

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

DUKE PACIFIC, INC.
13950 Monte Vista
Chino, CA 91710

Employer

Docket No(s). 06-R3D3-5175 through 5177

**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 this matter under submission, renders the following decision after reconsideration.

JURISDICTION

Beginning on July 10, 2006, the Division of Occupational Safety and Health (Division) conducted an accident inspection at a place of employment in California maintained by Duke Pacific, Inc. (Employer). On December 12, 2006, the Division issued three citations to Employer alleging violations of workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.¹

Citation 1 alleged a General violation of section 1509(a) [failure to establish, implement and maintain an effective IIPP] and proposed a penalty of \$160. Citation 2 alleged a Serious violation of section 1716.1(c)(1)(A) [failure to protect employees from falls], and proposed a penalty of \$16,200. Citation 3 alleged that Employer violated section 1716.1(f)(1) [failure to implement professional engineer erection procedures], and proposed a penalty of \$16,200.

Employer filed timely appeals of all citations.

Administrative proceedings were held, including an evidentiary hearing before an Administrative Law Judge (ALJ) of the Board. After taking testimony and considering the evidence and arguments of counsel, the ALJ issued a Decision on August 11, 2008. The Decision sustained the violations and penalties alleged in Citations 1 and 2. It also sustained the violation but

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

reduced the classification of Citation 3 from Serious to General and assessed a civil penalty of \$160.

Employer timely filed a petition for reconsideration, which specified that it was seeking reconsideration of the Decision only as to Citations 1 and 2. The Division did not file an answer to the petition.

The Board took Employer's petition under submission by order of November 4, 2008.²

ISSUES

Whether the Decision was correct in sustaining the violation alleged in Citation 1.

Whether the Decision was correct in sustaining the violation alleged in Citation 2.

EVIDENCE

The Board adopts and incorporates the summary and discussion of the evidence in the Decision. For convenience, we briefly restate the evidence here.

Employer constructs roofs. The accident involved here occurred at a construction project in Riverside, California where Employer was constructing a roof over a 90-foot long by 77-foot wide building. The building had girder running along the long central axis of the building, which divided the span of the roof into two 38.5-foot wide sections. The roof was being constructed of "panels" consisting of steel trusses or joists which spanned the distance between the exterior wall and the central girder to support sheets of plywood and lengths of lumber for framing. The panels measured 45 feet by 8 feet.³ Based on the photograph admitted into evidence as Division exhibit 2-5, and testimonial evidence, the steel trusses and the wooden components were combined on site into individual roof panels, which were then lifted to the roof level for attachment to the main structure.⁴

Employer's on-site foreman used a Gradall, a four-wheeled vehicle equipped with an extension boom, to lift the completed roof panels to the roof

² The Board's order "stayed" the "Order Dismissing Appeal of the [ALJ] dated August 11, 2008." The order should have referred to the *Decision* dated August 11, 2008, as there is no "Order Dismissing Appeal" of that date in the record. We correct that clerical error in the Board's order hereby.

³ The 45 x 8 dimensions were given in the Decision on page 3. The Decision notes on page 4 that one witness testified the panels were 39 to 40 feet long and 8 feet wide. Given the stated width of the building, it seems that the shorter estimate is more accurate. Be that as it may, the precise dimensions are not relevant to our decision.

⁴ Exhibit 2-5 shows the Gradall is supporting a roof panel consisting of metal and wood into position at roof level. Sky can be seen between the panel and the wall of the building to the right of the field of view.

level. From here, one end would be lowered onto the “ledger”⁵ on the exterior wall, and the other onto the central girder. The Gradall would support the panel in place until another employee, called the “lander,” working on the partially completed roof, welded the panel to the building at both the ledger and central girder locations. Initial welds – called tack welds – were used to hold the panel in position until complete, full welds could be made later.

On the day of the accident, three panels had been installed using the procedure summarized above. When the foreman lifted the fourth panel to roof level with the Gradall, it did not fit into place because the central girder was bent or “bowed.” Consequently, the steel truss portion of the roof panel could not be sufficiently aligned to rest on the girder. The foreman dismounted from the Gradall, which he left in position to support the roof panel, and then used a forklift to bend or push the girder into position so it would support the roof panel. With the girder now aligned and supporting the roof panel, he went back to the Gradall and took it out from under the panel. While moving the Gradall, he hit the central girder, causing it to move enough to no longer support the roof panel, which fell to the ground. The lander, who was standing on the panel, fell with the panel and was seriously injured as a result. Although the lander was wearing a fall protection harness, it offered no protection because it was not connected to an anchor point.

DECISION AFTER RECONSIDERATION

In making this decision, the Board relies upon its independent review of the entire evidentiary record in the proceeding. The Board has taken no new evidence. The Board has also reviewed and considered the briefs and arguments of the parties.

Labor Code section 6617 sets forth five grounds upon which a petition for reconsideration may be based:

- (a) That by such order or decision made and filed by the appeals board or hearing officer, the appeals board acted without or in excess of its powers.
- (b) That the order or decision was procured by fraud.
- (c) That the evidence does not justify the findings of fact.
- (d) That the petitioner has discovered new evidence material to him, which he could not, with reasonable diligence, have discovered and produced at the hearing.
- (e) That the findings of fact do not support the order or decision.

⁵ A “ledger” or “ledger board” is “a board attached to studding to help support the joists.” (Webster’s New World Dict. (3d college ed. 1991) p. 770.) Here the ledger was a long horizontal component near the top of the inner surface of the exterior wall to which the roof panel joists could be attached by welding, and which would support the roof panels at that point. (See also Harris, Dictionary of Architecture and Construction (1975) p. 290.)

