

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

In the Matter of the Appeal of:

**HATHAWAY DINWIDDIE CONSTRUCTION CO.
811 WILSHIRE BOULEVARD, SUITE 1500
LOS ANGELES, CA 90017**

Employer

Inspection No.
1410726

DECISION

Statement of the Case

Hathaway Dinwiddie Construction Co., (Employer), operates a construction business. Employer was constructing a three-story subterranean parking structure, retail shops, and above-grade office structures at the work location. Beginning March 19, 2019, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Christian Nguyen (Nguyen), conducted an inspection of the construction site (or the job site) located at 1357 Vine Street, Los Angeles, California, after an accident that took place at the job site, which was unrelated to the Employer.

On June 26, 2019, the Division cited Employer for an alleged failure to guard all exposed ends of protruding steel so as to protect employees and others from the hazard of impalement. Employer filed a timely appeal of the citation, contesting the existence of the violation. Employer also raised a series of affirmative defenses.¹

This matter was heard by Leslie E. Murad, II, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board. On February 23, 2021, and on May 13 and 14, 2021. ALJ Murad conducted the video hearing with all participants appearing remotely via the Zoom video platform. Attorney Manual M. Melgoza of Donnell, Melgoza & Scates, LLP, represented Employer. Victor Copelan, District Manager for the Los Angeles office, represented the Division. The matter was submitted on October 7, 2021.

Issues

1. Did the Division establish that Employer violated section 1712, subdivision (c) (1), by having exposed/uncapped rebar on the job site?

¹ Except where discussed in the Decision, Employer did not present evidence in support of its affirmative defenses, and said defenses are therefore deemed waived. (*RNR Construction, Inc.*, Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017).)

Findings of Fact

1. An accident occurred on the job site unrelated to any work being performed by Employer. As a result, the Division inspected Employer's job site.
2. While inspecting Employer's job site, Nguyen observed uncapped and exposed rebar.
3. Employer did not guard all exposed ends of rebar projections with protective covers.
4. Employees were exposed to an impalement hazard of the uncapped and exposed rebar.
5. The Division conducted a valid inspection of Employer's jobsite.

Analysis

1. Did the Division establish that Employer violated section 1712, subdivision (c) (1) by having exposed/uncapped rebar on the job site?

California Code of Regulations, title 8, section 1721, subdivision (c) (1)², provides:

(c) Protection from Reinforcing Steel and Other Similar Projections.

(1) Employees working at grade or at the same surface as exposed protruding reinforcing steel or other similar projections, shall be protected against the hazard of impalement by guarding all exposed ends that extend up to 6 feet above grade or other work surface, with protective covers, or troughs.

In Citation 1, Item 1, the Division alleges:

Prior to and during the course of the inspection, including but not limited to March 19, 2019, employees working at grade throughout the construction job site while being exposed to unprotected rebar, were not protected against the hazard of impalement as required.

² Unless otherwise specified, all references will be to sections of title 8 of the California Code of Regulation.

In order to demonstrate a violation of section 1712, subdivision (c)(1), the Division must demonstrate that Employer failed to protect employees from exposed protruding reinforced steel that extend up to six feet above grade or work surface with protective covers or troughs.

The Division has the burden of proving a violation by a preponderance of the evidence. (*Nolte Sheet Metal, Inc. v Occupational Safety and Health Appeals Board*, 44 Cal. App. 5th 437, 446; *ACCO Engineered Systems*, Cal/OSHA App. 1195414, Decision After Reconsideration (Oct 1, 2019).) "Preponderance of the evidence" is usually defined in terms of probability of truth, or of evidence that when weighted with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence. (*Timberworks Construction, Inc.*, Cal/OSHA App. 1097751, Decision After Reconsideration (Mar. 12, 2019).)

A. Violation of the Safety Order

The Division offered into evidence at hearing many photographs taken by Nguyen during his inspection on March 19, 2019. The photographs depict uncapped rebar on Employer's job site. Nguyen testified extensively about seeing uncapped rebar on the job site near employees or in an area that employees would travel and be exposed to uncovered rebar. Nguyen further testified that he observed multiple instances of exposed and unprotected rebar at Employer's job site. This same uncapped rebar was observed to be so close to employees it put these same employees in the zone of danger of an impalement hazard that Nguyen had to order employees away from the protruding rebar. Exhibits 14 and 15 that show a man in a trench with uncapped rebar near him. Exhibit 16 is a close-up of the uncapped rebar. The Employer contends that the trench is much deeper than shown in the photograph and the uncovered rebar was not a hazard. Nguyen testified that the exposed rebar was within two feet of the employee and at such a height that it was so close so as to impose a hazard of injury to the employee. Nguyen ordered the man out of the trench and to stop work, which the employee did. Caps were to be placed on the exposed rebar. The uncapped rebar hazard was shown.

