BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1304597**
MARTIN ROOFING COMPANY, INC. **6608 FEDERAL BOULEVARD** **LEMON GROVE, CA 91945** **Employer**	**DECISION**

Statement of the Case

Martin Roofing Company, Inc. (Employer), is a roofing contractor. On March 27, 2018, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Timothy Decker (Decker), commenced an accident investigation at 8501 Ildica Street in Lemon Grove, California (the worksite).

On July 17, 2018, the Division issued two citations to Employer, alleging three violations. Citation 1, Item 1, alleges a failure to establish, implement, and maintain an effective injury and illness prevention program. Citation 1, Item 2, alleges a failure to maintain an effective heat illness prevention plan. Citation 2, Item 1, alleges a failure to provide fall protection. Employer timely appealed the citations, contesting the existence of the violations, the classification of the violations, and the reasonableness of the proposed penalties. Additionally, Employer asserted a series of affirmative defenses.[1]

At the hearing, the parties presented stipulations regarding Citation 1, Item 1, and Citation 1, Item 2, wherein Employer withdrew its appeal of the citations and accepted a standard non-admissions clause. Therefore, the issues remaining on appeal relate only to Citation 2, Item 1. In particular, Employer alleges that a more specific safety order than the safety order cited in Citation 2, Item 1, applies to the facts of this case.

This matter was heard by Mario L. Grimm, Administrative Law Judge (ALJ) for the Occupational Safety and Health Appeals Board, in West Covina, California, on February 11, 2021, with the parties appearing remotely via the Zoom video platform. Kyle Kring and Kerri

[1] Except as otherwise noted, Employer did not present evidence in support of its affirmative defenses, and said defenses are therefore deemed waived. (*RNR Construction, Inc.*, Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017).)

Polizzi, Attorneys, of Kring & Chung, LLP, represented Employer. Kathryn Woods, Staff Counsel, represented the Division. The matter was submitted for decision on April 14, 2021.

Issues

1. Were Employer's operations at the worksite within the scope of section 1731?

2. Did Employer comply with the fall protection requirements of section 1731?

Findings of Fact

1. On March 15, 2018, Employer was installing a roof in connection with the construction of a new, production-type residence at the worksite.

2. The residence had a roof slope of 4:12.

3. The residence was not a custom-built home.

4. Employer was not engaged in a re-roofing operation at the worksite.

5. Employer was not engaged in a roofing replacement.

6. Employer was not working on an addition to existing residential dwelling units.

7. Ludin Castillo (Castillo) was installing edge metal on the first story roof of the residence. The first story roof had an eave height of 9 feet, 10 and 5/16th inches above the grade. Castillo was not wearing fall protection. He fell to the ground, and suffered a serious injury.

8. The edge metal being installed by Castillo was integral to the roofing system.

9. Employer's employees used personal fall protection when working on a roof with an eave height exceeding 15 feet above the grade.

Analysis

1. Were Employer's operations at the worksite within the scope of section 1731?

In Citation 2, Item 1, the Division cited Employer for a violation of California Code of Regulations, title 8, section 1670,[2] subdivision (a), which provides:

> Approved personal fall arrest, personal fall restraint or positioning systems shall be worn by those employees whose work exposes them to falling in excess of 7 1/2 feet from the perimeter of a structure, unprotected sides and edges, leading edges, through shaftways and openings, sloped roof surfaces steeper than 7:12, or other sloped surfaces steeper than 40 degrees not otherwise adequately protected under the provisions of these Orders. Note: . . . (3) Requirements relating to fall protection for employees working in roofing operations are provided in section 1730 of the Construction Safety Orders.

The citation alleges:

> Prior to and during the course of the investigation, employees were exposed to falls in excess of 7 1/2 feet above compacted soil while installing edge metal and were not wearing personal fall arrest, fall restraint or positioning systems. As a result, on or about March 15, 2018, an employee who was not protected from falling suffered a serious injury when he fell from the roof of the house on which he was installing edge metal.

Here, the residence in question had a roof that was one story high in some areas and two stories high in other areas. (Exhibit N.) Castillo fell from an area where the roof was one story high. The parties stipulated that Castillo fell from a height of 9 feet, 10 and 5/16th inches and that he was not wearing fall protection at the time of the fall. Because Castillo did not wear fall protection while exposed to falling in excess of 7 1/2 feet from the perimeter of a structure, the facts are within the scope of section 1670.

