

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

LOS ANGELES CITY FIRE DEPARTMENT
200 North Main Street, Room 1060
Los Angeles, CA 90012

Employer

Docket No. 03-R3D5-3960

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code, having taken Los Angeles City Fire Department's (Employer's) Petition for Reconsideration under submission, renders the following decision after reconsideration.

JURISDICTION

On July 15, 2003, a representative of the Division of Occupational Safety and Health (Division) conducted an investigation at a place of employment maintained by Employer at 400 Yacht Street, Berth 194, Wilmington, California.

On September 16, 2003, the Division issued one citation to Employer, alleging a violation of section 3210(b).¹ Employer filed a timely appeal contesting the citation.

This matter came on regularly for hearing on November 18, 2005, before an Administrative Law Judge (ALJ) for the Board and the matter was submitted after the parties submitted post hearing memoranda in lieu of closing arguments.

The ALJ rendered a decision on March 17, 2006, denying Employer's appeal, but reclassifying the violation as general, and imposing a penalty of \$250.00.² The ALJ so ruled because she concluded that section 3210 [fall protection/guardrails at elevated worksites] applied to firefighters undertaking

¹ Unless otherwise noted, references are to Title 8 of California Code of Regulations.

² On April 11, 2006, an Amendment to Decision was issued changing only the notation on the Summary Table to reflect the reclassification.

training exercises. She concluded Article 10.1 Personal Protective Clothing and Equipment for Firefighters³ was silent regarding fall protection, and so it was not inconsistent with the general industry safety orders requiring fall protection. She further concluded the Employer failed to prove all the elements of exception 5 in the Safety Order [guardrails not required for infrequent use of elevated work sites if fall restraint/fall arrest system used], and that another exception to fall protection systems found in section 1669(c) did not apply to this work location.

Employer filed a Petition for Reconsideration asserting that fall protection is not required for firefighting activities, including training, because the activity-specific Safety Orders found in Article 10.1, sections 3401 et seq. supersede the General Industry Safety Order of section 3210. It also asserted that section 1669(c) applied to excuse the requirement of personal fall protection equipment during this training exercise. On May 11, 2006, the Board took the petition for reconsideration under submission. On May 22, 2006, the Division submitted its Answer, asserting section 3210(b) applied to firefighters and that Employer failed to prove any exception applied.

EVIDENCE

The testimony of Division Safety Compliance Officer Nirmal Paul, the injured firefighter, Alfonso Raffta, his supervisor, Captain Eric Nakamura, County Chief Thomas A. Ottman, as well as two photographs, and a letter from Employer's safety officer, James Dolan, established the circumstances surrounding the May 17, 2003, injury which was the subject of the investigation.

That day, Nakamura supervised a training drill for Raffta and three fellow firefighters designed to simulate the pumping of water from an open source for use in fighting fires. Since locating the fire truck within 25 feet of an open source of water was required, this pier was suitable for the drill. Once the location was established, the drill consisted of attaching three, 10-foot-long, 2.5 inch diameter, rigid-type hoses together, placing one end in the open water source, and attaching the other to the fire truck. Then, the pumping mechanism on the truck was engaged, which required walking back and forth from either side of the fire truck and manipulating controls to obtain the desired pressure. Also, the trainee was required to un-kink fire hoses in between monitoring and adjusting suction pressure valves on the engine. Then, after the drill was over, the employees dismantled the equipment, including the hoses.

³ Sections 3401 through 3411.

Nakamura supervised this drill at least 25 times previously. Its purpose is to prepare engineer candidates for a timed performance examination as part of their promotion to engineer. A qualified engineer would operate the engine in conformity with the drill procedures in the course of firefighting activity. During the approximately two hours of drilling at the pier location, each of the four engineer candidates performed the drill six or seven times.

A pier is the location of choice for conducting this drill because operating the controls on the engine to establish proper atmospheric pressure to pump water up to the truck is more difficult than if the water source was at the same level as the truck. This results in better-trained engineer candidates. On the pier where this training drill was conducted, there was a lower walkway constructed of wood floating on the water, which was located adjacent to the edge of the pier, approximately 12 feet below the top of the pier. At the time of the accident, the drill had concluded and the employees were in the process of putting away the hoses. Nakamura was standing on that lower platform guiding the water end of the hose as it was being retrieved by the drill participants. For reasons that remain unclear, the end of the hose that was attached to the truck became dislodged about this time, and moved uncontrollably across the pier, knocking Raffta off of the pier, and on to the floating wooden walkway 12 feet below. Raffta was hospitalized for more than 24 hours following the accident, and missed approximately 40 days of work.

