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 N B Baker Electric, Inc. dba Baker Electric Solar (Employer).

JURISDICTION

On April 28, 2015, the Division of Occupational Safety and Health (the Division) conducted an inspection of a worksite where Employer’s employee was surveying a roof in Irvine, California. On June 17, 2015, the Division issued one serious citation to Employer, alleging a violation of section 1670, subdivision (a) [failure to provide appropriate fall protection].

Employer timely appealed the citations.

A hearing was held before an Administrative Law Judge (ALJ) of the Board on December 13, 2016. A decision in the matter issued on May 23, 2017, upholding the single citation and associated $16,875 penalty.

Employer timely filed a petition for reconsideration and subsequently filed a Motion to Amend Petition for Reconsideration by Adding Citations to the Hearing Transcript.

The Division filed an Answer to the petition.

The Board now denies Employer’s Petition for Reconsideration for reasons described below.

ISSUES

1. Is section 1670, subdivision (a) applicable to the work done by Employer’s solar surveyors?
2. Has Employer demonstrated that it was in compliance with a more specific, applicable safety order?
3. Did the ALJ improperly exclude evidence, or fail to consider evidence presented by the Employer?
4. Assuming a violation exists, was it properly classified as serious?
FINDINGS OF FACT

The Board has independently reviewed and considered the entire evidentiary record in this matter, and hereby adopts the findings of fact contained in the decision of the ALJ. (Decision, p. 2.) In making this decision, the Board has taken no new evidence.

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 files its petition for reconsideration on the basis of Labor Code section 6617, subdivisions (a), (c), and (e). Employer’s specific contentions are addressed below.

Is section 1670, subdivision (a) applicable to the work done by Employer’s solar surveyors?

On June 17, 2015, the Division issued a single serious citation to Employer, alleging a violation of section 1670, subdivision (a). Section 1670 is located in the Construction Safety Orders (CSO), and requires the following:

(a) 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: (1) Requirements relating to fall protection for employees working at elevated locations on poles, towers and other structures are provided in Section 2940.6(b) and (c) of the High Voltage Electrical Safety Orders. (2) Requirements relating to fall protection for employees working on poles, towers, or similar structures are provided in Section 8615(g) of the Telecommunications Safety Orders. (3) Requirements relating to fall protection for employees working in roofing operations are provided in Section 1730 of the Construction Safety Orders.
The alleged violative description found in the citation issued to Employer reads:

Prior to and during the inspection, including, but not limited to, on 4/28/15, there was at least one employee working on top of a second story roof and there was no personal fall arrest, personal fall restraint or positioning systems worn by this employee who was exposed to falling in excess of 7 ½ feet from the perimeter of a structure, unprotected side and edge, or leading edge. The height of this second story roof was approximately 19 feet.

Employer asserts the affirmative defense that an exception to the safety order is applicable. Employer is correct that the safety orders contain an exception from use of fall protection; that exception is found at section 1669, subdivision (c), and states:

When the work is of short duration (i.e., non-repetitive) and limited exposure and the hazards involved in rigging and installing the safety devices required by this Article equals or exceeds the hazards involved in the actual construction, these provisions may be temporarily suspended, provided adequate risk control is recognized and maintained under immediate, competent supervision.

Under Board precedent Employer bears the burden of establishing each element of the exception. (Guardsmark, Cal/OSHA App. 10-2675, Denial of Petition for Reconsideration (Sep. 22, 2011).)

Employer explains that its surveyor, who was on the roof for about 15 to 20 minutes taking measurements for future solar panel installation, was engaged in work of short duration and that it would be more hazardous to install the anchorage system for a fall protection system than to follow section 1670, subdivision (a). However, as the ALJ discusses in his Decision, in order to make use of this exception, an employer must both show that the hazards involved in rigging and installing the safety devices would equal or exceed the hazards involved in construction, and also show that “adequate risk control” was “maintained under immediate, competent supervision.” (Section 1669, subdivision (c).) There is no dispute that the worker in this instance was working alone, without supervision of any kind. By the terms of the regulation, which expressly require both immediate and competent supervision, Employer cannot take advantage of the exception. The Board has previously stated,

Even if Employer had developed adequate risk control measures for this task, Employer had to prove the task was performed under the "immediate" supervision of a competent foreman. To meet this burden, Employer had to prove a foreman was close by, paying particular attention to Snyder, so the foreman could act to prevent risk control violations and other actions and conditions that might increase risk. (See, Duke Timber Construction Co., OSHAB 81-347, Decision After Reconsideration (Aug. 19, 1985); Pacific Roof Structures, OSHAB 84-1040, Decision After Reconsideration (May 21, 1984); and Ruffco Construction, OSHAB 90-1006, Decision After Reconsideration (May 31, 1991).) (McLean Steel, Inc.
The Board cannot either read terms into or out of the regulation, but must interpret the language as a whole. (See, *Base Materials v. Board of Equal.* (1959) 51 Cal. 2d 640, 645 [“If possible, significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose.”]) Employer has failed to show that it met the terms of the exception.

