BEFORE THE
STATE OF CALIFORNIA
OCcupational safety and health
APPEALS BOARD

In the Matter of the Appeal of:

SAN DIEGO GAS AND ELECTRIC
6999 CLAIREMONT MESA BLVD.
SAN DIEGO, CA  92111

Employer

Inspection No. 1082280

DECISION

Statement of the Case

San Diego Gas and Electric Company (Employer) is a public utility. Beginning August 4, 2015, the Division of Occupational Safety and Health (the Division) through Senior Safety Engineer\(^1\) Darcy Murphine (Murphine) conducted an accident inspection at a place of employment maintained by Employer at 6999 Clairemont Mesa Blvd., San Diego, California (the site). On January 11, 2016, the Division cited Employer for guardrails that were two low\(^2\).

Employer filed a timely appeal contesting the existence of the alleged violation. Employer also alleged affirmative defenses.\(^3\)

This matter came on regularly for hearing before Dale A. Raymond, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at San Diego, California on April 20, 2017. Jeffrey M. Tanenbaum, Attorney, of Nixon Peabody LLP, represented Employer. Eric L. Compere, Staff Counsel, represented the Division. The matter was submitted on June 6, 2017.

Employer moved at hearing, without objection, to amend Employer’s name from “San Diego Gas & Electric” to “San Diego Gas & Electric Company” to correctly reflect Employer’s name. Good cause appearing, the motion was granted.

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\(^1\) At the time of the inspection, Murphine was an Associate Safety Engineer.

\(^2\) Section 3210, subsection (b). Unless otherwise specified, all references are to sections of California Code of Regulations, title 8.

\(^3\) Employer alleged that the exception for mobile vehicles under section 3210, subsection (b)(9) applied. Affirmative defenses for which Employer did not present evidence are deemed waived. (See section 361.3 “Issues on Appeal” and Western Paper Box Co., Cal/OSHA App. 86-812, Denial of Petition for Reconsideration (Dec. 24, 1986).) They are not discussed.
Issues

1. Did Employer have 42-inch high guardrails at an elevated location?

2. Did the exception for mobile vehicles apply?

Findings of Fact

1. Employer’s employees were required to access the rear deck of an aerial lift truck to perform their job duties. The truck had a boom lift that needed to be secured before the truck was driven anywhere. Employees accessed the rear deck to store wooden cribbing and to secure the boom lift for travel. Employees did not access the rear deck while the truck was moving.

2. The rear deck was over four feet high and had open sides.

3. The rear deck was accessed by using permanent steps attached to the truck. There were handholds.

4. The rear deck had 18” high side rails. They could be lifted out from the deck. The rear deck did not have guardrails that were 42 inches high.

5. Employer’s truck was a mobile vehicle. Employer did not establish that the exception for guardrails for mobile vehicles applied.

Analysis

1. Did Employer have 42-inch high guardrails at an elevated location?

   Section 3210, subdivision (b) states:
   
   The unprotected sides of elevated work locations that are not buildings or building structures where an employee is exposed to a fall of 4 feet or more shall be provided with guardrails….

   Section 3207, subdivision (a) defines “guardrail” as “A vertical barrier erected along the open edges of a floor opening, wall opening, ramp, platform, runway, or other elevated area to prevent falls of persons.”
Section 3209, subdivision (a) states that a guardrail shall have a vertical height within the range of 42 to 45 inches from the upper surface of the top rail to the floor.

Citation 1, Item 1, reads as follows:

Prior to and during the course of the inspection, employees were accessing the rear deck of the aerial lift truck #7252 (CA license 6S65494) to store wooden cribbing (beams) and to secure the boom lift for travel. The height of the rear deck was greater than four feet, about five above the ground, and was accessed via permanent steps. The open sides of the elevated work location were provided with railing that did not meet the requirements for guardrails. The railings were only 18 inches high. The exceptions for mobile vehicles/equipment did not apply.

The Division has the burden of proving a violation by a preponderance of the evidence. 

Howard J. White, Inc., Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983.)

In order to establish a violation of section 3210, subdivision (b), the Division must establish three elements: (1) there was an unprotected side which was not a building, (2) the fall distance was four feet or more, and (3) the guardrails, if any, did not have a vertical height between 42 and 45 inches.

As for the first element, Employer did not dispute that (1) its employees walked on the rear deck of its aerial lift trucks in the course of performing their job duties (Exhibits 3-4, 3-5) and that (2) the rear deck had unprotected sides. (Exhibits 3-1, 3-2, 4-2, G-1) Therefore, the first element was established.

