§ 3203(a)

ISSUE

Did the foreman's inability to produce a copy of Employer's IIPP at the site prove that Employer had not implemented or was not maintaining an effective written IIPP?

FINDINGS AND REASONS
FOR
DECISION AFTER RECONSIDERATION

The Foreman's Inability to Produce a Copy of Employer's IIPP at the Site Did Not Prove That Employer Had Not Implemented or Was Not Maintaining an Effective Written IIPP.

Section 3203(a) directs every employer to "establish, implement and maintain" an effective written IIPP, but it does not state that an employer must have a copy of its IIPP available at every job site. Hence, the fact that Employer's foreman was unable to produce an IIPP is not dispositive of the issue of whether Employer had an IIPP in place.

Moreover, in this case, compliance officer Hughes testified that a few days after the inspection another compliance officer told him that Employer had a written IIPP, and that he believed the other compliance officer. The other compliance officer's statement would be admissible against the Division in a civil proceeding, over a hearsay objection, because it appears from the evidence that the other compliance officer was authorized by the Division to make the statement. (See Evidence Code §1222.) It would also be admissible because the Division, through Hughes's testimony, manifested belief in the truth of the statement. (See Evidence Code §1221.)

At the hearing, Hughes stated that the Division did not dispute that Employer had a written IIPP in existence, and that the sole evidence the Division was relying on to establish the violation was Employer’s failure to produce the IIPP at the jobsite. The Division did not and could not claim to have been surprised by Employer’s production and introduction into evidence of the IIPP at the hearing, even though Employer’s president admitted that Employer failed to produce the IIPP at either of the two informal conferences with the Division.

For the above stated reasons, the Board concludes that the ALJ's finding of a violation of section 3203(a) is not supported by a preponderance of the evidence and shall reverse that ruling. The appeal from Citation No. 1, Item 2 is granted and the penalty set aside.

§ 1640(b)(5)(A)

ISSUE

Does the evidence support the ALJ's finding that employees were exposed to the hazard of working from inadequately planked, elevated scaffold platforms?

FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

The Evidence Supports the ALJ's Finding That Employees Were Exposed to the Hazard of Working from Inadequately Planked, Elevated Scaffold Platforms.

Section 1640(b)(5)(A) provides, in pertinent part, that the elevated platforms of light-trade wooden pole scaffolds, " . . . shall consist of 2-inch by 10-inch or larger planks laid closely together [and that] there shall be no other openings in the platform except those necessary for the passage of employees and material."

At the hearing, Employer stipulated to the accuracy of the compliance officer's testimony and photographs, demonstrating that, at the time of the inspection, several platforms consisted of one plank or two planks and, thus, did not meet the requirements of the cited safety order.

The compliance officer also testified that Employer's foreman stated that employees had worked from the deficient platforms on days before the inspection. Employer contested the Division's evidence on this point. In support of its defense, Employer offered the testimony of President Franklin Wang that the platforms had been fully planked while employees were working from them, that Employer had finished framing the building the day before the inspection, and that the missing planks had been removed by a crew of employees dismantling the scaffold. Vice President F.U. Wu corroborated Wang's testimony, except he testified that though the framing was nearly completed a few things remained to be done. Employer also relied on Compliance Officer Hughes's admission that he saw no employees on the platforms.

The ALJ determined that the Division had proven employee exposure to the hazard and affirmed the cited violation, reasoning as follows:

> Hughes' testimony that employees of Employer were performing work from the single-planked scaffolding shown in Division [photographic] Exhibit 4 was based on the unrefuted hearsay statement of Employer's Foreman Ernesto Valencia. Statements made outside of a hearing by representatives of an employer, such as management personnel, are

> imputed to an employer as an authorized admission. (See Evidence Code 1222; Macco Construction, 84-1106, Decision After Reconsideration (Aug. 20, 1986).) The record establishes that as the foreman and the individual designated to accompany the inspector during the inspection, Valencia was authorized to communicate information on Employer's behalf. While it may be true, as Franklin Wang testified, that there was dismantling being done, it is equally clear from the credited testimony of Employer's Vice President F. U. Wu that the framing had not been completed. And since Valencia had not been told that a second crew had begun dismantling some of the scaffolding [per Wu's testimony] . . . [Valencia's statement to Hughes] that employees under his supervision were working from the single planked scaffolding is all the more convincing. Therefore, a general violation of Section 1640(b)(5)(A) is found to exist. (ALJ Decision, pg. 6)

In its petition for reconsideration, Employer contends that Hughes's testimony that foreman Valencia told him employees had worked from the deficient scaffold platforms is not sufficient evidence to support the ALJ's finding that employees were exposed to the hazardous condition of the platforms. The Board disagrees.

