as Employer’s daily log, dated January 29, 2001, which he filled-out to document training that he conducted. The training lasted for 10 or 15 minutes with half the time spent discussing the hazards associated with “holes in floor,” as Strohbeck wrote on the log. Employer “always covers” holes like the dumb-waiter opening “at all times” since they present a safety hazard. Two or three months before the accident, an employee was reprimanded for not nailing or screwing down a hole covering.

Strohbeck admitted that at the time of the Division’s inspection on February 14, 2001, there were no markings on the plywood over the floor opening. The last time he saw the cover there were no markings or stenciling on it. At the time of the accident, Strohbeck was unaware of the requirement

that the covering be marked with certain warning words. Hence, this requirement was not discussed with employees at safety meetings. Strohbeck verified that he told Frye that Employer “looked everywhere” for the covering, which dimensions would have been a little larger than the opening, but could not find it.

Jermaine testified for Employer that he was employed by Employer as its foreman on February 9, 2001, which responsibilities included supervising the crew, including Lyne, and routinely inspecting for hazards at the beginning and end of the workday. It is his understanding that “floor openings are not to be left unattended when they are open, and [they] must be covered with plywood and secured down when the work is done.

Around noon on February 9, 2001, Jermaine and Lyne were in the laundry room 1 to 2 feet from the dumb-waiter opening. Strohbeck was not present when Jermaine instructed Lyne to “do the fire blocking in the stairwell near the landing and up the stairwell wall opposite the laundry room with the dumb-waiter hole.” The walls were “studded-in” with no sheet rocking. Jermaine testified that the dumb-waiter opening had “a piece of plywood across the opening and slanted in the opening.” Then he stated that he “believed” there were “two pieces of plywood – a piece of plywood inside the opening and a piece of plywood across the face of the opening [but] not on top of the piece of plywood across the opening.” There was a piece of plywood across the vertical studs up the wall, which was screwed onto the wall, “approximately 6 to 10 inches or 8 inches off the floor,” 40 inches high at the top, and 30 to 40 inches long. He could “see under the plywood about six inches.” When asked on cross-examination if there were any letters on the plywood over the hole, he answered: “I don’t believe so.”

ISSUE

Did the ALJ act in excess of her powers by denying Employer an opportunity to cross-examine Lyne on his deposition testimony?

FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

Employer contends that the ALJ acted in excess of her powers by denying Employer an opportunity to cross-examine Lyne regarding previous testimony given at a Workers’ Compensation Appeals Board deposition. Employer specifically alleges that the following six discrepancies would have been revealed had it been allowed to cross-examine Lyne:

Workers’ Compensation Appeals

The Occupational Health and

Board

Safety Appeals Board

Matter of Lyne v. Matarozzi/Pelsinger Builders, Inc.

Appeal of Matarozzi & Pelsinger Builders, Inc.

Deposition of Daire Lyne
September 26, 2001:

Testimony of Daire Lyne Hearing
of February 9, 2002:

1. DT 41:23-42:17: Nails were used to secure covers over dumb waiter holes.

1. RT 84:7-10: Nails and screws could not be used to secure a cover of the dumb waiter hole due to heating system directly under the floor.

2. DT 59:7-14: Mr. Lyne never saw things handed through dumb waiter holes.

2. RT 86:15 & RT 128:1-3: Things were handed up through the dumb waiter hole.

3. DT 60:9-19: During the morning of the accident, Mr. Lyne was moving a door jamb of the HVAC contractor.

3. RT 89:17: Mr. Lyne was sheetrocking the stairs during the morning of the accident.

4. DT 62:4-6: During the morning of the accident, Mr. Lyne was working 15 to 20 feet away from the dumb waiter hole.

4. RT 89:18-93:16; 97:9-98:14; 101:23-114:20: During the morning of the accident, Mr. Lyne was work under the staircase directly adjacent to the dumb waiter hole.

5. DT 69:7-20: Mr. Lyne's lunch break, on the day of the accident was 12:00 to 12:30.

5. RT 79:16-12: Mr. Lyne's lunch break, on the day of the accident was from 12:00 to 1:00 p.m.

6. DT 71:8-12: The dumb waiter hole was obscured by something. It was dark.

6. RT 151:18-23; 151:24-152:1: There was lighting in the area of the hole. Mr. Lyne had no trouble seeing during his work near the dumb waiter hole.

