

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

In the Matter of the Appeal of:

SOLARCITY CORPORATION
5402 Clearview Way
San Mateo, CA 94402

Employer

Docket. 14-R3D2-3707

**DENIAL OF PETITION
FOR RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code hereby denies the petition for reconsideration filed in the above entitled matter by Solarcity Corporation (Employer).

JURISDICTION

Commencing on May 22, 2014, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On October 30, 2014 the Division issued one citation to Employer alleging six violations of occupational safety and health standards codified in California Code of Regulations, title 8.¹ Five of the alleged violations were classified as “general,” the sixth as “regulatory.”²

Employer timely appealed.

Following Employer’s appeal administrative proceedings were held before an Administrative Law Judge (ALJ) of the Board, including a duly noticed contested evidentiary hearing.

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

² Section 334 states in pertinent part: “(a) Regulatory Violation -is a violation, other than one defined as Serious or General that pertains to permit, posting, recordkeeping, and reporting requirements as established by regulation or statute. For example, failure to obtain permit; failure to post citation, poster; failure to keep required records; failure to report industrial accidents, etc. [¶] (b) General Violation -is a violation which is specifically determined not to be of a serious nature, but has a relationship to occupational safety and health of employees.”

On January 20, 2016 the ALJ issued a Decision (Decision) which sustained five of the alleged violations and granted Employer's appeal as to one, Item 3.

Employer timely filed a petition for reconsideration seeking review of the Decision regarding Items 1, 2, 4, and 5 in the citation. Employer did not challenge the Decision's holding that it had violated Item 6.

The Division filed an answer to the petition.

ISSUES

Were Employer's provisions for obtaining emergency medical assistance in compliance with the requirements of section 1512, subdivision (i)?

Were the remote hand washing stations allegedly available adequate to comply with section 1527, subdivision (a)(1)?

Did Employer train its employees regarding heat illness as set forth in section 3395, subdivision (f)(1)?

Did Employer's heat illness prevention plan contain all the necessary elements called for in section 3395, subdivision (f)(3)?

REASON FOR DENIAL OF PETITION FOR RECONSIDERATION

Labor Code section 6617 sets forth five grounds upon which a petition for reconsideration may be based:

- (a) That by such order or decision made and filed by the appeals board or hearing officer, the appeals board acted without or in excess of its powers.
- (b) That the order or decision was procured by fraud.
- (c) That the evidence does not justify the findings of fact.
- (d) That the petitioner has discovered new evidence material to him, which he could not, with reasonable diligence, have discovered and produced at the hearing.
- (e) That the findings of fact do not support the order or decision.

Employer's petition asserts that the Decision was issued in excess of the ALJ's powers, the evidence does not justify the findings of fact, and the findings of fact do not support the Decision.

The Board has fully reviewed the record in this case, including the arguments presented in the petition for reconsideration. Based on our independent review of the record, we find that the Decision was based on a preponderance of the evidence in the record as a whole and appropriate under the circumstances.

Employer sells and installs photovoltaic or solar panels, which use sunlight to produce electricity, to commercial and residential customers. Employer's crews install the panels at its various customers' locations, and so are mobile crews. Crews may be assigned to perform work on up to four different locations in a workday.

One of Employer's crews was assigned to perform work at a residential development in Ramona, California in order to prepare a house under construction there for later solar panel installation. During that work a crew member fell from an attic space and was seriously injured. The Division's investigation of that accident revealed several alleged violations, four which are the subject of this decision.

Item 1. Item 1 alleged a violation of section 1512, subdivision (a), which provides:

“(a) Provision of Services. Where more than one employer is involved in a single construction project on a given construction site, each employer is responsible to ensure the availability of emergency medical services for its employees. The employers on the project may agree to ensure employee access to emergency medical services for the combined work force present at the job site. Such an emergency medical service program shall be adequate to service the combined work force present, but only one emergency medical program need be established at such site.”

It was not disputed that there was more than one employer at the worksite, and that the general contractor had not posted the information required to contact emergency medical service providers.

