

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

In the Matter of the Appeal of:

THE HERRICK CORP.
7021 Koll Center Parkway
Pleasanton, CA 94566

Employer

Docket No. 07-R3D1-0495

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken the petition for reconsideration filed by the Division of Occupational Safety and Health (Division) under submission, renders the following decision after reconsideration.

JURISDICTION

On January 22, 2007, a representative of the Division issued one Citation to The Herrick Corp. (Employer) after an accident investigation regarding an incident that occurred on July 22, 2006. The proposed penalty for the alleged violation of Title 8, Cal. Code of Regulations section 1710(m)(2) [failure to ensure use of fall protection]¹ was \$18,000. Employer filed an appeal contesting the violation, its classification, the abatement measures, and the reasonableness of the proposed civil penalty.

An evidentiary hearing was held on February 24, 2008, before an Administrative Law Judge (ALJ) for the Board. At hearing, the parties stipulated that the Serious classification was established, and that the penalty was calculated correctly. The only issue was whether the violation had been established. The ALJ determined the language of the cited safety order did not apply to the circumstances alleged in the citation and proven at the hearing, and thus granted Employer's appeal.

¹ All references are to Title 8, California Code of Regulations unless otherwise indicated.

The Division subsequently filed a petition for reconsideration contending the decision was issued in excess of the Board's powers, that the evidence does not justify the findings, and that the findings do not justify the decision. Employer filed an answer. The Board took the matter under submission, and after review of the record and arguments, issues this decision after reconsideration.

EVIDENCE

An employee of Employer, a steel erection contractor, fell approximately 18 feet through an opening in the steel decking of a steel framed structure when removing a temporary plywood cover from the opening. He removed the temporary plywood cover in the normal course of his work activities as an iron worker apprentice. His job was to reinstall the permanent steel decking over the temporary opening after another employee completed welding work that required access through the opening.

This employee's job duties for the months preceding the injury, including the morning of the injury (which occurred after lunch, and of which the employee has no memory), was to create and later repair floor openings as needed to allow welders (his co-workers) access below the steel decking. He installed temporary covers, and when the work was complete, he reinstalled the decking. He had to remove the temporary plywood cover to perform this last activity. When he removed one such plywood cover to facilitate re-decking the opening, he fell through the opening. He was not protected by personal fall arrest or restraint systems. Although he was wearing a fall protection harness, it was not tied off during the opening-repair activity. He was told he did not have to tie off during the re-installation of decking when repairing such temporary openings, but he was instructed to otherwise tie off when exposed to falls of six feet or more.

ISSUE

Is removal of a temporary floor cover in preparation for re-installation of the permanent steel decking in a steel-framed building "steel erection activity" covered by section 1710(m)(2)?

FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

Section 1710 is a lengthy safety order applicable to structural steel erection activities. The subsections applicable to the circumstances in this case state:

Structural Steel Erection.

(a) Scope and application.

(1) This section sets forth requirements to protect employees from the hazards associated with steel erection activities involved in the construction, alteration, and/or repair of single and multi-story buildings, bridges, and other structures where steel erection occurs. The requirements of this section apply to employers engaged in steel erection unless otherwise specified.

Exception: This section does not cover electrical transmission towers, communication and broadcast towers, or tanks.

NOTE: Additional requirements for work on steel framed structures are contained in Article 20, Section 1635(b) of these orders.

(2) Steel erection activities include hoisting, connecting, welding, bolting, and rigging structural steel, steel joists and metal buildings; installing metal deck, siding systems, miscellaneous metals, ornamental iron and similar materials; and moving from point-to-point to perform these activities.”

(§1710(a).) “Structural steel” is defined.

Structural steel means a steel member, or a member made of a substitute material. These members include, but are not limited to, steel joists, joist girders, purlins, columns, beams, trusses, splices, seats, metal decking, girts, and all bridging, and cold formed metal framing which is integrated with the structural steel framing of a building.

“Steel erection” is defined.

Steel erection” means “the construction, alteration or repair of steel buildings, bridges and other structures, including the installation of metal decking and all planking used during the process of erection.

(§ 1710(b).)

The listed exception to the applicability of the safety order, specifically, “electrical transmission towers, communication and broadcast towers, or

tanks” was not shown to apply. (§1710(a).) Employer’s employee was repairing the metal decking access hole created to allow another employee to weld at a point on the structure below the decking. This is a steel erection activity by definition, as it is “installing metal decking.” (§1710(b).)

Employer was alleged to have violated subsection 1710(m)(2) by not providing an employee who was exposed to an 18 foot fall with fall protection. Section 1710(m)(2) states:

Work Other Than Connecting.

When performing any other work at a work point, iron workers shall be provided with and use personal fall protection as described in Article 24 where the fall distance is greater than 15 feet.