Exhibit 36 shows a plywood bridge over an area with unprotected rebar next to the bridge. Employer told Nguyen that this pathway leads to other areas of the jobsite. Exhibit 37 shows a different view of the plywood bridge path and uncapped rebar. Exhibit 38 shows the same plywood bridge with the far end of the bridge also with unprotected rebar. Exhibit 39 shows the terminus of the plywood bridge leading to a set of stairs with unprotected rebar. Employer told Nguyen that this area depicted in these photographs was where employees transfer to other portions of the job site. This employee path is in the zone of danger for the uncapped rebar.

Nguyen further testified that he observed unprotected rebar as depicted in Exhibit 6-1. This Exhibit shows uncovered rebar near picnic tables which was shown to be a hazard. It was

disputed whether employees used the tables when on breaks, but clearly the unprotected rebar was a hazard to employees using the picnic tables. There are several other photographs showing exposed rebar. In addition to photographs already identified, other photographs with uncapped rebar include Exhibits, 12, 17, 20, 21, 31, 32, 40, 42, 43 and 47.

The evidence presented by the Division through Nguyen's testimony was overwhelming and supports the conclusion that the safety order was violated by the Employer. There was present during the Division's inspection exposed protruding reinforced steel that extend up to six feet above grade or work surface with un-protective covers or troughs. The Division therefore has met its burden of proof showing a violation of the safety order.

B. Employee Exposure

Employer argues that exposure to employees was not shown by the Division. The Appeals Board has articulated tests for determining employee exposure. In *RNR Construction, Inc.*, Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017), the Appeals Board states:

The zone of danger is that area surrounding the violative condition that presents the danger to employees that the standard is intended to prevent. (*Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (April 24, 2003).)

The Division may establish exposure in one of two ways. First, the Division may demonstrate employee exposure by showing that an employee was actually exposed to the zone of danger or hazard created by a violative condition. (*Benicia Foundry & Iron Works, Inc.*, *supra*, Cal/OSHA App. 00-2976.) Actual exposure is established when the evidence preponderates to a finding that employees actually have been or are in the zone of danger created by the violative condition. (*Dynamic Construction Services, Inc.*, Cal/OSHA App. 14-1471, Decision After Reconsideration (Dec. 1, 2016), citing *Gilles & Cotting, Inc.*, 3 O.S.H. Cas (BNA) 2002, 1975-76 O.S.H. Dec. (CCH) P 20448, 1976 OSAHRC LEXIS 705 (Feb.20, 1976) fn4.)

In addition to demonstrating actual employee exposure to the hazard, "the Division may establish the element of employee exposure to the violative condition without proof of actual exposure by showing employee access to the zone of danger based on evidence of reasonable predictability that employees while in the course of assigned work duties, pursuing personal activities during work, and normal means of ingress and egress would have access to the zone of danger." (*Dynamic Construction Services, Inc.*, *supra*, Cal/OSHA App. 14-1471, citing *Benicia*

Foundry & Iron Works, Inc., supra, Cal/OSHA App. 00-2976.) That is, the Division may establish employee exposure by showing the area of the hazard was "accessible" to employees such that it is reasonably predictable by operational necessity or otherwise, including inadvertence, that employees have been, are, or will be in the zone of danger. (Id. [citations omitted].)

Employee exposure to the unprotected rebar was shown many times. Nguyen testified that he observed unprotected rebar as depicted in Exhibit 6-1. This Exhibit shows uncovered rebar near picnic tables. Employer claims that these tables were not in use by way of the testimony of Nicholas Tracy (Tracy), Employer's on-site Senior Superintendent. Nguyen testified that Tracy told him the uncovered rebar had been near the picnic tables since January of 2019. Tracy denies saying this to Nguyen. Nguyen further testified that Tracy did not tell him the picnic tables were not being used. Tracy also denies this. Tracy testified he did tell Nguyen that the picnic tables were not currently being used. Nguyen's field documentation worksheet was admitted into evidence as Exhibit 63. Exhibit 63 was reviewed by Nguyen. The worksheet notes made by Nguyen supported Nguyen's testimony that Tracy told him the lunch and break picnic table area did not have rebar caps since January 15, 2019.

Nguyen testified that he took photographs as depicted in Exhibits 14 and 15 that show a man in a trench within two feet of uncapped rebar near him. Exhibit 16 is a close-up of the uncapped rebar. Nguyen ordered the man out of the trench and to stop work, which he did. This was explained in more detail above. The uncovered rebar hazard was shown.

