

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

In the Matter of the Appeal of:

NORTH FORK SPRINGS CONSTRUCTION
P.O. Box 300
Oak View, CA 93022

Employer

Docket Nos. 02-R4D1-199
through 202

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board) issues the following decision after reconsideration, pursuant to the authority vested in it by the California Labor Code. The Board took reconsideration of this matter on its own motion.

JURISDICTION

Beginning June 25, 2001, a representative of the Division of Occupational Safety and Health (Division) investigated an accident at a place of employment located at 560 South Stanford Avenue, Los Angeles, California, maintained by North Fork Springs Construction (Employer). The Division issued Employer a number of citations for violations of occupational safety and health standards contained in Title 8, California Code of Regulations, which Employer timely appealed. A hearing was held before an Administrative Law Judge (ALJ) of the Board on May 16, 2003 and the ALJ rendered her decision on June 5, 2003 granting all of Employer's appeals. On July 2, 2003, the Board ordered reconsideration of the ALJ's decision on its own motion. The Division submitted an answer in response to the order of reconsideration on August 1, 2003.

**FINDINGS AND REASONS
FOR
DECISION AFTER RECONSIDERATION**

The Board has fully reviewed the record in this case, including the testimony at the hearing and the documentary evidence admitted, the

arguments of counsel, the decision of the ALJ, and the arguments and authorities presented in the answer to order of reconsideration. In light of all of the foregoing, we find that the ALJ's decision was proper and was based on substantial evidence in the record as a whole. Therefore, we adopt the attached ALJ's decision in its entirety and incorporate it into our decision by this reference.

DECISION AFTER RECONSIDERATION

The decision of the ALJ dated June 5, 2003 is reinstated and affirmed.

CANDICE A. TRAEGER, Chairwoman
ROBERT PACHECO, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: May 31, 2007

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DECISION

Background and Jurisdictional Information

Employer is a construction contractor and construction sub-contractor. Between June 25, 2001 and December 5, 2001, the Division of Occupational Safety and Health through Associate Cal/OSHA Engineer Shlomo Goldberg conducted an accident inspection at a place of employment maintained by Employer at 560 South Stanford Avenue, Los Angeles, California (the site). On December 6, 2001, the Division cited Employer for the following alleged

violations of the occupational safety and health standards and orders found in Title 8, California Code of Regulations¹:

<u>Type</u>	<u>Section</u>	<u>Cit/Item</u>	<u>Penalty</u>
Serious	1511(a) [unsafe work place]	2	\$4,725
Serious	1626(e) [stair railings]	3	\$4,725
Serious	2405.4(b) [ungrounded electrical system]	4	\$3,150
General	1509(a) [IIPP]	1-1	\$175
General	1509(c) [Code of Safe Practices]	1-2	\$175
General	1509(e) [safety meetings]	1-3	\$175
General	1513(c) [holes in stairways]	1-4	\$260
General	1629(a)(4) [number of stairways]	1-5	\$175

Employer filed timely appeals contesting the existence of the alleged violations, their classifications, the abatement requirements, and the reasonableness of all proposed penalties.

This matter came on regularly for hearing before Dale A. Raymond, Administrative Law Judge for the California Occupational Safety and Health Appeals Board, at West Covina, California on May 16, 2003. Employer was represented by Randall Hromadik, Employer Representative. The Division was represented by Shlomo Goldberg, Associate Cal/OSHA Engineer. Oral and documentary evidence was presented by the parties and the matter was submitted on May 16, 2003.

Law and Motion

At the hearing, Employer moved, over objection, to dismiss Citation 2 based upon lack of sufficient evidence for the Division to sustain its burden of proof. The motion was taken under submission and is disposed of in this Decision.

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

Employer made a hearsay objection to all statements made to Goldberg except for the Accident Reports admitted as Exhibits 7 and 8.

Docket 02-R4D1-200

Citation 2, Serious, § 1511(a)

Summary of Evidence

The Division cited Employer for knowingly permitting an employee to work in an unsafe place.

Associate Cal/OSHA Engineer Shlomo Goldberg (Goldberg) testified that he began an inspection at the site on June 25, 2001. On June 13, 2001, the Fire Department reported an accident that occurred earlier that day. (Exhibits 7 and 8) The reports stated that Supervisor Randy Hromadik (Hromadik) suffered head trauma and a right foot injury and was admitted to the hospital. During his inspection, Goldberg spoke to Mortiz Halpern (Halpern), who was the construction superintendent of the general contractor, Fassberg Construction (Fassberg). Halpern told Goldberg that he saw Randy Hromadik step on a piece of plywood that was not secured to a joist. The plywood gave way and Hromadik fell about 10 feet to the basement below. Goldberg requested additional information from Employer, but never received it. Based upon the above, Goldberg issued Citation 2 for a serious violation of § 1511(a).

