

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

In the Matter of the Appeal of:

**LOS ANGELES CITY FIRE DEPARTMENT
200 N. MAIN STREET, 18TH FLOOR-RISK
MNGMT.
LOS ANGELES, CA 90012**

Employer

Inspection No.

0000139

DECISION

Statement of the Case

The Los Angeles City Fire Department (Employer) provides fire, rescue, and other first responder services. Beginning June 3, 2017, the Division of Occupational Safety and Health (the Division), through District Manager Victor Copelan (Copelan), conducted a fatality inspection at 104 West 4th Street, in Los Angeles, California (the site).

As a result, on December 1, 2017, the Division issued Special Order Number 139 (the Special Order) regulating Employer's use of aerial ladders. Employer timely appealed the Special Order with several affirmative defenses including assertions that: implementation of the Special Order restricts Employer's ability to safely train for and respond to emergencies, and may create greater hazards for employees and the public.¹ This appeal was docketed as inspection number 0000139.

Additionally, on December 1, 2017, the Division issued three citations to Employer alleging violations of California Code of Regulations, title 8.² Employer filed timely appeals of the citations. This appeal was docketed as inspection number 1239535.

Inspection numbers 0000139 and 1239535 were consolidated. Inspection number 1239535 was deemed the lead case.

The two matters came regularly before Rheeah Yoo Avelar, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (Appeals Board) on

¹ Except where discussed in this Decision, 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).)

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

December 17, 2020, December 18, 2020, and February 18, 2021.³ ALJ Avelar conducted the hearing remotely via the Zoom video platform. Jorge Otano, Deputy City Attorney, and Erika Johnson-Brooks, Deputy City Attorney, from the Los Angeles City Attorney's Office, represented Employer. William Cregar, Staff Counsel, represented the Division. The matter was submitted on May 9, 2021.

Issue

1. Does the Special Order correct unsafe conditions that threaten employee safety?

Findings of Fact

1. Employer must conduct realistic training exercises to prepare employees to perform actual operations safely.
2. Employer responds to emergencies where aerial ladders may be needed to provide core services such as fire suppression and rescue.
3. Employees must carry tools and equipment, including other ladders, on an aerial ladder to provide first responder services.
4. Repositioning an aerial ladder takes time, which jeopardizes rescues, and may not be possible due to physical obstructions, necessitating overreaching from an aerial ladder.
5. Responding to an event may require employees to work on the top three rungs of an aerial ladder.
6. Anchoring to a fall protection system on an aerial ladder limits employees' ability to reach in a rescue or rapidly escape unexpected conditions.
7. Extendable side rails and rungs are part of an aerial ladder's truss system and serve as safe handholds.
8. Various environments may prevent safely positioning an aerial ladder 36 inches above a landing.

³ The official record of the proceedings of the first day of hearing is an audio recording. Court reporter's transcripts were deemed to be the official record of the proceedings for the remaining days of hearing.

Analysis

1. Does the Special Order correct unsafe conditions that threaten employee safety?

Pursuant to Labor Code section 6308, the Chief of the Division may issue a “special order,” as defined in Labor Code section 6305. The Division may issue special orders "to correct an unsafe condition, device, or place of employment which poses a threat to the health or safety of an employee and which cannot be made safe under existing standards or orders of the standards board." (*Robert D. Schultz and James A. Noll dba The Showboat Lounge*, Cal/OSHA App. 01-125, Decision After Reconsideration (May 29, 2003) citing, *Gray Line Tours* Cal/OSHA App. 74-598, Decision After Reconsideration (Sept. 16, 1975).)

Coplan testified that the Special Order was issued in response to a fatality that occurred during a training exercise in which an employee carrying equipment fell from an aerial ladder. He testified that the Division issued the Special Order regarding Employer’s use of aerial ladders because no safety standard applies to aerial ladders used as firefighting equipment. Section 3636, subdivision (b)(5), regulates “aerial devices” and exempts “firefighting equipment.”

Upon issuance of a special order, an employer has the right to file an appeal therefrom. (Lab. Code §§ 6308(c) and 6319(a)).

