

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

ILH CONSTRUCTION COMPANY
3145 Geary Boulevard, Suite 479
San Francisco, CA 94118

Employer

Docket No. 02-R1D1-4172

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken the petition for reconsideration filed by Ivar Hoftvedt/ILH Construction Company (Employer) in the above-entitled matter under submission, makes the following decision after reconsideration.

JURISDICTION

On August 20, 2002, the Division of Occupational Safety and Health (the Division) conducted an accident inspection of a place of employment, a construction site, operated by Employer in San Francisco, California. Following the inspection, the Division issued two citations to Employer on September 10, 2002, alleging violations of the occupational safety and health standards and orders found in Title 8, California Code of Regulations.¹ Employer appealed the two citations. After a hearing, an Administrative Law Judge of the Board issued a Decision on May 27, 2005, which upheld most violations alleged in Citation 1, and the single serious violation alleged in Citation 2. Employer timely petitioned for reconsideration of the Decision as to Citation 2. The Division filed an answer to Employer's petition.

FACTUAL BACKGROUND

Citation 2 alleged a violation of section 1632(j)(1), which provides:

¹ Unless otherwise indicated, references are to Title 8 California Code of Regulations.

(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 did not dispute that the wall openings in question were less than 3 feet above the working surface, that the drop outside them was about 16 feet (i.e. more than 4 feet), or that the openings were not furnished with either a standard or intermediate rail. Employer argues that (1) a forklift had been used to block the openings prior to the inspection, and (2) the opening was “in use” at the time of the inspection – that is, was being used to bring materials into the building under construction.

The evidence at hearing established that the forklift would have blocked only one of the two wall openings involved, even if it had been in place at the time of the inspection. Employer contended he had moved the forklift from the wall opening to facilitate the Division’s inspection, as he understood the forklift itself was of interest to the Division.

There was no evidence that any material was being moved either in or out of the structure through the wall openings during the inspection. One of Employer’s employees, however, was observed to lean through one opening to request additional materials be brought up to that floor.

ISSUE

Whether an exception to the rail requirement exists, and, if so, whether Employer proved the exception applies to this situation.

DISCUSSION

The record establishes, and Employer did not dispute, that the wall openings did not have a rail. The evidence further proves that even if the forklift would have qualified as an acceptable substitute for a rail, it would have brought only one of the two wall openings into compliance; the other remained unprotected. While we do not agree that the forklift was acceptable, (see *Procon, Inc.*, Cal/OSHA App. 80-101, Decision After Reconsideration (Apr. 10, 1985)) neither do we need to decide that question, since Employer would still not have been in compliance with section 1632(j)(1). Therefore we address Employer’s argument that there is an “in use” exception to section 1632(j)(1).

Employer’s petition states: “Section 1632 (2) reads: ----- . [sic] The removable railings shall be kept in place when the opening is **not in use** and should preferably be hinged or otherwise mounted so as to be conveniently

replaceable.” (Emphasis in original) Employer claimed the opening was in use during the inspection and therefore a rail was not required.

We note that Employer’s citation to section “1632 (2)” is incomplete. A perusal of the safety order reveals, however, that the quoted language is found in section 1632(d)(2). Section 1632(d) pertains to “hatchways and chute floor openings,” not wall openings. Therefore, the exception does not apply to wall openings. Section 1632(j), the section at issue here, does not contain any such exception.

When construing or interpreting a safety order, we give its words their ordinary meaning when there is no ambiguity. *Spaich Brothers, Inc., dba California Prune Packing Co.*, Cal/OSHA App. 01-1630, Decision After Reconsideration (Feb 25, 2005). Section 1632(j) unambiguously does not contain an “in use” exception; and the “not in use” language in section 1632(d) is limited to that particular section. We find, therefore that there is no “in use” exception applicable here. We find, therefore, that a violation of section 1632(j)(1) was established. Employer did not challenge the classification of the violation, and therefore the ALJ’s decision that the violation was serious remains unchanged.

DECISION AFTER RECONSIDERATION

The Decision of May 27, 2005 is affirmed and reinstated. The appeal from a serious violation of section 1632(j)(1) is denied and a civil penalty of \$900 is assessed.

CANDICE A TRAEGER, Chairwoman
ROBERT PACHECO, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: December 24, 2008