On cross-examination, Goldberg testified that he also spoke to Peter Dasaloff (Dasaloff), an employee of Van Elk Ltd., who said that he saw Hromadik slip, lose his balance, and fall through a hole to the basement below.

Hromadik testified that he was in charge of making the work place safe. Earlier, he nailed plywood on the first floor over a hole above the basement. On the day of the accident, the steel subcontractor (Van Elk Ltd.) removed the plywood but did not replace it. At the end of the day, Hromadik took a piece of plywood to put over the hole. He inadvertently stepped into the hole and fell. As a result, he was hospitalized from about 3:00 p.m. to 5:00 p.m. Hromadik did not take any precautions to ensure that he did not fall through the hole.

Goldberg asserted that Hromadik should have bent down on his knees and slid the plywood over the hole to protect himself from the fall hazard. Since Hromadik was aware of the hole but did not take any measure to protect himself, Goldberg moved, after Hromadik's testimony, to reclassify Citation 2 as willful. As Employer had put classification in issue in its appeal, the motion was granted.

Findings and Reasons for Decision

Section 1511(a) is too vague and ambiguous to be constitutionally enforceable. Citation 2 is dismissed and the penalty is set aside.

The Division has the burden of proving every element of its case, including the applicability of the cited safety orders, by a preponderance of the evidence. (*Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).)

The Division cited Employer under § 1511(a) which reads “No worker shall be required or knowingly permitted to work in an unsafe place, unless for the purpose of making it safe and then only after proper precautions have been taken to protect the employee while doing such work.”

Former § 1511(b) read “No worker shall be required or knowingly permitted to work in an unsafe place ...” In *State of California Department of Transportation*, Cal/OSHA App. 79-1039, Decision After Reconsideration (Oct. 16, 1980), the Appeals Board held that former § 1511(b) was unconstitutionally vague, in violation of due process. It found that the word “unsafe” was vague and the safety order language did not provide an employer with guidance to help it determine what is required to avoid a violation.

Since the language of § 1511(a) is the same as former § 1511(b), it is found that § 1511(a) is unconstitutionally vague. Citation 2 is dismissed and the penalty is set aside.

Dockets 02-R4D1-199, 201 and 202

Citation 3, Serious, § 1626(e)

Citation 4, Serious, § 2405.4(b)

Citation 1, Item 1, General, § 1509(a)

Citation 1, Item 2, General, § 1509(c)

Citation 1, Item 3, General, § 1509(e)

Citation 1, Item 4, General, § 1513(c)

Citation 1, Item 5, General, § 1629(a)(4)

In Citation 1, Employer was cited for failure to establish, implement, and maintain an effective Injury and Illness Prevention Program (IIPP) (Item 1), failure to have a Code of Safe Practices available at the site (Item 2), failure to hold safety meetings at least every 10 days (Item 3), holes in stairway landings (Item 4) and failure to have enough stairways (Item 5). In Citation 3, Employer was cited for lack of stair railings, and in Citation 4, Employer was cited for an ungrounded electrical system.

Goldberg testified that he issued Citation 1, Item 1 for a § 1509(a) violation based upon the unsafe conditions he found on June 25, 2001 (set forth in the other Citations and Items), and upon Employer’s failure to provide information he requested. Goldberg specifically pointed to the hole and plywood covering (Citation 2) as an unsafe condition that was evidence that Employer lacked an effective IIPP.

Goldberg interviewed foreman Wilfredo Ponce. (Ponce) Ponce told Goldberg that there was no Code of Safe Practices and that safety meetings were held monthly. Accordingly,

Goldberg issued Citation 1, Item 2 for a violation of § 1509(c) and Citation 1, Item 3 for a violation of § 1509(e).

Goldberg observed that the building was a four-story, 39-foot high building with only one stairway, so he issued Citation 1, Item 4 for a violation of § 1513(c). Four of the landings had seven inch gaps in the floor. Goldberg took a photograph of one of the gaps. (Exhibit 3). Therefore, he issued Citation 1, Item 5 for a violation of § 1629(e).

Goldberg testified the stairway had open sides but no railings, as illustrated in photographs he took. (Exhibits 4 and 6). As all employees had to use the one stairway, he issued Citation 3 for a serious violation of § 1626(e).