No fall protection equipment was used that day, nor was fall protection equipment used in the past in performing similar open water pumping drills. Throughout the training, Nakamura supervised and observed the trainees.

ISSUES

1. Does section 3210 apply to fire fighting activities?
2. Does the exception to requiring the use of a personal fall protection system in section 1669(c) apply?

FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

- 1. Since there is no conflict between the specific Safety Orders pertaining to fire fighting activities and the General Industry Safety Order regarding fall protection, section 3210(b) applies and Employer must establish it either provided the required fall protection or fell within an exception.**

Fall protection is required for all employees pursuant to section 3210 of the General Industry Safety Orders. Section 3210, “Guardrails at Elevated Locations”, requires guardrails for buildings and other workplaces that are elevated. Numerous exceptions are also listed. This section applies to all work locations unless a more specific safety order applies that has inconsistent requirements. (§ 3202(a)⁴.)

The Standards Board has enacted safety orders specific to firefighting activities. (Article 10.1, §§ 3401 et seq.) “These Orders establish minimum requirements for personal protective clothing and equipment for fire fighters when exposed to the hazards of fire fighting activity, and take precedence over any other Safety Order with which they are inconsistent.” (§ 3401.) The protective clothing and equipment requirements also apply “during training activities.” (§ 3401(b)(1).) This rule similarly requires that an inconsistency exist between Article 10.1 and the General Industry Safety Orders before non-compliance with the latter is allowed. (§ 3401(a).)

Board precedent has long held that in order for two Safety Orders to be inconsistent, they must conflict. (*Pacific Gas and Electric Company*, Cal/OSHA App. 82-1102, Decision After Reconsideration (Dec. 24, 1986); *Bostrom-Bergen Metal Products* Cal/OSHA App. 00-1012 Decision After Reconsideration (Jan. 10, 2003); *HFS Investments, Inc.* Cal/OSHA App. 96-3079 Decision After Reconsideration (June 6, 2001).) Thus, if activity-specific Safety Orders are silent concerning hazards covered by the General Industry Safety Orders, or can be read consistently with them, the Board does not recognize a conflict.

The General Industry Safety Orders mandate fall protection in the form of railings for work at elevated locations, unless one of many exceptions apply. (§ 3210(a) and (b).) Section 3210(b) states in pertinent part:

Other Elevated Locations. 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. Where overhead clearance prohibits installation of a 42-inch guardrail, a lower rail or rails shall be installed. The railing shall be provided with a toeboard where the platform, runway, or ramp is 6 feet or more above places where employees normally work or pass and the lack of a toeboard could create a hazard from falling tools, material, or equipment.

⁴ “These orders establish minimum standards and apply to all employments and places of employment in California as defined by Labor Code Section 6303; provided, however, that when the Occupational Safety and Health Standards Board has adopted or adopts safety orders applying to certain industries, occupations or employments exclusively, in which like conditions and hazards exist, those orders shall take precedence wherever they are inconsistent with the General Industry Safety Orders hereinafter set forth.”

Exceptions: [¶¶]

5. Elevated locations used infrequently by employees if the employees using them are protected by a fall restraint/fall arrest system used in accordance with the requirements in Article 24 of the Construction Safety Orders.

Thus, the General Safety Orders require railings or personal fall restraint/fall arrest systems for intermittent work at elevated locations.

Article 10.1 created minimum requirements for personal protective clothing and equipment for firefighting activities, but was silent on fall protection for firefighting activities. We see no indication in the language of Article 10.1 indicating the Standards Board intended the simple *omission* of fall restraint systems, including fall protection equipment, from the Article to mean that no fall protection need be provided to firefighters while engaged in firefighting or training activity at elevated work locations. It would therefore be inconsistent with long standing Board precedent to conclude that the two Safety Orders, sections 3401 et seq. and 3210, conflict.

Although we agree with the ALJ that section 3210 applies to firefighting activity, we conclude that she improperly failed to consider the exception encompassed in section 3210(c). That safety order provides a general exception to railings for any employment wherein complying with subsection (b) is impracticable due to equipment or work processes, provided the employer uses an alternate means of protecting employees from falling.

Where the guardrail requirements of subsections (a) and (b) are impracticable due to machinery requirements or work processes, an alternate means of protecting employees from falling, such as personal fall protection systems, shall be used.” (§ 3210(c)).