As an affirmative defense, the Appeals Board has recognized that an employer may show that a more specific safety order applies and that it complied with that safety order. (*Bellingham Marine Industries, Inc.*, Cal/OSHA App. 12-3144, Decision After Reconsideration (Oct. 16, 2014).)

Employer contends section 1731, a roofing safety order that sets a 15-foot threshold for the use of fall protection, is a more specific safety order and should be applied in this instance. The scope and application of section 1731 are provided in subdivision (a) as follows:

> (1) This section shall apply only to roofing work on new production-type residential construction with roof slopes 3:12 or greater.

[2] Unless otherwise specified, all references are to the California Code of Regulations, title 8.

(2) This section does not apply to custom-built homes, re-roofing operations, roofing replacements or additions on existing residential dwelling units.

Note: For other roofing operations and slopes less than 3:12, see Section 1730.

Employers bear the burden of proving their affirmative defenses. (*DISH Network California Service Corporation*, Cal/OSHA App. 12-0455, Decision After Reconsideration (Aug. 28, 2014).)

a. Is section 1731 a more specific safety order than section 1670?

Section 1670 provides for fall protection in construction generally. However, it specifies that fall protection for employees working in roofing operations is subject to a different safety order: "Note: . . . (3) Requirements relating to fall protection for employees working in roofing operations are provided in section 1730."

Section 1730 addresses roof hazards, including fall protection for employees working in roofing operations. It sets a 20-foot threshold for the use of fall protection in roofing operations. However, it identifies limited circumstances when section 1731 becomes the applicable safety order: "Exception to Section 1730: Section 1731 applies instead of Section 1730 for roofing work on new production-type residential construction with roof slopes 3:12 or greater."

Section 1731 applies to fall protection in roofing work on new production-type residential construction with roof slopes 3:12 or greater. It was created "to harmonize" the fall protection trigger height for roofing work on production-type residential roofing with the trigger height for residential-type framing activities, which is covered by section 1716.2. The purpose and necessity for section 1731 is "to provide a single uniform 15-foot trigger height for the majority of work performed during the early phases of production-type residential construction work; i.e., during framing and roofing operations, thereby simplifying and improving compliance." (Section 1731, Initial Statement of Reasons, p. 2, and section 1731, Final Statement of Reasons, p. 1.) This limitation is more specific than the scope of section 1670, which applies generally to fall protection during construction work. Therefore, section 1731 is a more specific safety order than section 1670.

b. The elements of section 1731

With respect to the scope and application of section 1731, the parties stipulated to all but one of the elements. The parties stipulated that the worksite was a residential property, a production-type home, and a new residential construction. They further stipulated that the roof slope was 4:12. The parties also stipulated that the worksite was not a custom-built home, not a re-roofing operation, not a roofing replacement, and not an addition on existing residential dwelling units. The remaining element is whether Castillo was performing "roof work" under the safety order.

c. Roof Work

Where the regulations define a term, the Appeals Board is obligated to apply that definition. (*California Highway Patrol*, Cal/OSHA App. 14-0120, Decision After Reconsideration (Aug. 16, 2012).) Where a statutory or regulatory term is not defined, "it can be assumed that the Legislature was referring to the conventional definition of that term." (*OC Communications, Inc.*, Cal/OSHA App. 14-0120, Decision After Reconsideration (Mar. 28, 2016).) To obtain the ordinary meaning of a word, the Appeals Board may refer to its dictionary definition. (*Fedex Freight, Inc.*, Cal/OSHA App. 317247211, Decision After Reconsideration (Dec. 14, 2016).)

"Roof work" is defined in Section 1731, subdivision (b), as follows: "The loading and installation of roofing materials, including related insulation, sheet metal that is integral to the roofing system, and vapor barrier work, but not including the construction of the roof deck." This definition must be applied because it is provided in the safety order.

The parties stipulated that Castillo was in the process of installing edge metal when he fell. Witnesses for both parties testified that edge metal is a type of sheet metal. Since the safety order defines "roof work" to include the installation of "sheet metal that is integral to the roofing system," the issue becomes whether the sheet metal installed by Castillo was "integral to the roofing system."

