

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

In the Matter of the Appeal of:

WEST COAST COMMUNICATION
1921 West 11th Street
Upland, CA 91786

Employer

Docket Nos. 05-R2D3-2801 and 2802

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code issues the following Decision After Reconsideration in the above entitled matter.

JURISDICTION

On February 15, 2005, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment maintained by West Coast Communication (Employer) in Weaverville, California. On June 6, 2005, the Division issued two citations to Employer alleging violations of occupational safety and health standards codified in California Code of Regulations, Title 8.¹ Employer timely appealed, and alleged the affirmative defense of “independent employ action” (IEAD).

Administrative proceedings were subsequently held, including a duly-noticed evidentiary hearing before an Administrative Law Judge (ALJ) of the Board. On May 30, 2007 the ALJ issued her Decision which upheld the citations but reduced the classification of Citation 2 from “serious” to general, and further reduced the civil penalty for the violation accordingly.

Employer timely petitioned for reconsideration as provided for in Labor Code sections 6614 and following. The Division filed an answer to the petition.

The Board took Employer’s petition under submission by Order of August 17, 2007, and further stayed the Decision at that time.

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

EVIDENCE

Employer installs cables used to carry television signals. The two citations in question were issued when a Division inspector observed one of Employer's employees, a Mr. Fain (Fain), working on cables attached to a telephone pole along a narrow road. Fain was in the elevated work bucket or basket of an aerial device without wearing fall protection equipment and without having placed traffic cones out on the road to warn approaching motorists. The aerial device was mounted on the truck Fain used. The inspector contacted the employee, who stated that he had the required fall protection equipment and traffic cones in his truck. Fain had not donned the fall protection equipment or deployed the traffic cones because he was in a hurry. The inspector further testified that Fain stated he had been trained both to use the fall protection equipment and to place the traffic cones, knew he should have done so, and expected to be disciplined for not having done so.² The employee put on the equipment without difficulty after he talked to the inspector, who therefore concluded he was experienced in using it.

The inspector testified that because the road where the work was being done was narrow, an oncoming car could collide with the employee's truck and cause him to fall from the aerial lift's basket. Further, since Fain was working about 15 feet above ground without fall protection, a fall from the lift, whether induced by a collision with his truck or occurring for another reason, would more likely than not result in serious injury as defined in Labor Code section 6302(h).

As a result of his observations and conversation with Fain, the inspector issued Citation 1, alleging a general violation of section 1598(a) [failure to insure traffic controls in use while employee was working in elevated aerial device]; and Citation 2, alleging a serious violation of section 3648(o) [failure to insure employee tied off to basket of elevated aerial device].

The evidence further established that Fain was working alone, and that Employer had supervisory personnel in the area who would check on its employees at least once each day. The inspector also talked to one of Employer's supervisors, who confirmed the facts adduced by the inspector and stated he knew of the work Fain was assigned that day. The inspector also noted that other employees who were working at the location where he contacted the supervisor were properly tied off to aerial devices.

Based on the foregoing, the Decision held that Employer did not know and in the exercise of reasonable diligence could not have known that Fain was not complying with the safety orders in question. Based on the lack of Employer knowledge, the ALJ reclassified Citation 2 from serious to general

² The Decision notes that Fain was terminated by Employer for the safety violations involved here.

and reduced the civil penalty accordingly. The Decision sustained both Citations, as modified and denied Employer's appeal. The Decision specifically denied Employer's asserted IEAD, holding that Employer had not proved the first of its five elements. We will summarize the evidence further with regard to the IEAD in our discussion below.

Employer's petition for reconsideration contends it did satisfy the IEAD.

ISSUES

Whether Employer satisfied the independent employee action defense.

FINDINGS AND REASON FOR DECISION AFTER RECONSIDERATION

The Board has fully reviewed the record in this case, including the arguments presented for and against the petition for reconsideration. Based on our independent review of the record, we find that substantial evidence in the record shows that Employer satisfied all five elements of the IEAD. Accordingly, we reverse the Decision, grant Employer's appeals and impose no civil penalties.

The IEAD is an affirmative defense. To succeed, an employer must show that all five elements of the defense are satisfied by a preponderance of the evidence. (*Emerson Russell Maintenance Company*, Cal/OSHA App. 08-4166, Denial of Petition for Reconsideration (Sep. 23, 2010) citing *Mercury Service, Inc.*, Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980); see *Davey Tree Surgery Co. v. Occupational Safety & Health Appeals Bd.* (1985) 167 Cal.App.3d 1232.) The five elements are: (1) the employee was experienced in the job being performed; (2) the employer has a well-devised safety program that includes training employees on safety related to their particular job assignments; (3) the employer effectively enforces the safety program; (4) the employer has a policy of enforcing sanctions against employees who violate the safety program, and (5) the employee caused a safety violation which he knew was against his employer's safety requirements.

The Decision found that Employer had satisfied elements 2 through 5, but Employer had not proved the employee, Fain, was experienced in the job being performed. We will not revisit elements 2 through 5 because of the Decision and because those issues were not presented by the parties. (Labor Code section 6618 [issues not raised on reconsideration are waived].) We hold that the ALJ's Decision focused on the wrong aspect of the work involved in reaching the conclusion that element 1 of the IEAD was not shown.

As noted above, Employer was cited because Fain chose not to place the traffic cones he had with him in the truck and not to wear fall protection because he was in a hurry. The evidence also showed that he had been trained to place traffic cones and wear fall protection, had demonstrated proficiency in so doing, and had been observed to have done so by Employer's personnel during field "audits." Thus, the issue is whether Fain was experienced in the work being or which was to be performed, namely placing traffic cones and donning the fall protection equipment. The Decision's focus on the lack of proof that Fain had performed "the specific task [of a splicer technician] 'enough times in the past to become reasonably proficient' " was misplaced. (Decision, p. 8, quoting *Solar Turbines, Inc.*, Cal/OSHA App. 90-1367, Decision After Reconsideration (July 13, 1992) *et al.*)

The ALJ, and the Division's answer, considered whether Employer had produced sufficient evidence to show Fain was adequately experienced in the technical aspects of his job as a "cableman" (our term).³ But the aspect of the work that was pertinent to the violations was his experience in placing traffic cones and using fall protection equipment. We find the evidence more than adequate to prove that he had sufficient experience in both to meet the requirements of the IEAD's first element. He had been tested on his ability to use fall protection and place traffic controls less than a month before the inspection at issue, and had previously had his field work audited for compliance at least four times during the period from December 2003 through February 2005 and passed each time.⁴ Further, neither is a particularly complex process which requires extensive experience, particularly the placing of traffic cones.

Our holding here applies to both Citations, since the IEAD was pleaded and established as to both.

³ Moreover, we observe but do not decide that it appears from the evidence that Fain had adequate experience in the more technical aspects of his work to satisfy the first element, even if the focus were on his "cableman" duties rather than the more mundane tasks of placing traffic cones and tying on to the lift basket. For example, the evidence was that Fain had 16 years' experience in telecommunications work.

⁴ Employer hired Fain in December 2003. Fain left Employer's employ in August 2004, and was rehired in January 2005. After his rehire he received new employee training. It was not indicated when Employer audited Fain's field work, but we infer the audits occurred during his employment with Employer.

DECISION

For the reasons stated above, we reverse the ALJ's Decision, grant Employer's appeals, and vacate the civil penalties.

CANDICE A. TRAEGER, Chairwoman
ART R. CARTER, Member
VICKI MARTI, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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