As for the second element, Senior Safety Engineer Darcy Murphine (Murphine) testified that the deck was 60 inches high. Employer did not refute that evidence. Employer agreed at hearing that the deck was over four feet high. Therefore, the fall distance was over four feet and the second element was established.

As for the second element, Senior Safety Engineer Darcy Murphine (Murphine) testified that the deck was 60 inches high. Employer did not refute that evidence. Employer agreed at hearing that the deck was over four feet high. Therefore, the fall distance was over four feet and the second element was established.

Where employees work on a deck with unprotected sides, as here, (element 1) and the fall distance is over four feet, as here, (element 2), standard guardrails are required (element 3). The top rail of standard guardrails must be a minimum of 42 inches. (Section 3209, subdivision (a).) Employer denied that the truck in question had guardrails at all, characterizing them as removable gates designed to hold cargo rather than prevent the fall of persons. The gates were 18 inches high. (Exhibits 3-3, G-2) The Division characterized them as guardrails. Whether or not they were guardrails, the third element is established. If they were not guardrails, there is a violation because there were no 42-inch high guardrails. If they were guardrails, a violation is
established because they were not 42 inches high because (1) either there were no guardrails or (2) the guardrails were not high enough. Murphine measured their height at 18 inches. (Exhibits 3-3).

Accordingly, a violation of section 3210, subdivision (b) was established by a preponderance of the evidence.

**Did the exception for mobile vehicles apply?**

Section 3210, subdivision (b), exception 9 states:

On mobile vehicles/equipment, where the design or work processes make guardrails impracticable, the use of sufficient steps and attached handholds or structural members which allow the user to have a secure hand grasp shall be permitted. Work from the decks, permanent/stationary platforms, runways, or walkways of mobile vehicles/equipment shall be excluded from the requirements of subsection (b) where it can be shown that guardrails or handholds are impracticable by the design or work processes.

Employer has raised an exception to the safety order. An exception to the requirements of a safety order is in the nature of an affirmative defense, which the employer has the burden of proving. (*Gal Concrete*, Cal/OSHA App. 89-317, Decision After Reconsideration (Sep. 27, 1990).) Exceptions must be strictly construed. (*Ibid.*)

In order to establish Exception 9, Employer must show that (1) guardrails were impracticable by design or work process, and (2) there were sufficient steps or handholds which allowed the user to have a secure hand grasp.


The dictionary defines “impracticable” as “incapable of being put into practice with the available means.” (Webster’s Encyclopedic Unabridged Dictionary of the English Language (1989) p. 716.)

Employer’s expert, John L. Bobis (Bobis) presented three reasons for his opinion that 42-inch high guardrails were impracticable: (1) a pinching hazard between the boom and the guardrail would be created; (2) the guardrails would be too high for the boom to lift materials from the deck and place them outside the truck and vice versa; and (3) the guardrails would be so heavy that they could not be lifted up by someone standing outside the truck.

First, the pinching hazard was not a realistic possibility. Employees are not present on the deck when the boom lifts materials between the deck and locations outside the truck. Employees access the rear deck for the purposes of securing the front and rear of the boom and to store cribbing. During these times, the truck is always stopped and the boom is always stationary. There is no reason for the boom to be moved; therefore, employees are not exposed to a pinching hazard. This work process does not make installation of 42-inch high guardrails impracticable.

Second, Employer did not show that the boom would be unable to load and unload materials on the rear deck. Even if 42-inch guardrails prevented the boom from transporting materials from the rear deck to a location off the truck, guardrails could be removable, just like the side gates on the truck now. There was no evidence that employees needed to be on the rear deck in order for the boom to load or unload material. Therefore, this work practice does not make installation of 42-inch guardrails impracticable.

Third, the argument that 42-inch guardrails of the type already on the truck might be too heavy to lift, and, therefore, impracticable, fails because Employer did not establish lack of alternatives. Bobis assumed that higher guardrails would be made of the same material and in the same style as the gates currently on the truck. Each side gate weighs 25 pounds. If the current gates were raised to 42 inches, they would each weigh over 50 pounds. Bobis’s testimony that it would require stronger or different braces and could cause ergonomic problems when employees lifted them was credible.