The Board has carefully reviewed the tape recordings of the hearing and finds that the ALJ did not abuse her discretion in limiting the examination of the witness. The Board also finds that examination on the requested questions would not change the decision in this case. It is clear from the tape that the witness had not reviewed the transcripts of the deposition. At the time of the hearing Employer's counsel did not present the ALJ with any appropriate legal

authority as to why she should have allowed the questions. In short, the Board finds that the probative value, if any, of the proffered evidence would have been substantially outweighed by the undue consumption of time. (See Evidence Code § 352).

The Board also notes, as did the ALJ, that the testimony of Lyne was not crucial but merely collateral to a resolution of this case. Appeals Board ALJ's "have full power, jurisdiction, and authority to hold a hearing and ascertain facts..., to regulate the course of a hearing, ..., to rule on objections, privileges, defenses, and the receipt of relevant and material evidence," (Section 350.1) The Board finds that the ALJ acted within her authority in disallowing the cross-examination of Lyne regarding the collateral matters described in Employer's petition for reconsideration.

1. A violation of Section 1632(b) is Factually Supported by Evidence Other than the Testimony of Lyne.

Section 1632(b) states, in pertinent part, that:

Floor ... openings shall be guarded by a standard railing and toe boards or coverCovering shall be secured in place to prevent accidental removal or displacement, and shall bear a pressure-sensitized, painted or stenciled sign with legible letters not less than one inch high, stating: "Opening-Do Not Remove"

It is undisputed that the floor opening at issue in this matter was greater than 12 inches in width. Section 1632(b) was properly cited by the Division since a temporary unsafe condition existed specifically, a dumb-waiter floor opening on the second floor through which employees or materials could fall.

The issue in dispute is whether or not that floor opening was secured and whether or not it had an appropriate warning required by section 1632(b). It is undisputed that no such warning was placed on the covering which may or may not have been used on the day in question. Both Jermaine and Strohbeck acknowledged at hearing that there were no such markings. As a result, based on this evidence alone, a violation of section 1632(b) was properly sustained by the ALJ.

In addition, however, the evidence presented by Employer's witnesses as well as Mr. Frye supported the ALJ's conclusion that the floor opening was not covered at the time of the accident. Employer notes that Lyne testified that the opening was not covered on the day of his accident. Employer also notes that Lyne testified that he had seen the opening uncovered in the past and that materials have been passed back and forth through it. Employer contends that, at least as to whether or not things were handed previously through the

dumb-waiter opening, Lyne's testimony is inconsistent with that presented at deposition. While this inconsistency may exist, it is immaterial to the issue of whether or not the opening was consistently nailed shut by Employer given that Employer's own witnesses acknowledged that it was not. As specifically found by the ALJ, Strohbeck confirmed that the dumb-waiter opening had been used to bring up heating and ventilation ducts between the floors. As a result, it is acknowledged by Employer that the opening was not always secured by a covering.

Despite this admission, Employer contends that the opening was covered at the time of the accident. Strohbeck's testimony discredits this allegation. As noted by the ALJ at page 9:

Although he testified that the dumb-waiter opening was "definitely covered" when he saw it from the kitchen pantry, obviously plans were being made for the subcontractor to uncover the opening (or to use the uncovered opening) to transport materials. Hence, it can reasonably be inferred that the dumb-waiter floor opening was either left uncovered for the use of subcontractors, or subcontractors were allowed to remove any temporary covering, which was not nailed or screwed down to the floor, to allow them to bring materials up to the other levels of the residence.

The ALJ properly inferred from this testimony that it was likely that the dumb-waiter opening was uncovered at the time of the accident.

The ALJ's factual conclusion is supported by other evidence derived from Employer's witnesses. Strohbeck testified that he did not know if the cover was actually nailed in place when he had last seen it, the day before the accident. This lapse in memory demonstrates that Employer neither inspected the opening everyday nor nailed a covering to the opening on a regular basis. The fact that Employer could not find the cover which was allegedly secured to the opening after the accident despite "looking everywhere for it" further indicates that it was not there.

Finally, the evidence presented by Employer witness Jermaine was properly discredited without reliance on the testimony of Lyne. Although Jermaine testified at hearing that he had seen the covering securely in place over the opening on the day of the accident, this statement was inconsistent with his prior statements made to Frye during the investigation when he stated that he did not know if there had been any floor covering. In addition, his statements were inconsistent with those presented by Strohbeck. As a result, the ALJ properly discredited his testimony.