“Connecting” is undefined, but a connector is an iron worker who connects hoisted structural steel members to the building in the course of erection. (§ 1710(b).) When no hoist is used, the work is not connecting work. “Work” and “work point” are not defined specifically in this section. As such, they must be given their plain and ordinary meaning. (*Structural Shotcrete System*, Cal/OSHA App. 03-986 Decision After Reconsideration (Jun.10, 2010); *Lundgren v. Deukmejian (Roberti)* (1988) 45 Cal. 3d 727, 735.)

The decision concludes that section 1710(m)(2) does not apply to the work of re-installing steel decking where it had been removed to create an access opening for welding work by Employer’s iron workers. The decision reasoned that the title of the subsection (m), phrased as follows: “Working or traveling on skeleton steel,” should be narrowly construed. The decision thus construes the phrase “working . . . on skeleton steel” to apply only to workers standing on the bare steel beam elements of the structure. Such interpretation changes the words selected by the Standards Board from “working on” to “standing on.” “The Appeals Board is without authority to change the clear terms of a safety order. (*Kenneth L. Poole, Inc.*, OSHAB 90-278, Decision After Reconsideration (Apr. 18, 1991).)” (*Rudolph & Sletten, Inc.*, Cal/OSHA App. 93-1251 Decision After Reconsideration (Apr. 8, 1998).) If the Standards Board intended section 1710(m) to apply only to beam-located work, either connecting (i.e. hoist assisted) or other work, it would not have included the reference to work locations atop securely stacked decking bundles in subsection (m)(3).² Also, it would have used the word “standing” rather than the more broad term “working.”

² “Working at periphery or interior of building. (a) When moving from work point to work point, . . . connectors (2) May walk the top surface of securely landed decking bundles.”

We construe the regulations by giving words their common sense meaning based on the evident purpose for which the enactment was adopted. (*In re Rojas* (1979) 23 Cal. 3d 152, 155.) The common sense reading of the phrase “working . . . on skeleton steel” is that it refers to employment of iron workers anywhere on the steel-framed structure. The Standards Board did not define the term “skeleton steel.” In such circumstances, the Board must provide an interpretation of the safety order that is consistent both with the common sense meaning of the term, the meaning intended by the Standards Board, and the legislative purpose of the OSH Act to provide a safe working environment for California workers. (*Carmona v. Division of Industrial Safety* (1975) 13 Cal. 3d 303 [comprehensive purpose of OSH Act establishes the quasi-judicial function of the agency is to interpret standards liberally to achieve a safe working environment].) Given the intent of the Standards Board to require fall protection for iron workers engaged in steel erection activities, we conclude section 1710(m)(2) requires non-connecting iron workers working on a steel framed structure to be provided protection against falls of 15 feet or more by means of the devices outlined in Article 24, and the requirement is not limited to those employees whose feet are located on a beam, rather than another structural steel member.

Here, Employer’s iron worker employee was assigned to work on the steel framed building. He was required to re-install the decking on to the steel frame which placed him on an incompletely decked portion of the steel building. In doing so, he was exposed to an 18 foot fall while not wearing personal fall protection, and no railing or other means of fall protection contained in Article 24 was provided.

We note that the construction industry safety orders (CISOs) also require fall protection for construction activities to be provided when employees are exposed to falls of seven and one half feet or more. (§ 1669 et seq.) Both the CISOs and the steel erection activity provisions address fall hazards. The Division is obligated to cite the more specific of two potentially applicable safety orders, as an employer may successfully defend against a citation by asserting a more specific safety order applies, and that it complied with such more applicable provision. (*Stacy and Witbeck, Inc.*, Cal/OSHA App. 05-1142 Decision After Reconsideration (May 12, 2011).) Here, the Division cited the more specific safety order which is applicable since the employee was engaged in steel erection activities when he was exposed to the 18 foot fall.

Employer’s argument that this fall hazard is not subject to any safety order, based on the purported meaning of a subheading, is not persuasive. The Board has consistently refused to restrict the application of an

unambiguous safety order based on a regulation's heading without a strong indication from the Standards Board that such restriction was intended. (*Spaich Brothers Inc. dba California Prune Packing Co.*, Cal/OSHA App. 01-1630, Decision After Reconsideration (Feb. 25, 2005); *Cambro Manufacturing Company*, Cal/OSHA App. 84-923, Decision After Reconsideration (Dec. 31, 1986); *PMR Race Cars*, Cal/OSHA App. 03-1825, Decision After Reconsideration (Dec. 2, 2009).) The principles of statutory construction do not allow us to recognize an implicit exception to the explicit scope of the safety order on this basis.³ That is, it would be improper to infer from one undefined term ("skeleton steel"), and an unusual definition of another term ("standing" as the meaning of "working"), that the Standards Board intended an iron worker installing decking on the steel frame of a steel framed building to be excepted from the fall protection requirement.⁴

An additional argument raised by Employer prior to submission of the matter, which the decision did not address, is that another safety order more specifically addresses the cited hazard.⁵ Employer argues the safety orders addressing floor openings, rather than the fall protections for steel erection activities, apply to remove the activity of working near an uncovered opening from the scope of section 1710. Employer argues sections 1635(b) and (c), and 1632, apply instead of section 1710 since the hazard here was a floor opening, and those other safety orders address floor openings. Section 1635(b), however, specifically states, as one of the 14 components of the floor opening cover requirements, that "personal fall protection and nets shall be required in accordance with Article 24 and section 1710." By the terms of section 1635(b), section 1710 still applies even when floor openings exist.⁶

³ Section 1710 states: "The requirements of this section apply to employers engaged in steel erection unless otherwise specified." An undefined term is not a specific statement that the employer is not required to comply with section 1710.

