

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

STACY & WITBECK, INC.
1320 Harbor Bay Parkway, Suite 240
Alameda, CA 94502

Employer

Docket No. 05-R1D1-1142

**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 this matter under reconsideration on its own motion, renders the following decision after reconsideration.

JURISDICTION

On October 26, 2004, a representative of the Division of Occupational Safety and Health (the Division) conducted an accident investigation at a place of employment maintained by Stacy & Witbeck, Inc., (Employer) at 10th and Mission Streets, in San Francisco, California following an injury arising from a fall from the bed of a dump truck.

On March 23, 2005, the Division issued a citation to Employer alleging two violations of safety orders found in the occupational safety and health standards and orders found in Title 8, California Code of Regulations.¹ Item 1 alleged a violation of 3210(b) [guardrails at elevated locations,] and Item 2 alleged a violation of 3328(g) [machinery and equipment shall be maintained in a safe operating condition].

Employer filed timely appeals contesting the existence of both violations.

An evidentiary hearing was held on September 29, 2006 before an Administrative Law Judge (ALJ) for the Board. At the hearing, the employer withdrew all of its affirmative defenses and asserted it was only contesting the existence of both violations. The November 22, 2006 Decision concluded that the existence of the 3328(g) violation was not established and granted Employer's appeal accordingly. However, the Decision denied Employer's appeal as to the 3210(b) citation. The ALJ concluded there was no evidence

¹ Unless otherwise specified all section references are to Title 8, California Code of Regulations.

that construction activities were performed on any fixed structure at the rented storage facility where the injury occurred, and that unloading the truck of construction materials was necessitated by the malfunction of the truck. As such, he concluded that the work activity engaged in by the injured employee was not in connection with construction. Thus, he concluded 3210(b) applied. Also, although the height of the floor of the work location where the injured employee worked was not established, the ALJ concluded the employee was exposed to a fall of six and one half feet since that was the height of the top of truck bed side over which she fell. He thus concluded she was exposed to a fall distance hazard of six and one half feet, and upheld the citation.

Employer subsequently filed a petition for reconsideration asserting three theories of error in the Decision. The Division filed an answer to the Employer's Petition. The Board ordered Reconsideration of the ALJ Decision on January 29, 2007.

EVIDENCE

On October 29, 2004, an employee of Employer fell from a dump truck while helping unload construction materials, and injured her wrists. The construction materials were located at a rented storage and loading facility used by Employer to supply its construction project with materials. The construction project being performed by Employer was removal of old water pipes and installation of new water pipes throughout the City of San Francisco. This work occurred at various locations on public streets. The trucks that hauled materials to the various pipe repair locations were also stored at the temporary yard. Crews worked day and night shifts loading and unloading trucks with construction debris and/or construction materials serving the various pipe replacement locations in San Francisco.

While working in the bed of the dump truck to attach a rigging to a bundle of two pipes to be removed by a loader², the injured worker was struck in the face by a two-by-four that became detached from the pipe bundle. Immediately before being struck, the worker moved quickly to the edge of the truck bed attempting to avoid being struck. In the course of that evasive action, she sat atop the tailgate of the dump truck bed, but was hit in the face by the material despite her movement. As a result, she fell out of the truck bed and broke both of her wrists.

The Division witness inspected the accident site approximately four days later. He testified he measured a truck at Employer's place of employment. He photographed the truck he measured. All parties agree the truck actually measured was not the truck involved in the accident. After his measurement of the truck, he approximated the height of the truck as 7' from the top of the side of the bed to the dirt ground below. The top of the side wall of the truck bed he measured had a board increasing the height of the side. The Division inspector

² The dump mechanism was malfunctioning on the truck, thus necessitating the removal of materials by lifting.

identified the board as a “2 by 6”. He did not measure the board separately from the height measurement, (which included the width of the horizontal board) but estimated it as a “2 by 6” from his many years of construction experience. Regarding his 7’ measurement, he considered it an approximation because he recognized there could be kinks in his tape measure, and that the dirt surface varied, so he was not 100% sure, but the distance was very close to 7’, within a “couple of inches.”

Later, the injured worker viewed the photograph of the truck measured by the Division inspector and noted two differences between it and the truck from which she fell. First, the truck from which she fell did not have a board (the 2x6) extending the height of the sides of the truck bed. This testimony, taken with the measurement of the Division inspector, confirms the height of the sides of the dump truck bed actually involved in the accident to be approximately 6 and one half feet high, within a “couple of inches.” The injured worker gave this estimate as well (six and one half feet) based on her familiarity working with the rented dump trucks.

There was no measurement provided by the Division concerning the height of the floor of the truck bed. The Division witness gave an estimate, based on having seen the truck in the photograph, that its sides were two and one half to three feet high. It was never clarified whether or not the two and a half to three foot estimate included the 2x6 attached vertically atop the side of the truck bed the Division inspector observed. No such board was on the truck actually involved in the accident. The floor of the truck bed could be 3 to 3.5 feet below the approximately 7 foot high truck bed side.

