

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

In the Matter of the Appeal of:

**SSA TERMINALS (OAKLAND), LLC.
dba SSA MARINE TERMINAL
1717 MIDDLE HARBOR ROAD
OAKLAND, CA 94607**

Inspection No.
1303461

**DECISION AFTER
RECONSIDERATION**

Employer

The Occupational Safety and Health Appeals Board (Board) issues the following Decision After Reconsideration.

JURISDICTION

SSA Terminals (Oakland), LLC. (Employer) operates a marine terminal and longshoring facility in Oakland, California. Two of its employees were injured in separate falls from fixed ladders which were components of rubber-tired gantry cranes (RTG). After investigating the two accidents, neither involving a ladderway opening, the California Department of Industrial Relations, Division of Occupational Safety and Health (Division) issued two citations to Employer, alleging violations of California Code of Regulations, title 8.¹ Only Citation 2, alleging a Serious violation of section 3212, subdivision (a)(2)(A) [failure to adequately guard ladderway openings on Employer's RTGs] remains at issue.² There were four allegedly noncompliant ladderway openings on each of Employer's rubber-tired gantry cranes that were observed during the Division's investigations of the two accidents, prompting the Division to issue the two citations.

Employer timely appealed the citations, and administrative proceedings were held, including a contested evidentiary hearing before an administrative law judge (ALJ) of the Board. The Division withdrew Citation 1, leaving only Citation 2 in contention.

On July 13, 2020, the ALJ issued a decision (Decision) granting Employer's appeal. The Division timely filed a petition for reconsideration (Petition). The Petition asserts that the Decision was issued in excess of the ALJ's powers, the evidence does not justify the findings of fact, and

¹ References are to California Code of Regulations, title 8, unless otherwise indicated.

² These citations were issued under Inspection Number 1303461. The Division conducted separate investigations for both accidents (Inspection Nos. 1303461 and 1303471), and cited Employer for alleged violations related to each accident. While the matters were consolidated for hearing, the ALJ's Decision in Inspection Number 1303461 is the sole subject of this Decision After Reconsideration.

the findings of fact do not support the Decision. (Lab. Code, § 6617, subs. (a), (c) and (e), respectively.)

In making this Decision After Reconsideration the Board has reviewed the entire record. We have taken no new evidence.

FINDINGS OF FACT³

1. An RTG is a large, self-propelled type of crane that lifts and carries shipping containers in order to load them on trailer trucks for transport from the Port of Oakland to their intended destinations. Alternatively, an RTG can unload containers from trucks returning them to the terminal for return to marine transportation.
2. Employer had 13 RTGs at the time of the inspection, all identical for purposes relevant here.
3. Each RTG had four fixed ladders which did not have swinging gates⁴ at their upper ends, a condition the Division cited as being noncompliant with section 3212, subdivision (a)(2)(A).
4. The ladders in question are all fixed; that is, they are permanently attached to, and part of the RTGs' structure. At their upper ends, the horizontal platforms, which are also part of the RTGs' structure, serve as walking and working surfaces. Each platform referred to in Citation 2 serves as a walkway used by Employer's employees in the conduct of their work.
5. The four platforms at issue are the elevator platform, the electrical house platform, the mechanical maintenance platform, and the engine and generator room platform.
6. The passageway to the access of the ladderway opening at the elevator platform on the RTGs had an offset sufficient to prevent an employee from walking directly into the opening.
7. The passageway to the access of the ladderway opening at the electrical house platform on the RTGs had an offset sufficient to prevent an employee from walking directly into the opening.
8. The passageway to the access of the ladderway opening at the mechanical maintenance platform on the RTGs had an offset sufficient to prevent an employee from walking directly into the opening.
9. The passageway to the access of the ladderway opening at the engine and generator room platform on the RTGs had an offset sufficient to prevent an employee from walking directly into the opening.

³ See also the Findings of Fact in the Decision, which we incorporate here by reference.

⁴ A "swinging gate," as the term suggests, is a gate at the top of a ladder, which serves to protect persons approaching the opening from falling into it. It is hinged at one side so it may be swung aside in order to get on or off the ladder.

DISCUSSION

Citation 2 alleged a violation of section 3212, subdivision (a)(2)(A), which provides:

(a) Every ladderway floor opening or platform with access provided by ladderway . . . shall be protected by guardrails with toeboards meeting the requirements of General Industry Safety Orders, Section 3209, on all exposed sides except at entrance to the opening. The opening through the railing shall have either a swinging gate or equivalent protection, or the passageway to the opening shall be so offset that a person cannot walk directly into the opening.