Employer also asserts that it has demonstrated the “logical time defense”, because of the short duration of the surveying work. “The ‘logical time defense’ is an affirmative defense which provides that the requirements of a safety order will not begin to apply until the necessary and logical time for an employer to address the violation and/or hazard arrives.” (*Dick Miller, Inc.* Cal/OSHA App. 13-0578, Denial of Petition for Reconsideration (Mar. 5, 2014).) Employer argues that because the work was of short duration, requiring the use of fall protection would have exposed the worker to increased hazard, due to the time it takes to install fall protection equipment. However, the fall protection orders themselves take such a scenario into account and include the section 1669, subdivision (c) exception for work of short duration, discussed above. Where the safety orders contain an exception covering the same concerns as a Board-created defense, the Board-created defense is not available. Employer has failed to meet the requirements of the exception contained in the regulation. Employer also failed to present anything other than cursory testimony or evidence to show that the logical time for abatement of the hazard had not arrived. The Division has established a violation of the safety order by a preponderance of the evidence.

**Has Employer demonstrated that it was in compliance with a more specific, applicable safety order?**

Alternatively, Employer argues that there is a more specific safety order applicable to the solar surveyor’s work, section 1723, subdivision (c), and that Employer was in compliance with the more specific safety order. Section 1723 states the following:

(a) The Orders contained in this Article are intended to apply to employees engaged in the removal or application of:
(1) Single-unit (Monolithic) roof coverings which include built-up roofing of asphalt or coal-tar pitch or like materials, and flat-seam metal roofings or like materials, and
(2) Multiple-unit roof coverings which include asphalt shingles, asbestos-cement shingles, standing-seam metal panels, shingle metal roofing, wood shakes and shingles, clay tile, concrete tile, slate or like materials.
(b) Applicable parts of this Article shall apply wherever kettles, tankers or pots with capacities in excess of 5 gallons are used in providing hot asphalt, pitch or like materials for construction or maintenance operations.
(c) When the work is of short duration and limited exposure, such as minor patching, measuring, roof inspection, etc., and the hazards involved in rigging and installing the safety devices required by this Article equals or exceeds the hazards involved in the actual
construction, these provisions may be temporarily suspended provided that adequate risk control is recognized and maintained.

Employer contends that because no solar standards provide guidance to solar installers, it should not be punished for following what it believed to be the pertinent safety standard. (Petition, p. 2.) While subdivision (c) includes “measuring” and “roof inspection” (which we assume to be part of a roof survey) within its ambit, it does so “provided that adequate risk control is recognized and maintained.” The parties agree that the solar surveyor was working alone, and there is insufficient evidence to establish that adequate risk control was “recognized and maintained” here. Moreover, the Board has consistently held that ignorance or mistake of law is not a defense to a citation, and reiterates that principle here. (OC Turf and Putting Greens, Cal/OSHA App. 13-1751, Denial of Petition for Reconsideration (Jun. 9, 2014), citing Nick's Lighthouse, Cal/OSHA App. 05-3086, Denial of Petition for Reconsideration (Jun. 8, 2007).)

In Pinnacle Builders, Inc., Cal/OSHA App. 97-2963, Decision After Reconsideration (Jul. 27, 2001), an employer, whose employee was nailing plywood sheeting to a roof frame, presented the same defense to a citation as Employer does here, arguing that it was subject to section 1723, subdivision (c) rather than the cited safety order. The Board disagreed:

Plywood and composition board sheeting are not included among the roof covering materials identified in section 1723(a) (1) and (2), nor are they like those materials in terms of the construction functions or purposes that they serve. All of the identified roof covering materials have the purpose of "covering" the roof with a barrier against the entry of rain, moisture, etc. In contrast, it is common knowledge that ordinary plywood or composition board sheeting cannot protect the top of a house against the weather effectively unless coated or covered with some other material. Division witness Lombardo's unrefuted testimony established that one purpose of roof sheeting is to stabilize the frame of a house.