Given that the seven foot estimate was within a “couple of inches” of seven feet, and that the “side” may or may not have included the approximately six inches added by the “2 by 6”, the range of possible heights of the truck bed is a low of 3’4” to a high of 4’8” (6’10” less the 3’6” side is 3’4”, and 7’ 2” less 2’6” side is 4’8”). The injured worker gave her lay estimate of the height of the truck bed as “about four feet.” There was no evidence to indicate which of the potential heights in the estimated range is more likely to be accurate than any other potential height.

ISSUES

Does the cited Safety Order apply to the work engaged in at the time of the accident?

FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

Employer argues that the cited safety order (section 3210, a General Industry Safety Order, herein “GISO”) does not apply to the events alleged in the citation, and so the appeal must be granted. Specifically, Employer asserts

a dump truck is a “jobsite vehicle” as defined in section 1504, and thus, under section 1597, must be equipped only in conformance with the Construction Safety Orders (CSOs).³ However, section 1597 applies only to vehicles used on construction jobsites exclusively and which are excluded from the provisions of traffic and vehicle codes. (*Pacific Gas and Electric Company*, Cal/OSHA App. 96-3336 Decision After Reconsideration (Feb. 27, 2001).) Petitioner’s trucks regularly operated on city streets, and thus are not governed exclusively by 1597. Petitioner posits that since the dump truck is “covered” by the CSOs, the dump truck is not covered by the GISOs.⁴ The Division responded, asserting without argument that the ALJ properly determined that the GISO applied, but cites no authority for this position. We consider, then, whether the correct Safety Order was cited.

Labor Code section 6317 requires the Division to cite the applicable safety order. Further, the evidence must show a violation of that safety order. (*Carris Reels*, Cal/OSHA App. 95-1456 Decision After Reconsideration (Dec. 6, 2000).)

The Division must show that employees of the cited employer were exposed to the hazard addressed by the safety order for the violation to be sustained. *Rudolph & Sletten, Inc.*, Cal/OSHA App. 80-602, Decision After Reconsideration (Mar. 5, 1981); *Moran Constructors, Inc.*, Cal/OSHA App. 74-381, Decision After Reconsideration (Jan. 28, 1975). When the Division cites the wrong or an inapplicable safety order, the appeal must be granted. *Bostrom-Bergen Metal Products*, Cal/OSHA App. 00-1012, Decision After Reconsideration (Jan. 10, 2003), *Carver Construction Co.*, Cal/OSHA App. 77-378, Decision After Reconsideration (Mar. 27, 1980), *Johnson Aluminum Foundry*, Cal/OSHA App. 78-593, Decision After Reconsideration (Aug. 28, 1979), *Varsity International Corporation*, Cal/OSHA App. 77-485, Decision After Reconsideration (May 9, 1979).

(*Oakmont Holdings dba Elegant Surface's*, Cal/OSHA App. 04-941, Decision After Reconsideration (Feb. 02, 2007).)

Although the GISOs apply to all employments, the Standards Board has determined that in some employments, different requirements are in force. (3202(a).) Section 1502 defines when the Construction Safety Orders apply.

³ The definition of “jobsite vehicle” is “a vehicle which is operated on a jobsite exclusively and is excluded from the provisions of applicable traffic and vehicular codes, and haulage and earthmoving vehicles regulated by the provisions of Article 10 of these Orders.” The dump trucks were not used exclusively on a jobsite. Rather, they transported materials on city streets from the 10th and Mission temporary storage yard to the various locations where pipe replacement work was being performed. A “haulage vehicle”, also defined in 1504, is a “self-propelled vehicle including its trailer, used to transport materials on construction projects.”

⁴ Employer also argues the evidence does not establish a violation of 3210(b) because an exception applies, and that the ALJ erred in allowing in to the record evidence of a similar piece of equipment to the one involved in the incident that is the subject of the violation. We do not reach these claims of error because of our analysis of the threshold issue of whether the correct Safety Order was cited.

(a) These rules [Subchapter 4, §§1500-1938 of Title 8] establish minimum safety standards whenever employment exists in connection with the construction, alteration, painting, repairing, construction maintenance, renovation, removal, or wrecking of any fixed structure or its parts. These Orders also apply to all excavations not covered by other safety orders for a specific industry or operation.

(b) At construction projects, these Orders take precedence over any other general orders that are inconsistent with them, except for tunnel Safety Orders or Compressed Air Safety Orders.

(c) Machines, equipment, processes, and operations not specifically covered by these Orders shall be governed by other applicable general Safety Orders.