Goldberg saw one of Employer's employees, a carpenter named Jaime Martinez (Martinez), using a saw on the fourth floor. The saw was plugged into a spider box. Upon testing the box, Goldberg found that it was not grounded. He traced the electric line back to the power pole. There was no grounding ring at the power pole so anyone using the electricity would not be protected. Exhibit 5 is a photograph of the end of the cord and the grounding ring that should have been used. Based upon the above, he issued Citation 4 for a serious violation of § 2405.4(b).

The proposed penalty worksheet (Exhibit 2) was admitted into evidence, but Goldberg did not testify regarding the reason for classification of any of the violations or the basis for his calculation of the penalties.

On cross-examination, Goldberg testified that there were approximately 12 of Employer's employees at the site when he inspected. Besides Martinez, he spoke to foreman Wilfredo Ponce (Ponce) and employee Miguel Cortez (Cortez) at the site.

Hromadik testified that the general contractor fired Employer on the day of his accident, June 13, 2001. Fassberg faxed a letter to Employer's office at about 5:00 p.m. that day. After June 13, 2001, Employer did not have any employees at the site. Jamie Martinez had worked for Employer for a short time, but was not working for Employer during Goldberg's inspection. Wilfredo Ponce was not Employer's foreman, and Hromadik had never heard of him. Hromadik had not heard of Miguel Cortez before the day of the hearing.

Prior to Employer being fired, about 95% of Employer's work was done by subcontractors. When Employer was fired, it told its subcontractors to work directly for the general contractor in order to mitigate damages. The subcontractors were familiar with the job and the general contractor would not have to spend time or money to find substitute workers. The job was a government construction project. Penalties would be levied against Employer if the project were late. Employer might be found liable for the penalties or cost overruns even if it had been fired midstream.

In rebuttal, Goldberg testified that he spoke to Office Manager Mike Skinner and Employer's sole proprietor Earl Arnold over the telephone, but neither said that Cortez, Martinez or Ponce were not their employees.

Citation 4

Findings and Reasons for Decision

The Division did not establish that any of Employer's employees were exposed to the electrical hazard referred to in § 2405.4(b). Citation 4 is dismissed and the penalty is set aside.

The Division cited Employer under § 2405.4(b) which provides “To protect employees on construction sites, the employer shall use either or both ground-fault circuit interrupters as specified in Subsection (b) of this Section or an assured equipment grounding conductor program as specified in Subsection (d) of this Section.

In order to establish a violation, the Division has the burden of proof to establish that Employer’s employees came within the zone of danger while performing work related duties. (*Bethlehem Steel Corp.*, Cal/OSHA App. 76-552, Grant of Petition for Reconsideration and Decision After Reconsideration (May 21, 1981)².)

Employer did not dispute that on June 25, 2001, a worker on the fourth floor was using a saw that was not grounded. The testimony was in conflict regarding whether the Martinez was one of Employer’s employees that day. The only evidence the Division offered to prove that Martinez was Employer’s employee was hearsay. Employer made a hearsay objection to Goldberg’s testimony. Under Rule 376.2 hearsay evidence is not sufficient in itself to support a finding when a timely hearsay objection has been made unless it would be admissible over objection in civil actions. Martinez’s statements are hearsay which does not fall within any exception.

While statements from Office Manager Mike Skinner (Skinner) or Owner Earl Arnold (Arnold) would not be hearsay, it was not clear that Goldberg specifically asked them to verify that Martinez was their employee. A failure to deny employment status is unpersuasive. This could be due to a number of reasons, including a failure to realize that employee status was in issue.

Accordingly, the Division has not met its burden with regard to Citation 4 to show employee exposure. Citation 4 is dismissed and the penalty is set aside.

Citation 3

Findings and Reasons for Decision

² An exception exists for multi-employer worksites, but the Division did not allege or attempt to prove that Employer fell within this exception. The multi-employer worksite regulations are found in § 336.10, which permits citation of (a) the employer whose employees were exposed to the hazard; (b) the employer who actually created the hazard; (c) the employer who has the authority to correct unsafe or unhealthy conditions on the worksite; and (d) the employer who had the responsibility for correcting the hazard.

The Division did not establish that any of Employer's employees were exposed to the fall hazard associated with § 1626(e). Citation 3 is dismissed and the penalty is set aside.

Section 1626(e) provides, “Stairways, until permanently enclosed, shall be guarded on all open sides with stair railings. Open sides of stairway landings, porches, balconies, and similar locations shall be guarded with standard railings.”