Employer defended on the basis that its own system for providing emergency medical services for its employees meets the requirements of section 1512, subdivision (a). Employer's system requires its mobile crews to call a central, internal number to contact an on-call “Incident Manager.” The Incident Manager takes the crew's report of the illness or injury and provides guidance and emergency medical services contact information as needed.

The core provision of section 1512, subdivision (a) is that, “[E]ach employer is responsible to ensure the availability of emergency medical services for its employees.” Subdivision (e) provides context and detail of what

employers must do to satisfy the mandate of subdivision (a). (*Devcon Construction Inc.*, Cal/OSHA App. 12-2062, Denial of Petition for Reconsideration (Mar. 13, 2014), citing *People ex rel. Younger v. Superior Court*, (1976) 16 Cal.3d 30, 41 [regulation considered in light of whole regulatory scheme].)

Subdivision (e) states:

(e) Provision for Obtaining Emergency Medical Services. Proper equipment for the prompt transportation of the injured or ill person to a physician or hospital where emergency care is provided, or an effective communication system for contacting hospitals or other emergency medical facilities, physicians, ambulance and fire services, shall be provided. The telephone numbers of the following emergency services in the area shall be posted near the job telephone, telephone switchboard, or otherwise made available to the employees where no job site telephone exists:

- (1) A physician and at least one alternate if available.
- (2) Hospitals.
- (3) Ambulance services.
- (4) Fire-protection services.

The Decision points out that, “Neither party produced evidence or argued at hearing that either there was 1) no job phone at the site; or 2) that Employer had proper equipment at the site for the prompt transportation of the injured or ill person to a physician or hospital [for treatment.]” (Decision, p. 6, fn. 6.) Employer’s Petition for Reconsideration (Petition) states that Employer’s witness testified that the crew had a truck for transportation, but does not contend it had elected to comply with section 1512 by providing transportation. (Petition, 5:10.) In this regard we note that there was no evidence that the crew’s truck was properly equipped to transport an injured or sick employee to obtain appropriate medical attention.

Employer argues that section 1512, subdivision (e) is written in the disjunctive and requires that there be a means of transportation, or “an effective communication system for contacting [medical services],” or the telephone numbers be posted at the worksite “or otherwise made available to employees[.]” (§ 1512, subd. (e); emphasis added.) Employer’s contention is that the required information is made available by their system.

The first sentence of subdivision (e) states that employers must have equipment for prompt transportation available, *or* an effective communication system for contacting emergency service providers. The second sentence then requires various phone numbers be posted at the site *or* otherwise made available to employees. The issue then is, since the numbers were not posted, does Employer's practice of having mobile crews call a company "incident manager" for assistance or additional information satisfy the safety order's requirements?

Employer raises an issue of regulatory interpretation, and the rules of statutory construction apply. In construing a statute or regulation, an interpretation that would render terms surplusage should be avoided, and every word should be given some significance, leaving no part useless or devoid of meaning. (*Orange County Scaffold, Inc.*, Cal/OSHA App 99-223, Decision After Reconsideration (Mar. 8, 2002), citing *City and County of San Francisco v. Farrell* (1982) 32 Cal.3d 47, 54.)

If, as here, an employer elects the option of establishing an effective communication system, it must do so by having the emergency contact information posted at the jobsite or making it otherwise available to employees. In this context, the safety order means available *at the job site*. If it is not "posted" there, it must "otherwise" be present there, such as on some document(s) or stored in a device, such as a cell phone or tablet computer, the crew carries with it. The alternative to posting contact information at the jobsite which subdivision (e) allows, we believe, is best understood to be some means other than "post[ing]" that places the information at the jobsite. This interpretation is also consistent with our interpretation of section 1512 in the context of other services which must be at the jobsite. (See *Triad Geotechnical Consultants, Inc.*, Cal/OSHA App. 95-2231, Decision After Reconsideration (Nov. 10, 1999) [§ 1512 requires person[s] qualified to render first aid be at worksite].)