Employer petitioned for reconsideration on the basis that the Decision was issued in excess of the Board's powers, the evidence does not justify the findings of fact, and the findings of fact do not support the Decision.

Citation 1, Docket No. 06-R3D3-5175

Citation 1 alleged Employer violated section 1509(a) by failing to establish, implement and maintain an effective Injury and Illness Prevention Program (IIPP). The citation classified the violation as "General." Employer stipulated that the \$160 penalty was calculated properly and in accord with the Division's Policy and Procedure Manual.

Section 1509(a) provides, "Every employer shall establish, implement and maintain an effective IIPP in accordance with section 3202 of the General Industry Safety Orders." In turn, section 3203(a)(2) provides in pertinent part that the IIPP shall "[i]nclude a system for ensuring that employees comply with safe and healthy work practices. . . . [and] that ensures employee compliance with safe and healthful work practices." Employer had an IIPP, and had a procedure for the erection process involved here.

The Decision held that Employer violated its IIPP when the foreman removed the Gradall from under the roof panel before it was tack welded to the central beam and the ledger on the exterior wall, resulting in the panel's fall. The foreman testified that he was familiar with Employer's roof erection procedure, knew it required tack welding the panel before the Gradall was moved, and yet he removed the Gradall from under the roof panel before the panel was welded. We affirm the Decision as to this holding.

Although the foreman was attempting to cope with or adapt to the unusual situation of the central girder being bowed out of alignment, it appears he did not consider the risks of moving the Gradall before the roof panel had been welded. Instead, he assumed the forklift would serve as a substitute support. And even if that assumption was correct, the foreman further did not consider the risks of hitting the central girder with the Gradall and whether that could cause the roof panel to fall because it had not yet been welded.

Removing the Gradall before tack welding violated Employer's erection procedure. (See Exhibit 3, paragraph 3(a) ["As the joists are placed, they shall be attached at each end to the supporting girder or ledger with a Tek screw or tack weld[.]"]) The person deviating from Employer's procedures was a foreman, and a foreman's or supervisor's actions are attributable to management. (*Frank M. Booth, Inc.*, Cal/OSHA App. 06-4703, Denial of Petition for Reconsideration (Jan. 27, 2009), citing *Davey Tree Surgery Co. v. Occupational Safety and Health Appeals Bd.* (1981) 123 Cal.App.3d 641); *Southern California Edison*, Cal/OSHA App. 89-445, Decision After Reconsideration (Mar. 14, 1991).) Thus the violation was established. (*Sully-Miller Contracting Co.*, Cal/OSHA App. 99-896, Decision After Reconsideration (Oct. 30, 2001); *Ayoob*

& Perry, Cal/OSHA App. 86-937, Decision After Reconsideration (May 18, 1987) [failure to follow own procedure violates 3203(a)(2)].

Citation 2, Docket No. 06-R3D3-5176

Citation 2 alleged that Employer failed to protect its employee, the lander who was working on the roof panel, from falling by using an approved means of fall protection, in violation of section 1716.1(c)(1)(A). Section 1716.1(c)(1)(A) provides:

(c) Exposure and Protection

- (1) Employees are to be protected from falls by guardrails as specified in section 1620 or a safety net, personal fall protection system, or other methods specified in Article 24 while walking/working on surfaces 15 feet or more above a lower level.
- (A) Employees working at the leading edge shall be provided with either fall protection as specified in Article 24, utilize a fall protection plan or be protected by parapets at least 24 inches high.

The evidence showed that the roof on which the lander was working was more than 19 feet above the ground, that there were no guardrails or safety nets, and that although he was wearing a fall protection harness, it was not tied off to any point on the roof or building. Employer's Safety Manager, Rod McCammon, testified that the lander was working at the leading edge at the time of the accident. Thus, the violation was established.

The evidence also established that the violation was serious as defined in Labor Code section 6432 [violation more likely than not to result in serious injury, assuming an accident occurs]. The Division's inspector testified that based on his years of experience and prior investigations of fall accidents, a fall from a height of 19 feet, 10 inches as occurred in this case is more likely than not to result in serious injury or death.⁶

Where, as here, the evidence establishes that a serious violation caused a serious injury; the violation is properly characterized as "accident-related." (Labor Code section 6319(d); section 336(c)(3); *K.V. Mart Company*, Cal/OSHA App. 01-638, Decision After Reconsideration (Nov. 1, 2002).) The Division proved there was a causal connection between the violation (employee not wearing fall protection) and the serious injury. The inspector testified that had the employee been tied off to the structure when the roof panel fell, he would

⁶ Labor Code section 6302(h) in pertinent part defines "serious injury" as "any injury . . . occurring in a place of employment or in connection with any employment which requires inpatient hospitalization for a period in excess of 24 hours for other than medical observation.[.]"

not have fallen to the ground and thus would have avoided serious injury.⁷ Accordingly, we affirm the serious, accident-related classification of the citation and the \$16,200 penalty assessed by the ALJ.

DECISION AFTER RECONSIDERATION

We affirm the Decision of the ALJ and deny Employer's appeals of Citations 1 and 2, and assess civil penalties of \$160 and 16,200, respectively, for the violations.

ART CARTER, Chairman
ED LOWRY, Board Member

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⁷ The testimony was that the employee might have been bruised, presumably by the forces exerted against his body by the harness when the fall was arrested.