The safety order does not define the term "integral." The Merriam-Webster Dictionary defines the word "integral" as "essential to completeness" and "formed as a unit with another part."[3]

Employer is a roofing contractor. Fred Martin (Martin) has been Employer's President for 25 years. He holds a valid C-39 roofing contractor's license. Employer's scope of work included installation of concrete roofing tiles, felt underlayment, and "roof-related sheet metal." (Exhibit K.) Martin testified that edge metal is also known as edge flashing and drip flashing.

Martin testified that edge metal is a long strip of metal placed at the perimeter edge of the roof, where the roof tiles and underlayment end. Edge metal has a 90-degree bend that allows it to fit along the corner of the roof deck. Edge metal extends four inches up the roof deck and two inches down the face board. The parties stipulated that edge metal is installed before the felt underlayment, which is installed before the concrete roof tiles. Exhibit W illustrates the placement of edge metal (labeled as drip flashing).

[3] https://www.merriam-webster.com/dictionary/integral <accessed Apr. 13, 2021>

Martin further testified that edge metal prevents damage to the roof structure. Edge metal prevents water intrusion from two sources. For water coming off the roof, edge metal blocks the water from wicking back and under the roof tiles at the roof perimeter. Additionally, edge metal blocks wind from pushing rain under the roof tiles at the roof perimeter. Water that enters in either manner can damage the roof deck.

Here, the evidence indicates the edge metal is essential to the completeness of the roofing system and forms a unit with the roof tiles and felt underlayment. Employer was installing the edge metal during the early phases of production-type residential construction work; i.e., during framing and roofing operations. The edge metal protects the roof deck in a way that the roof tiles and underlayment do not. It does this by blocking water intrusion at the roof perimeter, which is left vulnerable by the roof tiles and underlayment. Without the edge metal, water can damage the roof in multiple ways despite the installation of the other components. The Division does not dispute the function or the role of the edge metal. None of the evidence indicates the roofing system would be complete without the edge metal or that it would be reasonable to install the underlayment and roof tiles without installing the edge metal.

Additionally, the evidence does not indicate a purpose for the edge metal other than protecting the roof deck. Although the edge metal bends down the face board by two inches, this enables the edge metal to fit along the edge of the roof deck and provide protection where the other components do not. The evidence does not indicate the edge metal's purpose is to protect the face board or the exterior walls of the house. Thus, Employer established the edge metal is integral to the roofing system.

In sum, Castillo was installing edge metal, which is a type of sheet metal. The edge metal was integral to the roofing system installed by Employer. Accordingly, Castillo was engaged in "roof work," and the present matter is within the scope of section 1731.

d. Does Appeals Board precedent require the application of section 1670?

The Division contends that section 1670 applies because *Beutler Heating & Air Conditioning* (*Beutler*)[4] held that edge metal is not a "roof covering" and because *Beutler* applied section 1670 to an Employer installing edge metal.

In *Beutler*, the issue was whether section 1670 or section 1730 provided the applicable fall protection requirements. The employer argued that section 1730 (a roofing safety order with a 20-foot height threshold) should apply because the employer was installing edge metal that would become part of the roof. However, the employer in *Beutler* was not a roofing contractor. It was a heating and air conditioning company. It was contracted to install air-conditioning units,

[4] Cal/OSHA App. 98-556 Decision After Reconsideration (Nov. 6, 2001).

heating units, gutters, and "a roof flashing system," which could include edge metal. The Appeals Board held that section 1730 applies to the installation of "roof coverings" and that the safety orders contain examples, but not a definition, of roof coverings. Because edge metal was not listed in the examples of roof coverings, the Appeals Board considered whether edge metal was an unlisted roof covering. It found edge metal to be ambiguous because edge metal has some characteristics of roof coverings but can have characteristics that are unlike roof coverings, such as protecting the exterior walls of a building. Because of the ambiguity in whether edge metal was a roof covering under section 1730, the Appeals Board applied the safety order that provided the most protection for employees, which was section 1670.

After *Beutler* and after the creation of section 1731, the Appeals Board decided *Caldwell-Roland Roofing, Inc.* (*Caldwell-Roland*).[5] The issue was whether section 1670 or section 1730 applied to the sweeping of debris on a roof that was built 10 years earlier. The Appeals Board applied section 1670 because the employer was not installing or removing a roof covering. However, the Appeals Board cautioned that activities which are "preparatory of and integrally related" to a regulated activity can be covered as part of the regulated activity under appropriate circumstances.