Employer did not question its expert about alternatives and modifications. Each side of the truck in question has two gates. Notably, Bobis did not testify that the only type of guardrail possible was the type that was already on the truck or that the maximum number of gates on each side was two. He did not discuss alternatives such as using lighter materials, making each segment shorter, higher, and lighter, or using a different type of railing.
The Appeals Board has found that an employer’s failure to offer evidence on an issue, although production of the evidence was easily within the employer’s power to do so, raises the inference\(^5\) that the evidence, if produced, would have been adverse to their position. (Shimmick-Obayashi, Cal/OSHA App. 08-5023, Decision After Reconsideration (Dec. 30, 2013), citing Shehtanian v. Kenny (1958) 156 Cal. App. 2d 580.) Here, Employer had the power and motivation to ask the relevant questions. Employer’s failure to present evidence about alternatives raises the inference that the answers to the questions not asked would have been unfavorable for Employer. Therefore, it cannot be found that 42-inch guardrails are impracticable by design or work practice.

Although Employer may have met the second element of whether there were sufficient steps and handholds\(^6\), the second element is not reached unless Employer meets the first element.

Accordingly, Employer failed to establish that standard guardrails were impracticable by design or work processes. Employer did not establish that the section 3210, subdivision (b)(9) exception applies. Thus, the violation stands.

If Employer believes that compliance with the safety order is impossible or would pose a greater safety hazard, its remedy is to apply to the Occupational Safety and Health Standards Board for a variance. Employer may obtain relief if employee safety is not diminished by its work practice. (Hubbard Structures, Inc., Cal/OSHA App. 86-329, Decision After Reconsideration (Dec. 31, 1986); Oberti Olive Company, Cal/OSHA App. 78-0222, Decision After Reconsideration (Aug. 31, 1984).)

Employer did not appeal the violation’s classification or penalty amount. Thus, those issues are waived and are, therefore, established by law. (See § 361.3 (“Issues on Appeal”), Western Paper Box Co., Cal/OSHA App. 86-812, Denial of Decision After Reconsideration (Dec. 24, 1986); and Bourgeois, Inc., Cal/OHSA App. 99-1705, Denial of Decision After Reconsideration (Apr. 26, 2000).)

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\(^5\) The Appeals Board has held that reasonable inferences can be drawn from evidence introduced at hearing. (ARB, Inc., Cal/OSHA App. 93-2984, Decision After Reconsideration (Dec. 22, 1997).) “An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or established in the action.” (Evidence Code § 600, subdivision (b).) Evidence Code section 413 provides, “In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party’s failure to explain or to deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto, if such be the case.”

\(^6\) It was undisputed that the truck in question had permanent steps (Exhibit G-4) and that there were handholds. There was no reason to believe that the steps were insufficient, and the Division did not make that allegation. The Board has interpreted the word “sufficient” in Exception 9 to modify “steps,” but not modify “handholds.” (A.L. Gilbert Company, Cal/OSHA Ap. 08-1646, Decision After Reconsideration (Sep. 30, 2010).)
Conclusions

Employer’s employees worked on the rear deck of a truck with open sides. The fall distance was over four feet. There were no 42-inch high guardrails. The Division established a violation of section 3210, subdivision (b).

Employer did not establish that the exception for mobile vehicles in 3210, subdivision (b)(9) applied.

Order

It is hereby ordered that Citation 1, Item 1, is upheld.

It is further ordered that the penalty indicated above and set forth in the attached Summary Table be assessed.

06/12/2017

Dated:

DALE A. RAYMOND
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.**
APPENDIX A
SUMMARY OF EVIDENTIARY RECORD

Inspection No.: 1082280
Employer: SAN DIEGO GAS AND ELECTRIC
Date of hearing(s): April 20, 2017

DIVISION'S EXHIBITS

<table>
<thead>
<tr>
<th>Exhibit Number</th>
<th>Exhibit Description</th>
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<tr>
<td>1</td>
<td>Jurisdictional documents</td>
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<tr>
<td>2-1</td>
<td>Accident Report</td>
<td>Admitted Into Evidence</td>
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<tr>
<td>2-2</td>
<td>Inspection assignment form</td>
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<td>Inspection checklist</td>
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<tr>
<td>3-1</td>
<td>Photo: Driver side view of truck--front end</td>
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</tr>
<tr>
<td>3-2</td>
<td>Photo: Driver side view of truck--back end</td>
<td>Admitted Into Evidence</td>
</tr>
<tr>
<td>3-3</td>
<td>Photo: Tape measure showing height of side gates/railings as 18&quot; high</td>
<td>Admitted Into Evidence</td>
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<tr>
<td>3-4</td>
<td>Photo: Employee ratcheting boom--front end</td>
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<tr>
<td>3-5</td>
<td>Photo: Man standing on truck bed working platform--front end of truck</td>
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<tr>
<td>4</td>
<td>Photo: Passenger side of truck</td>
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EMPLOYER'S EXHIBITS