For the CSOs to apply, the work activity must be “in connection with the construction, alteration, painting, repairing, construction maintenance, renovation, removal or wrecking of any fixed structure[.]” The first issue is whether the under-street pipelines are “fixed structures.” “Structure” is defined in section 1504 as: “That which is built or constructed, an edifice or building of any kind, or any piece of work artificially built up or composed of parts joined together in some definite manner.” Under-street water pipelines are pieces of work artificially built up or composed of parts joined together in a definite manner. After they are constructed, the pipelines are not mobile, but fixed. (See *Bethlehem Steel Corp.*, Cal/OSHA App. 76-552, Decision After Reconsideration (May 21, 1981) and *Skyline Homes v. Occupational Safety and Health Appeals Bd.* (1981) 120 Cal. App. 3d 663). Thus, the pipelines are “fixed structures” as the term is used in section 1502, and fall within the definition of “structure” as defined in section 1504.

In accordance with this definition of “structure,” we note the last sentence of sub-section 1502(a) specifically states excavations are covered by the CSOs. Under-street pipe repairs have been covered by the excavation orders within the CSOs in many previous cases. (e.g. *JSA Engineering, Inc.*, Cal/OSHA App. 00-1367, Decision After Reconsideration (Dec. 3, 2002); *Hood Corporation*, Cal/OSHA App. 89-236, Decision After Reconsideration (Jun.22, 1990) [pipe handling procedures, including unloading trucks, governed by CSOs, specifically 1509]; *Mountain Cascade*, Cal/OSHA App. 98-1129, Decision After Reconsideration (Aug. 21, 2001); *Kenko, Inc.*, Cal/OSHA App. 00672, Decision After Reconsideration (Oct. 16, 2002) [vehicle operations in furtherance of pipeline construction project were in violation of Construction Safety Orders, citations affirmed.] Thus, the pipeline work is a type of work covered by the CSOs.

If the activity of the employee is employment “in connection with the” “removal” of the under-street pipe lines, the CSOs apply. (1502.) The character of the work, not its location, determines its connection to

construction, removal, etc., of a fixed structure. (*Kimberly-Clark Corporation*, Cal/OSHA App. 76-1178, Decision After Reconsideration (Feb. 22, 1980); *Sacramento Municipal Utility District* (“SMUD”), Cal/OSHA App. 92-1711 Decision After Reconsideration (Nov. 14, 1995).) In *Kimberly-Clark, supra*, there was construction activity at the site, a sawmill, but the employee was not employed by the construction company, nor doing construction work. He was restarting the mill machinery after the renovation, which was part of his regular work as a mill employee, and thus was not covered by the CSOs.

Similarly, in *SMUD, supra*, the Division had to show “whether [the employee]’s assignment related to any of the types of work listed in section 1502.” (*Id.*) The evidence only showed the employee was filling a water truck at a SMUD location, but there was no construction activity to which the work was tied. Since the tank-filling activity lacked a connection to any construction activity, the GISO applied.

Unlike the employees in *SMUD, supra*, and *Kimberly Clark, supra*, the employee here was at the construction employer’s temporary location performing a task connected to a particular construction activity. The employment activity of the injured employee, as it relates to the construction activity of Employer, is much more like that of the employee in *C.W. Poss, Inc*, Cal/OSHA App. 81-0350, Decision After Reconsideration (Apr. 11, 1985). There, retrieving materials from a construction-site storage container was activity covered by CSOs. The citation for a GISO requiring aisle ways for storage areas was inapplicable to the construction related activity of retrieving materials for use in the construction project, and the employer’s appeal was granted on that basis. Here, because Employer was removing old and installing new water pipes located under city streets, an off-street site was necessary to store materials such as pipes and sand and gravel. The employment activities of unloading, loading and hauling the materials from the storage location on a jobsite to the fixed structure under construction is covered by the CSOs. (*C.W. Poss, supra*, and *Kenko, Inc, supra*.) The injured worker testified the yard existed because Employer had to get the trucks off the street at night, the street being the location of the fixed structures under construction.

Since it is the character of the work, not its location, which determines whether it is construction activity, we conclude the ALJ erred in failing to recognize the injured worker’s employment at the 10th and Mission temporary yard as construction activity subject to the CSOs. The decision distinguishes *C.W. Poss* based on the location of the employee’s activity as being at a location remote from the fixed structure under renovation (footnote 7 of the decision). Location, however, is not the relevant fact in determining whether employment is in connection with construction activity. Had the pipe removal project been at a location that could be closed to the public, and storage of construction materials were possible in a location contiguous with the fixed structure (the pipeline), the distinction relied on in the Decision would vanish. This case is legally indistinguishable from the material-retrieving activity of the employee in

C.W. Poss, supra. That the primary construction activity (i.e. pipe removal and replacement) and the storage yard were, of necessity, at different locations, however, does not alter the character of the work as being in connection with construction activity. (*Pacific Gas & Electric Co, supra; SMUD, supra.*)