Nguyen further testified that Exhibit 24 shows an employee walking with a bucket past covered and exposed rebar. This employee was asked by Tracy to help recap rebar that had no caps. Tracy testified that this employee was not exposed to an impalement hazard because he was too far away from the rebar. Based upon his observation of the uncapped rebar and the man walking near it and with the supporting photographs he took, Nguyen's testimony was that it was a hazard. Exhibits 25 and 26 show close-ups of the exposed rebar in Exhibit 24. Exhibit 28 shows capped and uncapped rebar. Again, Nguyen warned the worker with the bucket to stay away from the uncapped rebar. The uncapped rebar hazard was shown

As Nguyen and Tracy walked the job site, they also saw other areas that were common walking paths with unprotected rebar adjacent to the walking path. Exhibit 32 depicts unprotected rebar coming out of the slab near a set of stairs. Exhibit 36 shows a plywood bridge over an area with unprotected rebar next to the bridge. Tracy told Nguyen that this is pathway that goes to other areas of the jobsite. Exhibits 37, 38 and 39 shows the same plywood bridge that was discussed in more detail above. This path is in the zone of danger for uncapped rebar.

The evidence presented shows that Employer's employees were exposed to the violative condition and the danger of uncovered rebar.

C. Did the Employer prove the inspection was not valid?

Labor Code section 6307 provides: "The Division has the power, jurisdiction, and supervision over every employment and place of employment in this state . . ." Labor Code section 6309 provides the Division with the authority to investigate a place of employment upon receipt of a complaint, without having to give notice to the employer. Labor Code section 6314 establishes the right of the Division, acting by and through its inspectors, to have free access to any place of employment to conduct an investigation and inspection during normal working hours, upon presenting their credentials to the employer. Although section 6314 allows an employer or its authorized representative to accompany the inspector during the inspection, there is no requirement that the inspector be accompanied.

The official duty of the Division investigator is to identify himself as a Division employee, obtain consent to enter and inspect, and if consent is refused, the investigator may obtain a warrant. (Lab. Code, § 6314; C.C.P. § 1822.51 and *Beacom Construction Co.*, Cal/OSHA App. 80-842, Decision After Reconsideration (Dec. 10, 1981).) In the absence of any evidence to the contrary, it is presumed officers act legally. (*Victor Badillo v. Superior Court*, (1956) 46 Cal.2d 269.). (*Bimbo Bakeries USA*, Cal/OSHA App. 03-5215, Decision After Reconsideration (June 9, 2010).)

On March 19, 2019, Nguyen held an opening conference at the job site with the Employer, who was the general contractor, and a subcontractor, Sanmar Construction (Sanmar) who was involved with the accident. Nguyen testified that he obtained consent to conduct the inspection on the job site.

Nguyen testified that he went to Employer's office across the street from the jobsite and spoke to Tracy, Employer's on-site Senior Superintendent. Nguyen testified that he went to the Employer's trailer and received consent to go on the job site and conducted an opening conference with Tracy before the inspection.

Employer argues there was no opening conference, therefore the inspection is invalid. Tracy denies he had an opening conference with Nguyen. Tracy testified that he received a call from Employer's Site Safety Supervisor Elisha Tripp (Tripp), that OSHA was on the job site. The storefront office across the street was the official site for Employer. Tracy testified there was a sign on the construction site that told all visitors to go across the street to sign in at Employer's office before going on the job site. Tracy testified that Nguyen did not go to the Employer's office. Tracy came over to the jobsite and met Nguyen at the ground floor of the construction site. Tracy introduced himself and asked Nguyen if there was anything he could help him with. Nguyen told Tracy he was there to investigate an injury to a Sanmar employee and that he had observed uncapped rebar on the job site.

Nguyen testified that while inspecting the jobsite, Nguyen was accompanied by Employer's representative, Tracy. Tracy or another person from Employer was always with Nguyen as he walked around the jobsite for the inspection.

Tracy testified he met with Nguyen on March 19, 2019. Nguyen testified that he explained his purpose for being on the site and received consent to inspect. At no time did Tracy object to Nguyen's inspection. Nguyen testified credibly, as did Tracy that, there was no objection made by the Employer to the Division's inspection. At no time did Tracy tell Nguyen to not inspect the jobsite. After conducting the opening conference and explaining his reason for his inspection, and hearing no objection from Tracy, Nguyen commenced his inspection in accordance with the authority vested in him by the Labor Code. The burden of proof is upon the employer to show that this was an invalid inspection. The Employer has failed to do so.

Employer failed to prove that the inspection was invalid. Based upon a preponderance of the evidence, a proper and legal inspection of Employer's jobsite took place.

Conclusion

Employer did not appeal the General classification nor the proposed penalty.

The evidence supports a finding that Employer violated section 1721, subdivision (c) (1) and the citation is sustained.

Order

It is hereby ordered that Citation 1, Item 1, is sustained and the penalty is assessed as set forth in the attached Summary Table.

Dated: 11/05/2021



Leslie E. Murad, II
Administrative Law Judge

The attached decision was issued on the date indicated therein. If you are dissatisfied with the decision, you have thirty days from the date of service of the decision in which to petition for reconsideration. Your petition for reconsideration must fully comply with the requirements of Labor Code sections 6616, 6617, 6618 and 6619, and with California Code of Regulations, title 8, section 390.1. **For further information, call: (916) 274-5751.**