

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

In the Matter of the Appeal of:

SAVANT CONSTRUCTION, INC.  
13830 Mountain Ave.  
Chino, CA 91710

Employer

Dockets. 14-R3D1-3018 through 3021

**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 Savant Construction, Inc. (Employer).

**JURISDICTION**

Commencing on July 2, 2014 the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On September 2, 2014 the Division issued four citations to Employer alleging violations of occupational safety and health standards codified in California Code of Regulations, title 8.<sup>1</sup> Citation 1 of the four citations was subsequently withdrawn by the Division, leaving Citations 2, 3, and 4 at issue.

Employer timely appealed.

Thereafter administrative proceedings were held before an administrative law judge (ALJ) of the Board, including a duly-noticed contested evidentiary hearing.

On July 28, 2015 the ALJ issued a Decision (Decision) which granted Employer's appeals of Citations 2 and 3, and sustained the alleged violation as to Citation 4.

Employer timely filed a petition for reconsideration of the Decision.

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<sup>1</sup> References are to California Code of Regulations, title 8 unless specified otherwise.

The Division filed an answer to the petition.

**ISSUE**

Did Employer commit a serious violation of section 3646, subdivision (e)?

**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's petition contends the Decision was issued in excess of the ALJ's authority, the evidence does not justify the findings of fact, and the findings of fact do not support the Decision.

The Board has fully reviewed the record in this case, including the arguments presented in the petition for reconsideration. We have taken no new evidence. Based on our independent review of the record, we find that the Decision was based on a preponderance of the evidence in the record as a whole and appropriate under the circumstances.

Employer was the general contractor and the controlling employer, at the project in question, a large construction site.<sup>2</sup> During an inspection of the site the Division's inspector observed and photographed two employees of a framing subcontractor standing on the midrail of an elevated work platform, a scissors lift, about 26 feet above grade.

As stated above, the Division issued four citations, later withdrawing one of them, and the Decision granted Employer's appeals of two others. One of the two for which the Decision granted Employer's appeal was Citation 3,

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<sup>2</sup> Labor Code section 6400, subdivision (b)(3) defines "controlling employer" as "The employer who was responsible, by contract or through actual practice, for safety and health conditions on the worksite, which is the employer who had the authority for ensuring that the hazardous condition is corrected (the controlling employer)." Employer does not dispute the ALJ's finding that it was the controlling employer on the project.

which alleged a violation of section 1712, subdivision (c)(2) [working above grade from a work surface without guardrails or fall protection above uncapped reinforcing steel]. The ALJ granted the appeal of this citation because the scissor lift providing the elevated work platform was equipped with a midrail and toprail, and the inspector testified that there would have been no violation if the subcontractor's employees had not been standing on the midrail. The ALJ reasoned that one of the elements of the alleged violation is to show the elevated work platform lacked guardrails, and that there was no dispute the lift had them. The Division thus failed to prove all elements of the violation alleged, and Employer's appeal was granted.

The ALJ upheld Citation 4, which alleged a serious violation of section 3646, subdivision (e) [employees stood on midrail of an elevated work platform]. Employer argues that ALJ's Decision granting its appeal of Citation 3 is wholly inconsistent with the Decision sustaining the violation alleged in Citation 4. For reasons stated next, we disagree.

Section 3646 sets forth "operating instructions" for elevating work platforms. Section 3646, subdivision (e) states: "Employees shall not sit, stand, or climb on the guardrails of an elevating work platform or use planks, ladders, or other devices to gain greater working height or reach." By its terms, section 3646, subdivision (e) prohibits employees from standing on the midrails, one of the guardrails, of the scissors lift;<sup>3</sup> it addresses employee behavior.

Section 1712, subdivision (a) states: "Scope. This section applies to all work sites and locations where employees work around or over exposed, projecting, reinforcing steel or similar projections. [¶s] (c) Protection from Reinforcing Steel and Other Similar Projections. [¶] (2) Employees working above grade or any surface and exposed to protruding reinforcing steel or other similar projections shall be protected against the hazard of impalement. Protection shall be provided by: (A) The use of guardrails[.]"

Thus, in contrast to section 3646, section 1712(c)(2), addresses the physical condition of an elevated work platform; it speaks to equipment requirements, not employee behavior. As facts here amply illustrate, an employer's equipment may be in compliance with safety orders pertaining to the characteristics of the equipment, and its employees may yet behave in ways which violate other safety orders. Therefore, we agree with the ALJ that the scissors lift can be in compliance with section 1712, subdivision (c)(2), and workers using it can nonetheless violate section 3646, subdivision (e), by standing on the midrails.