⁴ The same safety order creates an explicit exception when decking work may be undertaken without the use of personal fall protection. Subsection (n) allows an employer to create a Controlled Decking Zone for decking work that could not be accomplished if employees were afforded fall protection as outlined in Article 24. None of the requirements of subsection (n) have been shown to have been met by Employer. Since the exception from fall protection for decking work is specifically provided in subsection (n), we conclude the Standards Board meant for steel erection workers installing decking in all other circumstances to be required to use fall protection.

⁵ The decision concluded section 1701(m)(2) did not apply to this activity and granted the appeal on that basis, obviating the need to address this alternative defense asserted by Employer. The Employer is correct that if the Division cites a safety order that addresses a different hazard than the one alleged in the citation, the appeal is granted. (See *Carris Reels of California*, Cal/OSHA App. 95-1456, Decision After Reconsideration (Dec. 6, 2000).)

⁶ Also, the Note following section 1710(a)(1) states: "additional requirements for work on steel framed structures are contained in . . . 1635(b)." By use of the word "additional" we derive the intent of the Standards Board to be that the sections create cumulative, rather than alternative, requirements.

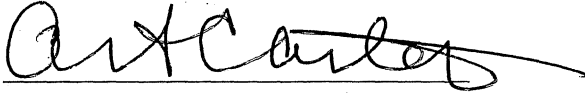
Also, section 1635(c), which Employer argues applies, states that, among other things, openings may be uncovered to allow for work access through such openings, and thereafter, the cover is to be put back in place. Subsection (7) of 1635(c) states, "After work requiring floor openings to be uncovered has been completed and prior to allowing other trades in the work area, the guarding and covers shall meet the provisions of Section 1632." By its terms, this section applies only when the temporary opening remains in place. The section does not apply to the work activity of removing the temporary opening. We do not read the safety order to require the cover remain in place over the temporary opening during the re-installation of the decking to eliminate the temporary opening itself. (See *Cal Energy Operating Corp.*, Cal/OSHA App. 09-3676, Denial of Petition for Reconsideration (Nov. 12, 2010) citing *Barnes v. Chamberlain* (1983) 147 Cal. App. 3d 792 [construction of statutes leading to absurd results is to be avoided].)

Sections 1635 and 1632 do not apply to the work activity of iron workers eliminating a temporary opening in steel decking. In *Oakmont Holdings dba Elegant Surfaces*, Cal/OSHA App. 04-1941, Denial of Petition for Reconsideration (Feb.8, 2007), the Board concluded that "storage" safety orders did not apply once the stored article was in transit, which began as soon as removal from storage began. At that point, the transportation safety orders applied to the hazard of displacement of heavy objects while in transit. Likewise, in the situation at issue, the static hazard of an existing opening was properly addressed by the cover requirements of sections 1635 and 1632. However, when the work assignment was to eliminate the hazard of the opening, and the cover needed to be removed to allow for installation of permanent steel decking, the safety order requiring the opening be covered no longer applies. Rather, the worker at that point is engaged in installing structural members in a steel framed structure, which is steel erection activity addressed by section 1710. Thus, by the rationale of *Oakmont Holdings*, *supra*, which we find compelling, sections 1635 and 1632 do not apply.

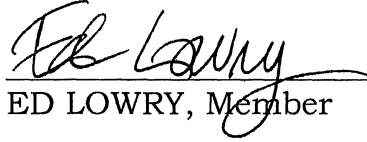
DECISION

Since work other than connecting required the iron worker to engage in steel erection activities at a work point on the steel framed building, and the exception to the fall protections allowed for decking work (Controlled Decking Zone) was not established, the cited safety order (§ 1710(m)(2)) required the employee to be protected from falls of 15 feet or greater by means of personal fall protection as described in Article 24. While re-installing steel decking in a temporary opening, a steel erection employer's employee was exposed to a fall hazard of 18 feet. He was not provided fall protection in accordance with Article 24. A violation of section 1710(m)(2) is

established. The proposed penalty of \$18,000.00 was stipulated by the parties to be calculated in accordance with the Division's penalty setting regulations, and is hereby imposed.



ART R. CARTER, Chairman



ED LOWRY, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

FILED ON:

MAR 26 2012