Just as installation of plywood sheeting is not a roofing activity based on the language of the regulation, neither is the installation of solar panels. While Employer argues in its petition that solar technology is quickly changing, and that there are products that both combine the purpose of a roof covering and a solar panel, no evidence was presented to suggest that Employer was inspecting the roof in preparation of replacing clay roof tiles with solar roofing tiles. The Board cannot read language into, or out of, a regulation promulgated by the Standards Board. (Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles (2001) 24 Cal. 4th 830, 844 ["As a rule, a command that a constitutional provision or a statute be liberally construed 'does not license either enlargement or restriction of its evident meaning'"].) Rather, Employer may look for a remedy via a petition for a variance with the Standards Board, or by requesting rulemaking activity from the Standards Board.
Did the ALJ improperly exclude evidence, or fail to consider evidence presented by the Employer?

Employer also asks the Board to look to Federal OSHA interpretive guidance issued in regards to 29 CFR 1926.500, subdivision (a)(1). The Cal/OSHA safety order’s language is unambiguous; there is no reason for the Board to look to a Federal source, or legislative history, for interpretative assistance. “We apply the plain language of the safety order when, as here, it is not ambiguous. (citations.)” (Treasure Island Media, Inc. Cal/OSHA App. 10-1093, Decision After Reconsideration (Aug. 13, 2015).) In a recent Denial of Petition for Reconsideration, Solarcity Corp., Cal/OSHA App. 14-3707, Denial of Petition for Reconsideration (Apr. 14, 2016), the Board explained:


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.)

Given that the Board can interpret the regulation without problems of ambiguity or absurd results, resorting to a Federal OSHA interpretative letter is unnecessary. (See, Siskiyou County Farm Bureau v. Department of Fish & Wildlife (2015) 237 Cal. App. 4th 411, 446.)

Employer also objects to the ALJ’s handling of its Exhibit E, a copy of Employer’s fall protection competent person manual. At the conclusion of the hearing, the parties discussed Employer’s Exhibit E. Employer states in its petition that the ALJ was “seemingly more concerned with the volume of his exhibit and how he was going to have to lug it back to his office, rather than its value in correctly deciding this case [and] excluded it.” This is a mischaracterization of the conversation that occurred on the record. Exhibit E was admitted, pending briefing: the ALJ requested that the parties explain in their briefs what portions of the 260-page document were relevant to the issues presented at hearing. The ALJ ultimately admitted 44 pages of the document, and those pages have been reviewed by the Board. In its petition for reconsideration, Employer fails to explain either how the admitted material is useful or relevant to its defense, or the relevance of the excluded material.

The ALJ was well within his authority when he acted to exclude portions of an irrelevant and voluminous document. “Although the technical rules of evidence do not apply to hearings held
before an administrative law judge of the Board, the judge is not obliged to receive irrelevant, immaterial or repetitious evidence.” (Crown City Plating Co., Cal/OSHA App. 92-052, Decision After Reconsideration (Nov. 18, 1994), citing sections 376.1 and 376.2; Okaw Industries, Inc., Cal/OSHA App. 77-602, Decision After Reconsideration (Feb. 14, 1978).)

Assuming a violation exists, was it properly classified as serious?

In order to establish a rebuttable presumption that a serious violation exists, the Division must demonstrate a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation. (Orange County Sanitation District, Cal/OSHA App. 13-0287, Decision After Reconsideration (May 29, 2015).) Here, the Division’s inspector testified that the actual hazard created by the alleged violative condition was falling from the roof, resulting in broken bones, cracked skulls, head trauma, concussions, short-term memory loss, broken legs, broken ankles, arms, broken ribs, and punctured lungs. The Division established the rebuttable presumption of a serious violation.

Labor Code section 6432, subdivision (c) provides the employer the opportunity to rebut the presumption of a serious violation. An employer may demonstrate that although it had exercised reasonable diligence, it could not and did not know of the violation. (Labor Code section 6432, subsection (a).) Employer argues that it had a valid safety training program and reasonably believed that installing fall protection anchors would be more dangerous to its employees. The ALJ rejected the argument, and the Board concurs. The preponderance of the evidence supports upholding the ALJ’s Decision, including the classification of the citation.

DECISION

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

Art R. Carter, Chairman
Ed Lowry, Board Member
Judith S. Freyman, Board Member

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