Citation 2 alleged:

Prior to and during the course of the inspection including but not limited to on March 22, 2018, the employer failed to ensure that the opening through the railing at every platform on Rubber Tire Gantry Cranes (RTG) with access provided by ladderway had either a swinging gate or equivalent protection.

The Division has the burden of proving a violation by a preponderance of the evidence. (*Home Depot USA, Inc. dba Home Depot 6683*, Cal/OSHA App. 1014901, Decision After Reconsideration (Aug 15, 2017).)

Section 3212, subdivision (a)(2)(A), provides three options to comply with its requirement (a swinging gate, **or** protection equivalent to a swinging gate, **or** a passageway so offset that a person cannot walk directly into the opening). Because the safety order is written in the disjunctive, an employer may satisfy the safety order if it complies with any one of the alternatives. (*Marine Terminals Corp., dba Evergreen Terminals*, Cal/OSHA App. 08-1920, Decision After Reconsideration (Mar. 5, 2013) [citations omitted].)

We agree with the ALJ that section 3212, subdivision (a)(2)(A), applies to the ladderway openings in question. (Decision, pp. 6-7.) Further, it is undisputed that the ladderway openings at issue did not have a “swinging gate or equivalent protection.” (Section 3212, subd. (a)(2)(A).) Employer argued, and the ALJ found, that each “passageway to the opening [was] so offset that a person cannot walk directly into the opening.” (*Id.*)

We address each of the four openings individually.

The elevator platform.

An employee who leaves the operating cab intending to return to ground level, who first descends in the elevator to the elevator platform, and who then steps straight out of the elevator, would be facing a guard rail, as shown in Exhibit 2, pages 4 and 5, and Exhibit 7, page 7. To move toward the ladder, that employee would then turn right, at a 90 degree angle, and walk two or three steps to the ladderway access. That employee is not able to walk directly from

the elevator on to the ladder; the enforced right turn provides an offset sufficient to avoid the possible hazard.

(Decision, p. 11.)

The three exhibits referenced above are photographs depicting the elevator door, the platform in front of it, and the railing at the edge of the platform parallel to the elevator door. All three photographs show that when exiting the elevator an employee would step forward toward the yellow railing, then turn right and move approximately three feet to access the ladder. These photos were the basis for the ALJ's ruling on this ladderway. We agree, and find that the ladderway opening was offset so that a person could not walk directly into it.

The E house or electrical room platform.

An employee leaving the "E house" after making adjustments or repairs, moving toward the ladder to descend, would be facing the structure of the RTG as he walks straight out of the electrical room. He would then have to turn right and walk one or two steps to the ladderway access, and then turn to his left to get on to the ladder. One view of this area is seen in Exhibit 7, page 10. A door handle on the entrance to the "E house" is seen in this photo. Portions of the platform are seen from below in Exhibit 7, pages 4, 5, and 6. Thus, access to the ladderway from this platform also includes an offset – two turns - sufficient to avoid the possible hazard.

(Decision, p. 11.)

Again, the Board agrees with the ALJ's assessment of this evidence. The four photos referenced by the ALJ show the platform by the electrical room from slightly above (Exhibit 7, page 10), and from below. (*Id.*, pp. 4, 5, and 6.) Again, as the ALJ found, there is sufficient offset to prevent a person from walking directly into the ladderway opening.

The mechanics' platform.

Access from the ground to this platform is via two ladders in succession, as seen in Exhibit 7, pages 5 and 19. From ground level, an employee would ascend the ladder with black rungs that leads to the two other platforms previously described. At the "E room" platform, another ladder, with yellow rungs, leads upward. An employee would ascend this ladder to gain access to the third platform. After working on the brake resistors or air-conditioning units, to return to ground level, the employee would descend this yellow-rung ladder to the E-house level, to then transfer to the black-rung ladder and descend on this to ground level.

"There is no photograph in evidence that provides a close-up, detailed view of this platform and its ladder access. [. . .]

“Employer’s crane manager Ken Larson testified about this platform, the equipment that stood on the platform, the work done by employees on the platform, and the route between the nearest ladder and the equipment that mechanics would work on. In his testimony he referred to Exhibit 7, page 5, and marked various features of the platform. Larson testified that after ascending to the platform on the yellow-rung ladder, and stepping off the ladder, the employee would be facing the RTG structure. Then, to reach the point at which he could make repairs or maintenance work on the mechanical equipment, the worker would have to make a series of left and right turns on the platform. Then, with the work done, to return to the ladder and to return to ground level, the worker have [sic] to make the same sequence of turns, in reverse.