“A personal fall protection system includes personal fall arrest systems, positioning device systems, fall restraint systems, safety nets and guardrails.” (§ 3207.) This system is one suggested “alternate means” to protect employees from falling, but it is not the only means. By a plain reading of this subsection, an employer may establish the exception if it provides evidence that its equipment or processes made compliance with subsection (b) impracticable, and that alternative fall protection means were implemented.

Alternative means of providing fall protection appear in many places within the regulations. (Subchapter 4 of Title 8, Construction Industry Safety Orders, Article 24 Fall Protection, § 1671.2 Controlled Access Zones, § 1671.1 Fall Protection Plans, § 1671 Safety Nets; Article 25, § 1675 Ladders: “No one shall be permitted to stand and work on the top 3 rungs or cleats of a ladder unless there are members of the structure that provide a firm handhold or the employee is protected by a personal fall protection system (e.g., positioning

device or fall restraint system) in accordance with the requirements of Article 24 (commencing with § 1669) of the Construction Safety Orders.”; Article 29, section 1712, Erection and Construction: “Employees shall not be permitted to place or tie reinforcing steel in walls, piers, columns, etc., more than 6 feet above an adjacent surface, unless a personal fall protection system is used in accordance with section 1670 or *other method affording equivalent protection* from the hazard of falls from elevated surfaces.” (emphasis added); section 1710 Controlled Decking Zones in Structural Steel Erection; section 1716.2 Wood and Light Gage Steel Frame Construction. Residential Light Commercial: “When employees are walking/working on top plates, joists, rafters, trusses, beams or other similar structural members over 15 feet above the surrounding grade or floor level below, fall protection shall be provided by scaffolding, guardrails, a personal fall protection system, *or by other means prescribed by CSO Article 24, Fall Protection.* Exceptions (A) When employees are walking/working on securely braced joists, rafters or roof trusses on center spacing not exceeding 24 inches, and more than 6 feet from an unprotected side or edge, they shall be considered protected from falls between the joists, rafters or roof trusses.” (Emphasis added.))

The alternative measures of Article 24, including Controlled Access Zones and Fall Protection Plans, are alternative means of protecting employees from falling. Also, some safety orders recognize an employer may prove its method “afforded equivalent protection” to the fall restraint or fall arrest system otherwise required. Similarly, the language of subsection (c) is not a mandate that personal fall protection systems be implemented, as is the case in exception 5 to subsection (b). Rather, it is a mandate that alternative means of protecting employees from falling shall be used. By including the phrase “such as personal fall protection systems,” the Standards Board articulates an example of “alternative means.” We conclude from this language a preference for such systems. However, an employer may use additional alternative means of providing fall protection.

There is sufficient evidence in the record to conclude that the railing requirements of subsection (b) were impracticable due to equipment or work processes. The “work process” engaged in by employer was conducting fire drills. Since the drill was designed to simulate as closely as possible a real world emergency, and railings would not be installed in the event of an actual emergency, the drill needed to be conducted without railings. Petitioner argues, and we agree, that the exigencies involved in its work processes deem the railing requirements of section 3210 subdivisions (a) and (b) impracticable. Employer can satisfy the first element of subsection (c).

Employer must satisfy the second element of the general exception. It must show that one or more alternative means of fall protection were employed. We are confident this and other fire fighting organizations have developed detailed procedures for responding to emergencies while maintaining the safest

practicable work environment for their employees. However, Employer did not provide evidence on how safety, and specifically fall hazards, were accounted for in this drill on this day, and so there is no evidence upon which the Board can conclude that alternative means of protecting employees from falling were used.

Nakamura testified that he observed Raffta the entire time he was performing the drill. He testified he had supervised this drill approximately 25 times in the past, and recalled no injuries arising therefrom. He testified that the drill was structured to maximize success of engineer candidates on their timed test operating the truck in like manner. Both he and County Chief Ottman testified that fall arrest systems would provide an entanglement hazard and would not adequately simulate the activity for which the drill was designed to train. Neither witness testified to any means implemented by the Employer to protect employees from falling, and thus there was no evidence of any of the alternative means described in Title 8.⁵ However, section 3210(c) is written broadly enough to allow any alternative fall protection means to be implemented. Even so, the exception does not excuse fall protection entirely

⁵ For example, using a Fall Protection Plan of section 1671.1 requires a showing of 10 items, including that the written plan be at the jobsite.

(1) The fall protection plan shall be prepared by a qualified person and developed specifically for the site where the construction work is being performed and the plan must be maintained up to date. The plan shall document the identity of the qualified person. Note: The employer need only develop a single site fall protection plan for sites where the construction operations are essentially identical.