As stated in the ALJ's decision, a hearsay statement excepted from the hearsay rule, as was the foremen's admission, can, by itself, support a finding of fact in a civil or Board proceeding. Moreover, Employer offered no evidence at the hearing to prove the foreman did not admit to Hughes that employees had worked from the deficient platforms. The assertion in Employer's petition that, "Our company investigation indicates that Mr. Earnesto Valencia has no knowledge of making any comment to OSHA inspector," is an offer of new evidence the Board cannot consider at this juncture because Employer has not shown that it could not have discovered this evidence and presented it at the hearing. (See Labor Code §6617(d) and §390.1(a)(4).)

The above quoted paragraph of the ALJ's decision indicates that determining the credibility of the hearing witnesses was essential to the finding that employees had recently worked from the deficient platforms.

Because an ALJ is present at a hearing and has the first-hand opportunity to watch and listen to witnesses as they testify, an ALJ's findings " . . . are entitled to great weight when the are supported by solid, credible evidence and should be rejected only on the basis of contrary evidence of considerable substantiality." (Lortz & Son Mfg. Co., OSHAB 80-618, Decision After Reconsideration (Aug. 28, 1981), page 4, citing Lamb v. Workmen's Compensation Appeals Bd. (1974) 11 Cal. 3d 274, 280-281.)

Applying that longstanding rule to this case, the Board concludes that the compliance officer's testimony as to the foreman's admission and Vice President F. U. Wu's testimony that some framing work still needed to be done, was "solid, credible evidence" of the fact that employees had worked from the deficient platforms in the days preceding the inspection.

The Board further finds that, to the extent the testimony of President Wang and Vice President Wu conflicted with the Division's evidence, their testimony was not shown to be of considerable substantiality. This is so because Employer did not prove that either of them was present when the compliance officer interviewed the foreman or at the site at all times during the previous days when the foreman said employees were working from the platforms. Without proof that the witnesses themselves had an opportunity to perceive the condition of the platforms and the extent of employee use, their testimony is of limited evidentiary value. Accordingly, the Board affirms the ALJ's finding of a general violation of section 1640(b)(5)(A).

§ 1670(a)

ISSUE

Did Employer establish the independent employee action defense?

FINDINGS AND REASONS
FOR
DECISION AFTER RECONSIDERATION

Employer Did Not Establish the Independent Employee Action Defense.

Section 1670(a) requires employees to use fall protection when working at heights in excess of 7 and 1/2 feet near the perimeter of a structure. It was undisputed that on December 15, 1993, the day before the inspection, Employer's foreman sent an employee onto the roof without fall protection to perform a work-related task. It was also undisputed that the employee fell approximately 33 feet from the edge of the roof and was seriously injured. In Employer's defense, President Wang and Vice President Wu testified that the foreman made a mistake when he sent the employee to the roof without fall protection. They also testified that, by so acting, the foreman violated one of Employer’s safety rules.

Employer did not specifically raise the independent employee action defense (the defense) in its appeal and it is not identified in the ALJ's decision as an issue, but in the "Findings and Reasons" for the decision regarding Citation No. 2, the ALJ lists the five elements of the defense set forth by the Board at page 3 of Mercury Service, Inc., OSHAB 77-1133, Decision After Reconsideration (Oct. 16, 1980):

1. The employee was experienced in the job being performed;

2. The employer has a well-devised safety program which includes training employees in matters of safety respective to their particular job assignments;

3. The employer effectively enforces the safety program;

4. The employer has a policy which it enforces of sanctions against employees who violate the safety program; and,

5. The employee caused a safety infraction which he or she knew was contra to the employer's safety requirements.

The ALJ then states that—

> Employer offered no evidence to establish any of these elements and, therefore, is not shielded from liability by this defense or by attempting to rely on the malfeasance of its on-site foreman and management representative—

and, ultimately, affirms the serious violation of section 1670(a) alleged in Citation No. 2.