To conclude the unloading of the pipes from the material transport vehicle was not connected to any construction activity requires ignoring the fact that Employer's operation at the rented facility existed only because of the need to supply the under-street pipe renovations. There was no evidence of any other purpose for the work activity at the 10th and Mission location besides the pipe line reconstruction. If this location were employer's permanent worksite, where it stored materials in anticipation of unknown future projects, or undertook activity not connected with a particular construction project, such as general hiring, tool storage, or new employee training, for example, then the activity would be more appropriately characterized as unrelated to any *particular* construction activity. This is the rationale in *SMUD* for concluding the CSO did not apply. But when a particular construction activity is supported by material handling directed at the specific project, then such material handling is connected to a specific construction activity. This is the test established by the Standards Board to determine if the CSOs apply. (1502.)

Although the activity is construction activity, in order for the GISO to be the wrong safety order, and thus inapplicable, there must be a CSO that conflicts with the cited GISO. If the applicable CSO is inconsistent with the requirements of a GISO, the CSO controls. (Section 1502.) The activity of working in a truck bed unloading pipes is work at elevated locations.⁵ This activity is addressed in both the cited GISO (3210(b)) and the CSOs (1669-1721). (*Western Roofing Service, Cal/OSHA App. 75-028, Decision After Reconsideration (Apr. 23, 1981).*) Thus, if the CSO applicable to working at elevated locations is inconsistent with the GISO applicable to working at elevated locations, the CSO governs. (*Bostrom-Bergen Metal Products, Cal/OSHA App. 00-1012, Decision After Reconsideration (Jan. 10, 2003).*) Here, the CSOs require employees at elevated work locations to be protected against falls if working at 7.5 feet or higher. (Section 1621.) The GISO governing elevated work locations requires protection of employees at elevated work locations of 4 feet or more. (Section 3210(b) [other elevated locations].) Thus, the two provisions conflict. In such circumstances, section 1502 provides that section 1621 applies. The Citation alleged a violation of section 3210, which is inapplicable. We cannot affirm a citation alleging a violation of a safety order that does not apply. (*Carris Reels, supra.*)

In addition, the evidence does not support a violation of the applicable safety order. The exact height of the work location (the bed of the truck where the materials were located that were being strapped for removal by the injured

⁵ Additional safety orders may also have applied, such as 5042 [employees shall be kept clear of suspended loads] or 1605.14[hoisting machines]. The Division's failure to cite these sections prohibit the Board from imposing penalties for violations thereof. (*Hood Corp, supra.*)

employee) was not established by a preponderance of the evidence. The record indicates the height of the truck bed ranged from 3'10" to 4'6", well below the 7'6" threshold of the applicable CSO. (Section 1621.) Even if the employee was standing and working atop the side of the dump truck bed (estimated at 6'5" in height), a scenario well outside the evidence adduced, such working level still complied with the governing CSO. Thus, the record establishes that a different safety order applied to the work activity in question, and that no violation thereof has been established by the Division.⁶ As such, we hereby grant Employer's appeal of Citation 1, Item 1.

We decline to address Employer's additional arguments as the matter is resolved by the forgoing analysis.

DECISION AFTER RECONSIDERATION

The Board vacates the \$300 penalty for the section 3210(b) violation since the activity engaged in at the time of the accident was transportation activity in connections with the removal and construction of fixed structures, and was governed by a CSO that directly conflicted with the cited GISO. No violation was shown of the applicable CSO. Therefore, Employers appeal of Item 1 is hereby granted.

ART R. CARTER, Chairman
CANDICE A. TRAEGER, Member
ED LOWRY, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: MAY 12, 2011

⁶ In any event, even if the GISO did apply, the evidence is equivocal as to the height of the working level of this employee. The range of heights gleaned from the Division inspector's testimony, and the employee's estimate of "about four feet", fails to show by a preponderance of the evidence that the truck bed where employee was standing and working exceeded the four foot requirement of 3210. The ALJ's conclusion that the employee was exposed to a fall of 6.5 feet because that is the height of the low protective side of the truck over which she fell ignores the requirement of the safety order that working levels that exceed four feet must have guardrails, or fall within an exception thereto. If his analysis were correct, then working levels of one foot surrounded by a four foot wall would expose an employee to falls of five feet, even though the employee is only working one foot off the ground. We must therefore reject his analysis of the fall height as being 6.5. We also reject Employer's argument that it fell within an exception to 3210(b) because installing guardrails on a dump truck is impractical. There is no evidence of the ability or impossibility of installing guardrails, hand holds, or any type of fall protection, and we are prohibited from assuming the existence of facts outside of the record. (See *Western Can Co*, Cal/OSHA App. 83-1987, Decision After Reconsideration (Dec. 22, 1987).)