

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

In the Matter of the Appeal of:

DEVCON CONSTRUCTION INC.  
690 Gibraltar Drive  
Milpitas, CA 95035

Employer

Dockets. 12-R1D2-2062 through 2064

**DENIAL OF PETITION  
FOR RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code hereby denies the petition for reconsideration filed in the above entitled matter by Devcon Construction Inc. (Employer).

**JURISDICTION**

The Division of Occupational Safety and Health (Division) conducted an inspection on January 19, 2012, at a construction site in Gilroy, California, where Devcon was building a public library. On June 20, 2012, 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.<sup>1</sup>

Citation 1, Item 1 alleges a general violation of section 1509(e) [failure to ensure that an employee attend safety meetings] and proposes a penalty of \$420. Citation 1, Item 2 alleges a general violation of 3668(d)(2) [failure to evaluate forklift performance of employee] and proposes a penalty of \$420. Citation 2 alleges a serious violation of 1632(j)(1) [wall opening not guarded as required], and proposes a penalty of \$5060. Citation 3 alleges a serious violation of 3650(s) [failure to ensure that debris box attachment was properly secured] and proposes a penalty of \$5060.

Employer filed a timely appeal contesting the existence of the violations, classification and reasonableness of the proposed penalties. A hearing was held before an Administrative Law Judge (ALJ) on May 21, July 15 and 16, 2013 in Oakland, California. A decision was issued on December 20, 2013,

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

affirming the three citations. Citation 3 was re-classified as general and the penalty was reduced to \$800.

Employer timely filed a petition for reconsideration. Employer is seeking reconsideration of the ALJ's decision in Citation 1, Item 2, and Citation 2.

### **ISSUE**

Was the decision correct in sustaining the appealed citations?

### **REASON FOR DENIAL OF PETITION FOR RECONSIDERATION**

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.

Employer has asked the Board for reconsideration of the ALJ's decision on the basis of (a), (c), and (e).

#### 1. Citation 1, Item 2

Employer argues that the safety order does not require any particular documentation to show an evaluation has been conducted of a forklift driver's performance under section 3368(d)(2). Although documentation of forklift evaluations completed by the Employer was requested by the Division, Employer did not provide anything beyond initial certification documentation for the driver at issue. Employer correctly notes that the ALJ's decision does credit testimony regarding a foreman's assessment of the forklift driver's ability to maneuver the forklift on site, including his ability to properly use a debris box attachment.

In the decision, the ALJ walks through the requirements of section 3668(d)(2), which states, "An evaluation of each powered industrial truck operator's performance shall be conducted at least once every three years." (Decision, p. 5-8). Read alone, one may interpret the word "evaluation" in several ways, as Employer suggests. However, the Board does not read each regulation in isolation, but consistent with principles of statutory construction,

views this section of the regulation with reference to the whole regulatory scheme of which it forms a part. (*Western Airlines, Inc.*, Cal/OSHA App. 86-0055, Decision After Reconsideration (Oct. 28, 1987), citing *People ex rel. Younger vs. Superior Court* (1976) 16 Cal.3d 30, 41 [127 Cal.Rptr. 122,544 P.2d 1322]). Section 3668(f) provides insight into the requirements of section 3668(d)(2), as it states:

The employer shall certify that each operator has been trained and evaluated as required by this section. The certification shall include the name of the operator, the date of the training, the date of the evaluation, and the identity of the person(s) performing the training or evaluation.

Section 3668(f) does not exempt evaluations (as opposed to the presumably more rigorous initial trainings) from the requirement to certify and document.

Based on the language of section 3668 read as a whole, it can be reasonably inferred that “evaluation” in this context is meant to be something more than the foreman running a new worker through his paces to ensure he is able to do the specific work at that jobsite. At the least, it involves showing when the evaluation happened, and who performed the evaluation. The standard requires some level of competence for the individual performing the evaluation, and has a list of skills that would be appropriate for training and evaluation. (Sections 3668(b)(4), 3668(c)(1) and (c)(2)). The Division’s inspector requested records of training and evaluation which are required by the standard, and did not receive any documentation to show that evaluations per section 3668 had taken place. The decision correctly found the Employer to be in violation of 3668(d)(2), and we incorporate the ALJ’s reasoning on this citation.

## 2. Citation 2

The language of the safety order is as follows:

Section 1632(j): Wall openings, from which there is a drop of more than 4 feet, and the bottom of the opening is less than 3 feet above the working surface, shall be guarded as follows:

- (1) When the height and placement of the opening in relation to the working surface is such that either a standard rail or intermediate rail will effectively reduce the danger of falling, one or both shall be provided;

Employer petitions for reconsideration of the serious citation for failure to guard a second floor wall opening. (Section 1632(j)(1), Decision, p.8).

Employer contends the wall opening could not be guarded at the time of the accident, as it was being used to deliver materials to the second floor, and at the time of the accident, was being used to deliver heavy tools from the second floor to the ground. According to Employer, it has shown a “logical time” defense (or *Nicholson-Brown* defense). (See, *Roland Associates Construction*, Cal/OSHA App. 90-668, Decision After Reconsideration (Jan. 6, 1992).). An employee stepped through the window and into a debris box while it was being loaded, resulting in a fall and injury.

Although Employer cites the *Nicholson-Brown* defense, Employer has provided no evidence that its way of moving the materials was a safer way of proceeding with the work than complying with the provisions of 1632(j)(1). In order to succeed on the *Nicholson-Brown* defense, Employer must demonstrate that it would have been more dangerous for its employees to comply with the safety order, while Employer only argues that it could not load or unload while the rail was in place. While it may be inconvenient for Employer to reconsider its means of delivering materials, in *ILH Construction Company*, Cal/OSHA App. 02-4172, Decision After Reconsideration (Dec. 24, 2008), the Board found that section 1632(j)(1) does not have an “in use” exception. In that decision, the Board stated that an employer, under the plain language of the safety order, may not leave a wall opening unguarded simply because it is being used at that moment for delivering materials. So the Board finds here.

Under Labor Code section 6432, a violation may be classified as serious 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.” A serious injury of a hospitalization of five days resulted due to the fall from the unguarded window opening. Employer was correctly found to have been aware of the unguarded window. The serious citation is proper.

### **DECISION**

For the reasons stated above, the petition for reconsideration is denied.

ART CARTER, Chairman  
ED LOWRY, Board Member  
JUDITH S. FREYMAN, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
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