We do not agree with Employer's contention that having a system which requires its mobile crews to call some established central in-house person to get guidance and information about what to do and who to call satisfies the safety order. The purpose of section 1512 is to have information about how to acquire emergency medical assistance for ill or injured employees readily available. Since the safety order deals with emergency situations, it is our view that time is of the essence in such circumstances.³ Employer's system of having the mobile crew contact an incident manager to explain the situation and have that manager assess it at a distance and then decide whether to provide emergency contact information, instead of calling for assistance immediately, interposes an extra layer of communication. Doing so adds to

³ "Emergency" is defined by Webster as "an unforeseen combination of circumstances or the resulting state that calls for immediate action ." (Webster's New Collegiate Dictionary, 1981, p. 368.)

both the time needed to contact a provider of emergency medical assistance and increases the possibility of error, misunderstanding, or miscommunication. That layer of delay and possibility of confusion in an emergency outweighs what we understand to be the advantage Employer implicitly argues is created by its system – providing crews with a familiar resource to call. On balance, it is safer and more effective to provide the mobile crew with the contact information so they have it if and when needed, rather than requiring them to call someone and explain why they need it before it is made available.

We believe that our interpretation harmonizes all the words of the safety order and give it a practical construction which addresses the purposes to be achieved, namely prompt and proper care of injured or ill employees. (See *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735; *Metropolitan Water District v. Adams* (1948) 32 Cal.2d 620, 630-31.)

Another line of our authority supports the same conclusion, that Employer’s system is not as “effective” as section 1512 requires. First, we have held that an employer may not substitute its own means of protection for the one called for in a safety order. (*West Valley Construction, Inc.*, Cal/OSHA App. 12-3526, Denial of Petition for Reconsideration (May 5, 2014); *Empire Pro-Tech Industries*, Cal/OSHA App. 07-2837, Denial of Petition for Reconsideration (Aug. 19, 2008); writ denied, San Diego superior court (2009).) Further, as we observed in *Empire Pro-Tech*, if an employer believes it has an alternative means of compliance which is at least as effective as the method prescribed in a safety order, it may apply to the California Occupational Safety and Health Standards Board for a variance. (*Id.*; Labor Code §§ 143, 143.1.)

It is also noted that this regulation dates back to 1973, which were pre-cellphone days. Given the technological advances in both communication and computer technology in the intervening 40-plus years, it may well be appropriate to apply to the Standards Board for a variance, and let that agency decide what means of (21st century) communications and information technology are equal in effectiveness to the level of protection it sought to establish in section 1512.

Item 2. This item involves the field sanitation requirement of section 1527 that portable toilets have adjacent hand washing facilities.

Section 1527, subdivision (a)(1) states, as relevant:

Washing facilities shall be provided as follows: A minimum of one washing station shall be provided for each twenty employees or fraction thereof [and] shall at all times . . . (F) When provided in association with a nonwater carriage toilet facility ... 2. Be located outside of the toilet facility and not attached to it. Exception to

subsection (a)(1): Mobile crews having readily available transportation to a nearby toilet and washing facility.”

It is not disputed that the employees in question constituted a mobile crew and had readily available transportation. Employer was cited because the toilets at the work location did not have the required washing facilities. One of Employer’s witnesses offered uncorroborated hearsay evidence that there were toilets and washing facilities about 600 yards away in model homes. (Decision, p. 8.) Employer’s petition also argues that any member(s) of the crew could have used their available transportation to drive that a toilet and wash facility was located approximately 3.9 miles from the worksite and estimated it would take 7 minutes to reach by vehicle. (Petition, 9:4-6.)

The Decision parses the violation to involve the presence of toilets without washing facilities at the worksite, which exposed the employees to the hazard sought to be prevented. Employer disputes that reading of the safety order, and argues a proper reading would yield the opposite result, i.e. the mobile crew exception.

Employer’s reading would have the Board accept that an employee would use the immediately available toilet and then walk or drive for several minutes to a separate location to wash, or entirely decline to use the closest toilet and travel the same several minutes to another location where full facilities were available. We assume for the sake of discussion such facilities were extensive and available.