The Special Order at issue requires:

1. A safe procedure for the use of aerial ladders [...] shall include the following requirements:
 - A. Employees shall climb or work with the body near the middle of the step or rung and shall not overreach from this position. When necessary to avoid overreaching, the employee shall descend and the ladder shall be repositioned.
 - B. When it is not practical to work with the body near the middle of the step or rung, the employee shall be protected by a personal fall protection system in accordance Article 24 of the Construction Safety Orders. [*Sic*]
 - C. Employees shall be prohibited from carrying equipment or materials which prevent the safe use of ladders.
 - D. When ascending or descending a ladder, the user shall face the ladder and maintain contact with the ladder at three-points at all times. NOTE: Contact with the ladder at three points means two feet and one hand, or two hands and one foot which is safely supporting the user’s weight.

- E. An employee shall not be permitted to stand and work on top 3 rungs of an aerial ladder unless there are members of the structure that provide a firm handhold or the employee is protected by a personal fall protection system in accordance Article 24 of the Construction Safety Orders. [Sic]
- 2. Access to Landings. When aerial ladders are used for access to an upper landing surface, the side rails shall extend not less than 36 inches above the upper landing surface to which the ladder is used to gain access; or when such an extension is not possible, an equivalent method or means shall be provided to ensure employees safely mount and dismount the ladder.

Employer asserts that the Special Order does not correct unsafe conditions, is vague and ambiguous, and that compliance with the Special Order could cause greater hazards to employees and to public safety. Employer presented Assistant Chief Dean Zipperman (Zipperman) to testify that time is of the essence when escaping hazards or providing emergency life-saving services for the public. He testified that emergency situations may present suddenly lethal environments for which Employer must train its employees. He also testified that training in realistic scenarios produces the muscle memory that enables employees to act at a moment's notice.

Zipperman further testified that Employer has an internal aerial ladder policy which is both feasible and addresses the Division's safety concerns. It provides:

6/7-02.10 CLIMBING (UP OR DOWN)

Members shall use both hands at all times when climbing ladders. Tools or equipment shall not be configured, or carried aloft in a manner that would prevent the free use of both hands at all times when climbing (ascending or descending) a ladder.

Ascending, look toward the rungs just above the head. Descending, look toward the rungs just below the head. Climb with hands grasping the center of the rungs, body erect, shoulders at an arm's length from the ladder, knees in line with the body, balls of the feet on the rungs. The legs carry the weight and the arms maintain balance and stability. Do not reach up to pull with the arms. Ascend briskly, but smoothly, feet and hands working together, taking every rung with the feet and every other rung with the hands. When descending, grasp each rung with alternating hands. The feet and hands should contact appropriate rungs at the same time to develop a rhythm that is essential to smooth climbing.

NOTE. If carrying a heavy load, it may be necessary to take every rung with the hands.

Each of the requirements of the Special Order shall be reviewed in turn.

1.A. Employees shall climb or work with the body near the middle of the step or rung and shall not overreach. When necessary to avoid overreaching, the employee shall descend and the ladder shall be repositioned.

Zipperman testified that exigent hazards may develop during operations and make time of the essence. Employer offered video evidence of an actual rescue that required an employee to reach beyond the middle of the aerial ladder. The event occurred at a multistory building on Barrington Avenue. It showed an aerial ladder just short of reaching a person precariously clinging to a narrow window ledge. The employee reached out beyond the ladder to perform the rescue. There was objectively no time for any employees to descend, reposition the ladder or truck, and ascend.

Zipperman further testified that apparatus operators, who drive aerial ladder trucks, position their vehicles in the most optimal location. He testified that often it is not possible to maneuver the truck or ladder further due to obstructions either on the street or above.

1.B. When it is not practical to work with the body near the middle of the step or rung, the employee shall be protected by a personal fall protection system.

Zipperman testified employees use fall protection when performing static tasks such a heavy stream operation in which water flows from the top of the aerial ladder. In such an operation, an employee latches a hip belt hook to an anchor on the aerial ladder. Zipperman testified that rescue and fire suppression operations are dynamic and the use of personal fall protection limits employees' ability to respond quickly, jeopardizing both the public and the employee. Employer offered evidence of actual operations in which anchored employees would not have been able to maneuver to rescue someone falling in a roof collapse in a restaurant fire, or to save themselves from an explosion in the wholesale district because detaching from the anchor would have required additional time.