With regard to the present matter, section 1731 did not exist at the time that *Beutler* was decided. *Beutler* did not address section 1731, and did not analyze the terms "roof work" or "integral to the roofing system." The term analyzed in *Beutler*, "roof covering," does not appear in section 1731. Section 1731 and "roof work" involve different elements than section 1730 and "roof coverings." Because *Beutler* did not examine whether the installation of edge metal can be roof work under section 1731, it does not require the application of section 1670 in this case.

Additionally, the present matter does not involve the ambiguities present in *Beutler*. Section 1731 identifies sheet metal in the definition of "roof work," whereas sheet metal is not listed in the examples of "roof coverings" for purposes of section 1730. Moreover, the evidence here is not equivocal regarding the sheet metal—it indicates the sheet metal was integral to the roofing system.

Unlike the employers in *Beutler* and *Caldwell-Roland*, Employer was contracted to install roof tiles, which is a regulated activity under section 1731 (and also section 1730). The edge metal being installed was "preparatory of and integrally related" to the regulated activity because it was installed prior to and under the roof tiles in order to form a protective unit with the roof tiles. Therefore, *Caldwell-Roland* supports the application of section 1731 in this case.

[5] Cal/OSHA App. 03-2905 Decision After Reconsideration (Jun. 9, 2010).

In sum, *Beutler* is not directly on point. The present matter does not involve an ambiguity leading to the application of section 1670. The principles of *Beutler* and *Caldwell-Roland* support the application of section 1731 in this case.

2. Did Employer comply with the fall protection requirements of section 1731?

Section 1731, subdivision (c)(1), provides fall protection requirements for a roof with a slope of 4:12, as in the present case:

> Roof Slopes 3:12 through 7:12: Employees shall be protected from falling when on a roof surface where the eave height exceeds 15 feet above the grade or level below by use of one or any combination of the following methods:
>
> (A) Personal Fall Protection (Section 1670).
>
> (B) Catch Platforms [Section 1724(c)].
>
> (C) Scaffold Platforms [Section 1724(d)].
>
> (D) Eave Barriers [Section 1724(e)].
>
> (E) Standard Railings and Toeboards (Article 16).
>
> (F) Roof Jack Systems [Section 1724(a)].

Here, Decker testified that, during his investigation, employees indicated they used fall protection when working on the second story roof (where the eave height exceeded 15 feet). Additionally, Exhibit 16 is a "tool box" training document related to fall protection. It states employees must use fall protection at a height of 15 feet. Martin testified that employees use fall protection once the fall height reaches 15 feet. The Division does not contend that Employer failed to protect employees from falling when on a roof surface where the eave height exceeded 15 feet above the grade. Therefore, the preponderance of the evidence indicates Employer complied with section 1731.

In sum, Employer established that a more specific safety order applies and that it complied with the more specific safety order. Accordingly, Citation 2, Item 1, is vacated.

Conclusion

Employer established that section 1731 applied to the work performed by Castillo at the time he fell from the roof. Employer complied with section 1731. Citation 2, Item 1, is vacated.

Order

It is hereby ordered that Citation 2, Item 1, is vacated. Citation 1, Item 1, and Citation 1, Item 2, are affirmed pursuant to stipulated agreements of the parties, and as set forth in the attached Summary Table. Further, the settlement terms for Citation 1, Item 1, and Citation 1, Item 2, are not intended to be and shall not be construed by anyone or any proceeding as an admission of negligence, fault, or wrongdoing, whatsoever by employer. Neither employer's agreement to compromise Citation 1, Item 1, or Citation 1, Item 2, nor any statement contained in this agreement regarding Citation 1, Item 1, or Citation 1, Item 2, shall be admissible in any other proceeding, either legal, equitable, or administrative except for purposes of administration and enforcement of the California Occupational Safety and Health Act and in proceedings before the Appeals Board.

Dated**:** 05/10/2021

MARIO L. GRIMM
Administrative Law Judge

The attached decision was issued on the date indicated therein. If you are dissatisfied with the decision, you have thirty days from the date of service of the decision in which to petition for reconsideration. Your petition for reconsideration must fully comply with the requirements of Labor Code sections 6616, 6617, 6618 and 6619, and with California Code of Regulations, title 8, section 390.1. **For further information, call: (916) 274-5751.**