The better reading of the safety order, which is consistent with the Decision’s, is that the toilets and washing station need to be in close proximity, a requirement not met in this instance. The situation here of toilets widely separated from washing facilities, is not non-compliance with the safety order. The safety order provides that the two types of facilities be near each other for very practical reasons founded, we believe, on human nature. It is unlikely that most individuals would relieve themselves and then travel about seven minutes to another location to wash; more likely they would not wash in such circumstances. Similarly, human nature makes it more likely than not that people, including Employer’s crew, would use the toilet available at the immediate site rather than traveling several minutes to another location where washing facilities and toilets were both available.

Employer also cites an interpretive letter issued by the federal Occupational Safety and Health Administration’s Director, Directorate of Construction in 2002, that toilet facilities are considered to be “nearby” if they are within 10 minutes travel time. (Petition, 8:18-25.) Federal decisions, let alone interpretive letters, are not binding on the Board. (*Frank M. Booth, Inc.*, Cal/OSHA App. 06-4703, Denial of Petition for Reconsideration (Jan.27, 2009), citing *Janco Corporation*, Cal/OSHA App. 99-565, Decision After

Reconsideration (Sep. 27, 2001), citing *United Air Lines, Inc. v. Occupational Safety and Health Appeals Board* (1982) 32 Cal.3d 762 and *Skyline Homes, Inc. v. Occupational Safety and Health Appeals Board* (1981) 120 Cal.App.3d 663.)

In this situation we need not look to a federal interpretative letter to gain an understanding of “nearby.” Section 3644, subdivision (b), a California standard on the subject of how close a toilet should be to a work location, provides that toilets be within 200 feet of the work location. (See also, *Guardsmark, LLC*, Cal/OSHA App. 12-0056, Denial of Petition for Reconsideration (Apr. 22, 2013); writ denied, Orange County superior court, 2014.)

Item 4. Here the Division alleged that Employer did not train its employees on heat illness as required.

Section 3395, subdivision (f)(3) requires an employer’s heat illness prevention plan (HIPP) to contain in writing the “procedures for complying with each requirement of . . . subsections (f)(1)[.]” (§ 3395, subd. (f)(3).) Subdivision (f)(1) requires employers train employees on several aspects of heat illness, including (among others) the employer’s procedures for complying with the heat illness standard. (*Id.*, subd. (B).) Item 4 alleged Employer’s heat illness plan did not include all the required elements. The Decision affirmed the citation. The facts support the ALJ’s Decision.

Employer’s plan did not explain how it would assure effective communication during high heat conditions. (§ 3395, subd. (e).) It’s plan, as shown in Exhibit 21, is essentially a paraphrase of the safety order instead of a set of specific procedures for achieving the requirements of the safety order.

Employer argues that its mobile teams consist of five persons who work in close proximity to each other, so that communication is by voice. Employer also contends that all employees requiring acclimatization are monitored during periods of high heat, not just new employees as required by the standard. Accepting for discussion those assertions as true, they still do not satisfy all of the high heat requirements, such as observing [all] employees for signs or symptoms of heat illness, making sure employees drink water frequently, and providing “close” observation of new employees for the first 14 days of work or providing guidance to supervisors and employees in the field about how to do accomplish those ends. (See § 3395, subd. (e) [high heat procedures].)

Item 5. This item alleges a failure to train employees on all elements of the heat illness plan as required by section 3395, subdivision (f)(1).

Employer’s plan did not contain all the required elements of a heat illness prevention plan. It makes sense to find, based on that fact alone, that Employer did not train its employees on all the required elements. The

Decision found, correctly, that Employer offered no evidence that it complied with the requirement to train its employees on procedures for contacting emergency medical services. Indeed, Employer's policy of having its field personnel contact in-house incident managers shows it had instituted its own substitute procedure rather than complying with the safety order. And, Employer's petition does not address the allegation directly, other than by contending its training was complete.

DECISION

For the reasons stated above, the petition for reconsideration is denied.

ART R. CARTER, Chairman
ED LOWRY, Member
JUDITH S. FREYMAN, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: APR 14, 2016