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<sup>3</sup> Section 3642, subdivision (a) states, in pertinent part: "The platform deck shall be equipped with: [¶] A guardrail or other structure around its upper periphery that shall be 42 inches high, plus or minus 3 inches, with a midrail."

Employer's petition also challenges the Decision's holding that it did not act with due diligence. Controlling employers may defend against and be relieved of responsibility for violations of other employers at a worksite if the controlling employer acted with due diligence with regard to discovering and/or taking steps to address the hazard at issue. (*Harris Construction Company, Inc.*, Cal/OSHA App. 03-3914, Decision After Reconsideration (Feb. 26, 2015), citing *United Association Local Union 246, AFL-CIO v. California Occupational Safety and Health Appeals Bd.* (2011) 199 Cal.App.4<sup>th</sup> 273 (*Harris*).)

Harris Construction was cited for a general violation after a plumbing subcontractor's employee was injured due to failure to depressurize a water line. The Board held that Harris had exercised due diligence in hiring the subcontractor and in supervising its work, in part because the work was specialized in nature and the hazard involved (a pressurized pipeline mistakenly believed to have been depressurized) was hidden, not readily apparent upon observation by Harris's personnel, and for that matter not known to the subcontractor's personnel.

The ALJ's Decision noted that, in contrast to *Harris*, Employer here offered no evidence of whether or how it had vetted the framing subcontractor before hiring it, or whether it had previous experience working with that subcontractor, and, if so, what that experience was. Also, we note that the framing work involved here was done in plain view, a fact distinguishing this situation from that in *Harris*. Indeed, the Division's inspector observed and photographed the subcontractor's employees standing on the scissor lift midrail; the hazard obvious, rather than hidden.

Employer contends, however, that it exercised due diligence given the facts. The location of the scissor lift was some 250 feet from its on-site office and hidden from view. Also, its superintendent had performed an inspection of that portion of the project area about 45 minutes before the inspector saw the violation.

The Decision and Employer's petition present two contrasting views on what constitutes due diligence on the part of a controlling employer. The Decision cites the factors we listed in *Harris* and goes on to hold that because Employer did not produce evidence of its before-the-fact consideration of the subcontractor's safety record, it had not shown due diligence. Employer argues, instead, that due diligence consists of its on-the-job inspection of the work, saying, in effect, it cannot be everywhere all the time to check the work it and/or its various subcontractors are doing.<sup>4</sup>

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<sup>4</sup> The ALJ relies on evidence that Employer had not inspected the framing work for about 45 minutes before the Division recorded the workers standing on the midrail in assessing whether the violation was serious or general. It is not clear whether, or to what extent, if any, that time interval influenced the ALJ's decision regarding due diligence. We do not here decide whether 45 minutes is so long of an interval as to compel a finding of no due diligence.

We hold that the steps a controlling employer takes in deciding which company or companies to retain as subcontractors is an element in determining whether the controlling employer acted with due diligence. (*Harris, supra.*) At the least, a subcontractor's safety record and experience may affect how much effort a controlling employer should devote to overseeing the subcontractor's work.<sup>5</sup> Also, the controlling employer must keep abreast of the work being done on the job; it would not be sufficient to hire an even excellent subcontractor only to then totally ignore its work on the project. There are myriad combinations of factors such as a subcontractor's safety record and experience, the type, complexity, and specialization of any specific work, and so on, which inform the calculus of whether a controlling employer has acted with due diligence. The instant matter and *Harris, supra*, show how two situations may differ. For present purposes while neither the preliminary vetting nor the in-progress inspection factor alone is dispositive, in combination we hold that Employer did not prove it acted with due diligence in fulfilling its responsibilities as controlling employer. There is nothing in the record which enables us to say with confidence that a 45 minute inspection interval was adequate. While facts not in evidence may have enabled the ALJ, or us on reconsideration, to reach such a conclusion had there been such evidence, we cannot go there on this record. (*Kenyon Plastering, Inc., Cal/OSHA App. 10-2710, Denial of Petition for Reconsideration (Aug. 13, 2012) [dispositive facts not in evidence not assumed].*)

### **DECISION**

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

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
FILED ON: OCT 19, 2015

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<sup>5</sup> For example, if the controlling employer is familiar with the subcontractor and knows it performs work safely, it may be appropriate to devote less time to oversight of that subcontractor than it would to a subcontractor with whom it has not worked before.