(Decision, pp. 11-12.)

The referenced photograph (i.e., Exhibit 7, p. 5) shows the mechanics platform in the upper left corner of the photo, and we note it is above the electrical room discussed immediately prior. It is the uppermost platform, to the left of a yellow ladder with a semicircular cage. The Decision specifically notes that other photographs admitted into evidence do not show the path an employee would use to access the ladder, provide a “very limited view of the route a worker would take,” and that no photograph “depicts access to the ladder from the platform.” (Decision, p. 12.) The Decision thus credited Employer’s testimony, summarized in the quoted section above. (*Id.*) We agree with the ALJ that the Division did not meet its burden of proof regarding this ladderway opening. Moreover, Employer introduced sufficient evidence to show that access to the ladder was offset enough to be protective.

The engine room platform.

This platform, and the engine and generator room that stands on it, are seen in Exhibit 7, pages 22 and 23. A ladder ascends from ground level to the platform. A fence-like barrier with two parallel rails, one of which appears to be approximately waist-high, runs the length of the platform, adjacent to the engine-generator room. This barrier extends beyond the left end of the engine room, continues to the corner at the end of the platform that is nearest the ladder access point, and then extends a short distance along the short dimension of the platform, as seen on page 23. The barrier appears to end at the point where a worker may gain access to the ladder leading to the ground (or to a different ladder that extends upward).

The Division presented no evidence concerning access to the ladder from this platform, other than [the Division’s inspector’s] brief general answer cited above [omitted here], which is too weak in itself to support a finding. It appears that in order for a worker who worked at the engine room to gain access to the ladder leading to ground level, the worker would walk to the “left” end of the

platform, and then take a right turn for one or two steps, and then turn to his left, to gain access to the ladder. There is no photograph in evidence that provides a clear view of the access point. In the absence of a useful photograph of the key area, and in the absence of specific testimony about a worker's means of access to the ladder, there is insufficient evidence to support the Citation 2 contention with respect to the engine room platform.

(Decision, pp. 13-14.)

The two photos referenced by the ALJ show the engine room and the platform surrounding it. From these, it is apparent that the ladder to the left of the engine room is several feet from the nearest corner of the engine room, which is to the left from the photographer's perspective.

In short, the photos in evidence show that the ladders in question provided offsets so "a person cannot walk directly into the opening." (§ 3212, subd. (a)(2)(A).)

The Division's Petition acknowledges the parties' different interpretations of the safety order, and among other things contends there must be both a barrier or railing protecting the ladderway opening *and* a layout that requires a person to change directions to satisfy section 3212, subdivision (a)(2)(A)'s offset alternative. (Petition, pp. 7, 8.)

The Division's interpretation reads requirements into the safety order. The plain language of section 3212, subdivision (a)(2)(A), does not require *both* a barrier *and* a change of direction to be in compliance with the offset alternative. It is well established that the Board will not read terms into or out of a safety order. (*United Parcel Service*, Cal/OSHA App. 315347864, Decision After Reconsideration (Sep. 6, 2017) [writ denied].) Further, the Division cannot satisfy its burden of proof if doing so would require reading terms into the cited safety order. (*ACCO Engineered Systems*, Cal/OSHA App. 1195414, Decision After Reconsideration (Oct. 11, 2019).)

The Division raises several arguments in its Petition, addressed in order below.

1. First, the Division argues that because an employee could walk in a straight line from a position on the work surface to the ladderway opening, the opening is not protected as required. This argument tacitly reads a requirement into the safety order, which, as we noted, is not permissible. And, the photographs in evidence show that the openings do require a change in direction when leaving or approaching the ladderway openings.

The Division further suggests that "offset" should be read to mean "guarded," "requires deliberate action to move past," or "with barrier walls or a maze to be navigated." Those suggested meanings read terms into the safety order. As already noted, the Board may not read language into a safety order.

Instead, the Decision correctly applied the definition of *offset* to the facts. "Offset" is not a defined term in the safety order, and so we apply the word's ordinary meaning, determined by referring to the dictionary. (*Guy F. Atkinson Construction, LLC*, Cal/OSHA App. 1332867, Decision After Reconsideration (July 1, 2022), citing *Heritage Residential Care, Inc. v. Division of Labor Standards Enforcement* (2011) 192 Cal. App. 4th 75, 82-83 (other citations omitted).)