(2) Any changes to the fall protection plan shall be approved by a qualified person. The identity of the qualified person shall be documented.

(3) A copy of the fall protection plan with all approved changes shall be maintained at the job site.

(4) The implementation of the fall protection plan shall be under the supervision of a competent person. The plan shall document the identity of the competent person.

(5) The fall protection plan shall document the reasons why the use of conventional fall protection systems (guardrails, personal fall arrest systems, or safety nets) are infeasible or why their use would create a greater hazard.

(6) The fall protection plan shall include a written discussion of other measures that will be taken to reduce or eliminate the fall hazard for workers who cannot be provided with protection provided by conventional fall protection systems. For example, the employer shall discuss the extent to which scaffolds, ladders, or vehicle mounted work platforms can be used to provide a safer working surface and thereby reduce the hazard of falling.

(7) The fall protection plan shall identify each location where conventional fall protection methods cannot be used. These locations shall then be classified as controlled access zones and the employer must comply with the criteria in Section 1671.2(a).

(8) Where no other alternative measure (i.e. scaffolds, ladders, vehicle mounted work platforms, etc.) has been implemented, the employer shall implement a safety monitoring system in conformance with Section 1671.2(b).

(9) The fall protection plan must include a statement which provides the name or other method of identification for each employee (i.e., job title) who is designated to work in controlled access zones. No other employees may enter controlled access zones.

(10) In the event an employee falls, or some other related, serious incident occurs (e.g., a near miss), the employer shall investigate the circumstances of the fall or other incident to determine if the fall protection plan needs to be changed (e.g., new practices, procedures, or training) and shall implement those changes to prevent similar types of falls or incidents. (§ 1671.1)

simply because it is impracticable. An employer, such as a fire department needs to provide the Appeals Board with evidence of how it protected its employees from falls in order to avail itself of the exception in 3210(c).

We note that, since the work at the elevated location was intermittent, the Division in its citation referred to exception 5 to section 3210 (b). That exception is inapposite here. It requires the use of personal fall restraint/fall arrest systems, of the kind defined in Article 24, in lieu of railings, if the work is intermittent. It is inappropriate to construe the exception as adopting all of Article 24's fall protection methods and exceptions. If the Standards Board intended all of Article 24 to apply to intermittent work at elevated locations, it would have said so. The phrase "used in accordance with the requirement in Article 24" describes the type of personal fall restraint/fall arrest systems that are acceptable. It does not extend the Construction Industry Safety Orders concerning fall protection to any elevated worksite where work is conducted intermittently. We decline to read exception 5 beyond what the Standards Board intended when it amended section 3210 in 1998.

2. Section 1669(c) is a general exception to the fall protection requirements of Article 24, but does not apply here because Article 24 does not apply to this work activity.

Section 1669(c) has been held to be a general exception to the fall protection requirements of Article 24.⁶ (*Sacramento Erectors*, Cal/OSHA App. 94-2601, Decision After Reconsideration (Mar. 30, 1999); *Ruffco Construction* Cal/OSHA App. 90-1006, Decision After Reconsideration (May 31, 1991).) Therefore the ALJ erred in holding that the exception stated in section 1669(c) applied only to work falling under the conditions specified in section 1669(a).⁷ However, Article 24 applies to construction activity. Firefighting activity is not construction activity. There is no other safety order that extends the entirety of Article 24 to Employer's pumping drill activity on the day of the accident. Therefore, section 1669(c) does not apply.

⁶ Because section 1669(c) addresses the "safety devices required by this *Article*[,] not section, it has been construed to apply to all of Article 24, and not just section 1669. (Emphasis added.)

⁷ The ALJ properly concluded that section 1669(a) was inapplicable. That section applies specifically to "When work is performed from thrustouts or similar locations, such as trusses, beams, purlins, or plates of 4- inch nominal width, or greater, at elevations exceeding 15 feet above ground, water surface, or floor level below and where temporary guardrail protection is impracticable, employees shall be required to use approved personal fall protection system in accordance with section 1670." The pier was not shown to be such a location.

DECISION AFTER RECONSIDERATION

The Board affirms the violation of section 3210(b) and assesses a penalty of \$250.00, adopting the analysis and conclusions of the ALJ regarding the classification of the violation, and vacating portions of that decision inconsistent herewith.

CANDICE A. TRAEGER, Chairwoman
ART R. CARTER, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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