In its Petition for Reconsideration, Employer admits that the foreman who directed the employee to go onto the roof without fall protection was an authorized representative of Employer who was responsible for enforcing Employer's safety program at the site. That notwithstanding, Employer contends that reversal of the IIPP violation alleged in Citation No. 1, Item 2 should be accepted as sufficient proof of the five elements of the independent employee action defense to warrant dismissal of this citation too. The Board disagrees.

The rationale for the defense is that if an employee who is acting independently, i.e., without the employer's direction and control, knowingly engages in conduct that is contrary to the "best safety efforts" of the employer, the employer should not be held responsible for the violation. (See Mercury Service, Inc., OSHAB 77-1133, supra, page 2)

In this case, the employee who fell from the roof was not acting on his own but under the direction of Employer, through its authorized representative, the foreman. In Davey Tree Surgery Co., OSHAB 81-1051, Decision After Reconsideration (July 29, 1982) (affirmed, Davey Tree Surgery Co. v. Occupational Safety and Health Appeals Board (1985) 167 Cal. App. 3d 1232), the Board refused to apply the defense to a violation committed by a foreman who did not tie-off while working from the basket of an aerial lift 28 feet above ground. Therein, at page 2, the Board explained that it, "does not apply the defense to foremen and supervisors because they are responsible for their workers' safety, and because they are their employers' representatives at the work site." (Citations omitted.)

In Ford Construction Co., Inc., OSHAB 86-459, Decision After Reconsideration (Sept. 23, 1987), the Board applied the Davey Tree doctrine and rejected the defense when a foreman, who remained above ground, ordered two employees to work without cave-in protection in an excavation that was 17 feet deep. The Board reasoned that, " . . . [the Davey Tree] rationale is all the more persuasive when, as here, the foreman remained unexposed himself while explicit[l]y ordering another employee to become exposed to

the unsafe condition." The Board added that, "Such evidence is highly indicative of Employer's failure to enforce its safety program and fatal to the affirmative defense." (Cf., S.J. Groves & Sons, Co., et al., OSHAB 82-1054, Decision After Reconsideration (March 7, 1985).)

This case is substantially similar to Groves. The foreman, from a safe position on the ground, ordered the employee to go up to the roof, without fall protection, where the employee was exposed to the hazard of falling from the edge of the roof. Therefore, the Board concludes that Employer failed to prove that its safety program was enforced effectively at the site. Such proof is required by the third element of the defense and, since Employer had to prove all five elements, the defense must be rejected for that reason alone.

The Board concurs in the ALJ's finding that Employer failed to produce appreciable evidence of the injured employee's experience in the job he was performing (first element); an enforced policy of sanctions against employees who violate the safety program (fourth element); or, that the employee, in following the foreman's order to go onto the roof without fall protection, knew he was acting "contra to the Employer's safety requirement" (fifth element).

Finally, the Board notes that mere reversal of the Citation No. 1, Item 2 IIPP violation and review of Employer's written IIPP does not prove that the program included all of the job assignment safety training required by the second element. With the exception of training related to hazardous substances the provisions of Employer's IIPP concerning safety training are general in nature. For example, Employer Exhibit A, "SAFETY TRAINING", page 8, states only that, "supervisors are responsible for providing safety training to their department employees utilizing the job instruction training (JIT) method . . . ." No "matters of safety respective to their particular job assignments," to which the training method is to be applied, are identified. And, no training records were offered to prove that training had been provided on such matters. Hence, while Employer may have included particular job assignment safety training in its program, it did not present sufficient evidence at the hearing to prove that fact.

For the above reasons, the Board concludes that the evidence supports the ALJ's findings of a serious violation of section 1670(a) and that Employer failed to prove it should be relieved of responsibility for the violation by the independent employee action defense.

DECISION AFTER RECONSIDERATION

The petition for reconsideration is granted to the extent of dismissing the general violation of section 3203(a) alleged in Citation No. 1, Item 2 and setting aside the related $300 penalty, and otherwise denied. The Board affirms the other violations found by the ALJ, and assesses civil penalties totaling $2,100.

JAMES P. GAZDECKI, Chairman
BILL DUPLISSEA, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
SIGNED AND DATED AT SACRAMENTO, CALIFORNIA – August 20, 1999