The ALJ cited a definition that, although not directly applicable, was “useful by analogy”: “A sharp bend (as in a pipe) in which one part is turned aside out of line.” (Decision, p. 10.) That definition is consistent with the Oxford Languages online dictionary definition of *offset* as, “The amount or distance by which something is out of line.” (Oxford Languages dictionary, www.google.com.) The ALJ used the foregoing to interpret *offset* in this context as meaning, “an arrangement that requires an employee to change direction in his movement, while walking toward the ladderway, in order to gain access to the ladder for his descent.” (*Id.*)

2. The Division’s second argument is a variation on its first, seeking to insert the requirement for a physical barrier into section 3212, subdivision (a)(2)(A). Here the Division relies on section 3277 to interpret section 3212 as requiring an indirect path to the ladderway. But, the Decision rejected Employer’s claim that section 3277 was more applicable, and here the Division again, though more subtly, seeks to insert language into section 3212, subdivision (a)(2)(A). This argument is rejected as well. (See *United Parcel Service, supra*, Cal/OSHA App. 315347864.)

3. Next, the Division argues that the ALJ added to its burden of proof by requiring it to “demonstrate exactly where” employees usually stand, and the direction they travel to prove a violation of section 3212, subdivision (a)(2)(A). The Division misreads the Decision in so arguing. The Decision found, instead, that the evidence established that each of the ladderway openings at issue was sufficiently offset to be in compliance. Thus, it was the actual layout of the platforms that mattered, and in view of that physical reality, they were found to be in compliance. The Division was not required to prove anything more, and could not have in this case, because the platforms were configured as they were.

4. The Division also argues that one of the employees who fell testified that he operated a switch close to a ladderway, and thus was exposed to the hazard of the ladderway opening. (Petition, pp. 19-20.) The Petition does not specify which ladderway was the subject of this testimony, or cite to the portion of the record where the testimony is to be found. Employer counters by saying that “[p]ushing a button on the way to the ladder” would not distract an employee both because it is a trivial activity and, since performed on the way to the ladder, unlikely to cause the employee to forget about the ladderway opening. (Employer’s Answer to Petition, p. 8.)

The Division appears to be referring to testimony by witness Mr. Berry, an RTG operator and one of the employees who fell, about pressing a button near one of the ladders at issue. (Hearing Transcript, Day 1 transcript, pp. 107-108.) A photograph in the record shows the button near the door to the elevator, at the “elevator platform” discussed earlier. Berry testified that he would press the button on his way up the ladder, or before descending it. Based on that testimony, Employer’s argument is the better view. Further, pressing the button while ascending the ladder is physically unlikely given the button’s distance from the ladder and height above the platform.

5. The Division next argued that the ALJ effectively required that the inspector had to climb onto the RTG in order to provide admissible testimony. To the contrary, the ALJ did not so hold. Rather, the ALJ held that the evidence the inspector provided in his testimony and exhibit, when weighed against Employer’s evidence, did not prove the violations alleged. The ALJ merely considered the relative persuasiveness of the competing evidence. We agree with that assessment of the facts.

6. The Division further argues that the ALJ's refusal to accept into evidence drawings of openings the inspector believed would be sufficiently protective may have led to errors in the Decision. (Petition, p. 21.) The ALJ was correct in declining the proffered evidence, since the inspector would have been giving his opinion on a question of law. The Board is not bound by the Division's legal interpretations, which raise questions of law. (*The Home Depot USA, Inc.*, Cal/OSHA App. 99-690, Decision After Reconsideration (Mar. 21, 2002); *Teichert Construction*, Cal/OSHA App 98-2512. Decision After Reconsideration (Mar. 12, 2002).) And, since the Division's Petition includes those proposed drawings, or their equivalent, and we have considered them, the error, if any, has been cured. We note that each of those drawings shows that there would have to be a physical barrier blocking the ladderway opening, contrary to the text of the safety order, as discussed above.

7. Lastly, the Division argues that the Serious classification and associated penalty should have been sustained. But, since the evidence showed there was no violation of section 3212, subdivision (a)(2)(A), the ALJ correctly did not reach the issue of how the alleged violation should have been classified.

DECISION

For the reasons stated above we affirm the ALJ's Decision.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

Ed Lowry, Chair
Judith S. Freyman, Board Member
Marvin P. Kropke, Board Member

FILED ON: 09/14/2023