Based on the testimony of Employer's witnesses, the ALJ properly found that the dumb-waiter opening on the second floor on Employer's job-site was not properly covered at the time of the accident. As noted by the ALJ, Lyne's testimony only added "considerable weight to the most probable conclusion—that the dumb-waiter floor opening was left open and uncovered on a regular basis, and consistent with that practice, was uncovered when Lyne fell through it." (See ALJ Decision at page 9) Based on this finding, as well as the undisputed finding that the floor covering did not contain the proper warning as required by section 1632(b), the evidence establishes that section 1632(b) was violated. The Board also finds that the ALJ acted properly in all aspects and that Employer was granted a full opportunity to fairly litigate the case².

2. Evidence other than Lyne's Testimony Supports the ALJ's Finding that the Violation of Section 1632(b) was Properly Classified as Serious.

There is no dispute that the fall distance between the second floor opening and the floor beneath was 11 feet 9 inches. Safety Engineer Frye testified without dispute as to the likely injury which could be sustained from a fall of that height. This finding was not disputed by Employer.

Employer appears to be attacking only the ALJ's finding of Employer knowledge to sustain the serious classification. In doing so, Employer alleges that Lyne's testimony as to the lighting conditions of the room in which he was working as well as the assignment he was given and the amount of time he spent with his supervisors obtaining that assignment are relevant to this determination. Employer misconstrues both the law as well as factual findings of the ALJ in asserting this conclusion.

Employer bears the burden of proof regarding the state of knowledge in a serious violation allegation. Here, the violation was in plain view. Specifically, the violation concerns an uncovered or improperly secured covering on a

² Employer made the following statement in its original petition for reconsideration, "The Administrative Law Judge (ALJ) acted in excess of her powers by denying the employer the opportunity to cross-examine the Division's key witness, Daire Lyne, as to inconsistencies between his testimony at the hearing and in prior sworn deposition testimony, and by refusing to accept in evidence a transcript of the witness's prior inconsistent testimony. These refusals denied the employer its due process right to a full and fair hearing, and its right to confront the witnesses against it." The issue of whether or not Employer was denied its due process right to a full and fair hearing, and its right to confront witnesses against it, "was not developed further by Employer in either the original or supplemental petitions. In the supplemental petition Employer framed the issue as" (1) The ALJ acted in excess of her powers by denying Employer an opportunity to cross-examine the Division's key witness and by refusing to accept evidence of that witness's prior inconsistent testimony; ... (2) The ALJ's refusal to allow cross-examination of the Division's key witness and her refusal to admit evidence for impeachment of that witness resulted in an incomplete record. Admission of the proffered evidence and a complete record in this action would not justify the ALJ's findings of fact; ... and (3) Admission of the proffered evidence and appropriate findings of fact made in light of the proffered evidence, would not support the ALJ's decision." As noted in the Decision After Reconsideration, the Board does not find that any of Employer's contentions, however framed, have merit.

dumb-waiter opening on the second floor of the building that Employer was working in. In addition, the violation involves a proper warning on the covering. The ALJ properly found that an employer, exercising reasonable diligence, could easily have discovered both the uncovered opening as well as the lack of a proper warning on any covering used on an intermittent basis. In addition, as noted above, Strohbeck's own testimony indicates that he did not daily inspect nor regularly secure the opening in question.

Employer appears to have confused the appropriate standard as to knowledge. Employer seems to contend that factors such as lighting in the area are material to determining what Employer actually knew. The appropriate standard, however, is what Employer knew or could have known had it exercised reasonable diligence. *Andersen Tile Co.*, Cal/OSHA App. 94-3076, Decision After Reconsideration (Feb. 16, 2000). As a result, neither the length of time spent by Employer with Lyne giving him his assignment, the amount of light in the room he was working within, nor any of the other alleged inconsistencies cited by Employer between the workers' compensation deposition and the hearing testimony (listed on page 5 of the petition for reconsideration), is relevant to the ALJ's proper determination that Employer, exercising due diligence, could have discovered the hazardous condition which led to Lyne's injury. Thus, the ALJ did not improperly exclude the deposition testimony as well as cross-examination thereon as being immaterial to the matters before her.

DECISION AFTER RECONSIDERATION

The Board affirms the ALJ's decision finding a violation of section 1632(b) and assessing a civil penalty of \$10,800.

MARCY V. SAUNDERS, Member
GERALD PAYTON O'HARA, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: August 12, 2004