Employer did not deny that the stairway Goldberg observed and photographed on June 26, 2001 (Exhibits 4 and 6) did not have stair railings. Exposure of Employer’s employees to the hazard was in dispute.

Hromadik, as the General Manager, would have personal knowledge of the foreman’s identity. Statements by Martinez and Cortez are hearsay to which no exception applies, and are insufficient for a finding. As discussed above, Skinner’s and Arnold’s silence does not establish employment status. Since Wilfredo Ponce was a foreman, his statements would not be hearsay as they would be authorized admissions³. The Division did not call Ponce to testify or present any other evidence, documentary or otherwise, to prove that Ponce or anyone else was Employer’s employee on June 25, 2001. If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust. (Evidence Code § 412). Accordingly, Hromadik’s denial that any of Employer’s employees were present on June 25, 2001 is credited over Goldberg’s testimony to the contrary.

Employer had employees at the site on June 13, 2001, one of which was Hromadik. However, this was a building under construction. There was no evidence that the stairway was in existence at that time.

Therefore, the Division failed to meet its burden to prove that any of Employer’s employees were exposed to the hazard of a stairway without stair railings as cited in Citation 3. Citation 3 is dismissed and the penalty is set aside.

Citation 1, Items 4 and 5

Findings and Reasons for Decision

The Division did not establish that any of Employer's employees were exposed to the hazards of holes in the landings (Citation 1, Item 4) or too few stairways (Citation 1, Item 5) in violation of §§ 1513(c) and 1629(a)(4). Citation 1, Items 4 and 5, are dismissed and the penalties are set aside.

³ Evidence Code § 1222(a) provides that evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement was made by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement.

In Citation 1, Item 4, the Division cited Employer for a violation of § 1513(c), which provides “Material storage areas and walkways on the construction site shall be maintained reasonably free of dangerous depressions, obstructions, and debris. Citation 1, Item 5 is for a violation of § 1629(a)(4) which provides that a building or structure is more than three stories or 36 feet, a minimum of two stairways must be provided.

Goldberg’s unrefuted testimony that, on June 25, 2001, there were at least four stairway landings with 7 inch wide holes, the building at the site was four stories high, 39 feet high and had only one stairway was based upon his personal observation. This testimony, based upon Goldberg’s personal observation, is not hearsay and is credited.

As discussed, the Division’s evidence does not establish that any of Employer’s employees were present on June 25, 2001 or afterwards. There was no evidence regarding the condition of the landings or height of the building on June 13, 2001, when Employer’s employees were present. Hence, the Division did not meet its burden to establish employee exposure. Citation 1, Items 4 and 5 are dismissed and the penalties are set aside.

Citation 1, Items 1, 2 and 3

Findings and Reasons for Decision

The Division did not establish that any of Employer's employees were exposed to the hazards cited in Citation 1, Items 1, 2 or 3. Citation 1, Items 1, 2, and 3 are dismissed and the penalties are set aside.

In Citation 1, Item 1, the Division cited Employer under § 1509(a) which requires Employer to establish, implement and maintain an effective IIPP. In Citation 1, Item 2, the Division cited Employer for failure to have a Code of Safe Practices readily available at the site. Citation 1, Item 3 cited Employer under § 1509(e) which requires Employer to hold safety meetings at minimum of every 10 working days.

Goldberg testified that he issued Citation 1, Items 1, 2, and 3 based upon Ponce’s statements and Employer’s failure to provide him additional information, as requested. Goldberg’s testimony that Ponce said he did not have an IIPP or Code of Safe Practices and that safety meetings were held monthly is credited. However, as discussed above, Hromadik’s testimony that Ponce was not Employer’s foreman is credited over the Division’s evidence to the contrary. If Ponce were not Employer’s employee, it would explain why Goldberg did not receive any additional information about Employer by making a request to Ponce. As Goldberg was not clear about the contents of the conversations he had with Skinner and Arnold, the statements Skinner or Arnold made or failed to make cannot carry substantial weight. Goldberg did not produce a Document request sheet, letter, or other written evidence to show the person to whom he made a request for additional information. He did not request Hromadik, who was responsible for safety, to provide any information.

Accordingly, the Division failed to establish violations of §§ 1509(a), 1509(c) or 1509(e) by a preponderance of the evidence. Citation 1, Items 1, 2, and 3 are dismissed and the penalties are set aside.

Decision

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

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

DALE A. RAYMOND
Administrative Law Judge

DAR:mc

Dated: June 5, 2003