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<td>A</td>
<td>Cal/OSHA 1B</td>
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<td>B</td>
<td>Operating Instructions for NorStar Aerial Platform</td>
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<tr>
<td>C</td>
<td>Photo: passenger side of truck</td>
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<td>D</td>
<td>John L. Bobis Curriculum Vitae</td>
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<td>F</td>
<td>Initial Statement of Reasons--proposed action, Title 8 CCR sections 3210 and 3388</td>
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<td>G-1</td>
<td>Photo: Passenger side of truck (same as 4-2)</td>
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<td>G-2</td>
<td>Photo: Tuck in position to remove 18” side gate on truck</td>
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<td>G-3</td>
<td>Photo: Sign on truck by stairs &quot;3 point contact&quot;</td>
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<td>G-4</td>
<td>Photo: Stairs on passenger side of truck</td>
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<tr>
<td>G-5</td>
<td>Photo: End of 18” gate on truck bed beside stairs</td>
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<td>H-1</td>
<td>2 Photos: Use of boom on truck to lift load beside truck</td>
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<td>H-2</td>
<td>2 Photos: Unloaded truck bed</td>
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<td>H-3</td>
<td>2 Photos: Unloaded truck bed</td>
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<td>H-4</td>
<td>2 Photos: Trucks with empty flatbeds</td>
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<td>H-5</td>
<td>2 Photos: Trucks with empty flatbeds</td>
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<td>H-6</td>
<td>2 Photos: Trucks with loaded flatbeds</td>
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<td>H-7</td>
<td>2 Photos: Two trucks with empty flatbeds</td>
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<td>H-8</td>
<td>2 Photos: Two trucks with boom-type lifts mounted on flatbed</td>
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**THIRD-PARTY/INTERVENOR EXHIBITS**

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**JOINT EXHIBITS**

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Witnesses testifying at hearing:

- Darcy Murphine, Senior Safety Engineer
- Charles Tuck, Construction Supervisor - Electric
- John L. Bobis, President, The Bobis Group
APPENDIX A
CERTIFICATION OF HEARING RECORD

Inspection No.: 1082280
Employer: SAN DIEGO GAS AND ELECTRIC

I, Dale A. Raymond, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hear the above-entitled matter, hereby certify the proceedings therein were electronically recorded or recorded by a certified court reporter. If the proceedings were recorded electronically, the recording was periodically monitored during the hearing. Either the electronic recording or the recording made by a certified court reporter constitutes the official record of the proceedings, along with the documentary and other evidence presented and received into evidence during or after the hearing. To the best of my knowledge the recording equipment, if utilized, was functioning normally and exhibits listed in this Appendix are true and correct, and accurately represent the evidence received during or after the hearing.

Dale A. Raymond
Administrative Law Judge

Date 06/12/2017
In the Matter of the Appeal of:
SAN DIEGO GAS AND ELECTRIC

Citation Issuance Date: 01/11/2016

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<td>3210 (b)</td>
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Sub-Total: $560.00

Total Amount Due*: $560.00

*You may owe more than this amount if you did not appeal one or more citations or items containing penalties. Please call (415) 703-4291 if you have any questions.

**PENALTY PAYMENT INFORMATION**

1. Please make your cashier's check, money order, or company check payable to: Department of Industrial Relations
2. Write the Inspection No. on your payment
3. Mail payment to:
   Department of Industrial Relations (Accounting)
   Cashier Accounting Office
   P.O. Box 420603
   San Francisco CA 94142-0603

   Online Payments can also be made by logging on to http://www.dir.ca.gov/dosh/CalOSHA_PaymentOption.html

   -DO NOT send payments to the California Occupational Safety and Health Appeals Board-

**Abbreviation Key:**
- G=General
- R=Regulatory
- Er=Employer
- S=Serious
- W=Wilful
- Ee=Employee
- A/R=Accident Related
- RG=Repeat General
- RR=Repeat Regulatory
- RS=Repeat Serious