1.C. Employees shall be prohibited from carrying equipment or materials which prevent the safe use of ladders.

Zipperman testified employees must carry tools, including other ladders, on aerial ladders to perform fire suppression and rescue operations. He testified that although Employer's policy addresses the same issue, the Special Order differs in that it directs that employees "shall be prohibited" which is an absolute restriction that prevents appropriate response to, or training for, emergency situations. Zipperman further testified operations occur in a variety of environments

with unexpected configurations, and that the qualifier “prevent safe use of ladders” does not provide meaningful guidance to avoid violations.

1.D. When ascending or descending a ladder, the user shall face the ladder and maintain contact with the ladder at three-points at all times.

Zipperman testified that Employer’s policy addresses the same concern. However, he testified that mandating three points of contact while facing the aerial ladder may endanger employees. Employer offered evidence of an actual operation in which employees narrowly escaped a sudden explosion while on the roof at a fire that occurred on Boyd Street. The ability to tread on the rungs, without using hands, facing away from the ladder, saved their lives.

Zipperman testified that working environments may present suddenly hazardous conditions for which Employer must train its employees. He testified that the ability of employees to race down the ladder, running only on the rungs, while engulfed in zero visibility smoke, was the result of training. He testified that training employees in realistic scenarios allows employees to rapidly and accurately respond to suddenly changing circumstances. Employer thus asserted that while training exercises should be safe, they need to be as realistic as possible, which the Special Order would not allow.

1.E. An employee shall not be permitted to stand and work on top 3 rungs of an aerial ladder unless there are members of the structure that provide a firm handhold or the employee is protected by a personal fall protection system.

Zipperman testified that the aerial ladder has side rails that serve as handholds, and that the ladder itself, as a part of the truss construction, is an appropriate handhold. Employer referred to the Barrington Avenue event as evidence of an actual operation in which a rescue necessitated working on the top three rungs of the ladder. Zipperman testified that employees train to perform such rescues at the tip of the aerial ladder using a weighted mannequin because past events have shown the necessity for replication of these scenarios in training.

2. When aerial ladders are used for access to an upper landing surface, the side rails shall extend not less than 36 inches above the upper landing surface to which the ladder is used to gain access; or when such an extension is not possible, an equivalent method or means shall be provided to ensure employees safely mount and dismount the ladder.

Zipperman testified that the size of the truss structure of the aerial ladder limits the ability to locate the ladder in the manner required in the Special Order. Employer provided examples of

an elevated window entry where extending the tip of the ladder 36 inches above the upper landing would compromise an employee's ability to safely reach the location and dismount the ladder. Zipperman additionally testified that rooftop environments are so varied that the mandatory "shall" contained in the Special Order leaves employees with no flexibility to determine the most appropriate placement of the aerial ladder.

Many of the Special Order provisions, including item number 2, appear to have been copied from section 3276, a safety order regulating the use of portable ladders. However, aerial ladders are not portable ladders. It is further noted that section 3276, recognizes and exempts emergency rescue operations and emergency rescue training operations from the requirement that portable ladders must be extended no less than 36 inches above an upper landing surface.

The Special Order contains several mandates and prohibitions related to the use of aerial ladders. However, it does not seem designed to accommodate the use of aerial ladders as firefighting equipment, which are entirely exempted from the safety order regulating aerial devices.

Employer demonstrated that the mandatory language of the Special Order forecloses the flexibility employees need to respond to variations of environment and changing conditions. Employer established the necessity of conducting safe but realistic training exercises to develop the routine skills that unexpected and deadly circumstances demand of employees. The Division did not establish how compliance with the directives of the Special Order corrects unsafe conditions for firefighters. Adherence may actually endanger employees and the public. Therefore, Employer's appeal is granted, and the Special Order is vacated.

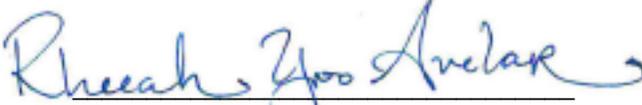
Conclusion

The evidence does not support a finding that the Special Order is valid.

Order

The Special Order is vacated.

Dated: 06/08/2021


Rheeah Yoo Avelar
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.**