

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

ESTENSON LOGISTICS LLC
9180 South Kyrene, Suite 107
Tempe, Arizona 85284

Employer

Docket No. 05-R1D4-1755

DECISION AFTER
RECONSIDERATION

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code issues the following Decision After Reconsideration in the above entitled matter.

JURISDICTION

At the times relevant to this proceeding Estenson Logistics LLC (Employer) provided transportation services to Home Depot, a national building products and home improvement retail chain. Commencing on February 15, 2005, the Division of Occupational Safety and Health conducted an inspection of Home Depot's Distribution Center in Fremont, California, a location where Employer's employees worked. On April 12, 2005, the Division issued two citations to Employer alleging violations of occupational safety and health standards codified in California Code of Regulations, Title 8.¹ Citation 1 alleged a Regulatory violation of section 342(a) [failure to report employee's serious injury]. Citation 2 alleged a Serious violation of section 3210(c) [failure to protect employees from falling from flatbed trailer].

Employer timely appealed the citations, and administrative proceedings were held, including an evidentiary hearing before an Administrative Law Judge (ALJ) of the Board.² After the hearing the ALJ issued a Decision on July 28, 2008. The Decision sustained both alleged violations, but held that the Division did not prove the "serious" classification of Citation 2, and accordingly

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

² The hearing was held on two days, May 1, 2007 and March 13, 2008. The ALJ who presided over the first day of hearing left the employment of the Board before the hearing reconvened. The proceeding was assigned to another ALJ pursuant to Board Regulation section 375.1(c). The parties stipulated that the evidence presented at the May 2007 hearing would be incorporated into the hearing record.

reduced it to a “general” violation. The Decision also imposed civil penalties in the amount of \$4,450; \$4,000 for Citation 1 and \$450 for Citation 2.

Both Employer and the Division timely filed petitions for reconsideration, challenging the Decision with respect to Citation 2 only.³ Employer contended it did not violate section 3210(c). The Division contended the Decision incorrectly reduced the violation’s classification from “Serious” to “General.” The Board took both petitions under submission, and stayed the Decision pending the issuance of this Decision After Reconsideration.

EVIDENCE

The Board incorporates by reference the summary of evidence in the Decision. Following is a brief recapitulation of the evidence.

The Home Depot Distribution Center (Center) contracted with Employer to perform the transportation services involved in shipping materials from the Center to Home Depot retail locations in northern California and Nevada.

Employer provides flat bed trailer trucks and truck drivers to take materials from the Center to the receiving retail stores, and occasionally to bring materials to the Center. Approximately 275 to 300 truck loads leave the Center each week. Employer had an office and a supervisor at the Center.

The flat bed trailers Employer used are about four feet wide, eight feet long, and the trailer bed is about four feet above ground level.

When conditions require the materials being transported to be protected from the weather, Employer covers them with polyurethane tarps. Part of the tarping process required one or two persons to climb on the loaded trailer, unfold the tarp, spread it over the materials, and secure it. At the time at issue, Employer contracted with a third company, Mercer Staffing Services (Mercer) to provide personnel to do the tarping when it was required. While Mercer was these individuals’ primary employer, it provided no supervision at the Center; Mercer’s employees were directed in their work at the Center by Employer.

Materials loaded on the trailers are bound together in bundles or stacks. The “packages” of materials are not of uniform sizes, and sometimes one bundle is loaded on top of another. The height and width of the various items on any given trailer are irregular, as is the spacing between the various bundles. When a loaded trailer is covered by a tarp the irregularities are concealed by the tarp.

³ Neither party has challenged the Decision as to Citation 1, which alleged a violation of section 342(a). All issues related to that aspect of the Decision are now waived. (Labor Code section 6618.)

On January 3, 2005, a Mercer employee (Mr. Zapien) working at the Center was assigned by Employer to tarp a loaded trailer. He was working alone at the time. After three or four hours of doing so, he told Employer's on-site supervisor that the tarps were wet, he was working alone, and was concerned about falling because of the wet and slippery conditions. Mr. Zapien (Zapien) requested another person help him with the tarping. Employer's supervisor responded that a second person would be available in about three more hours, and in the meantime Zapien should continue to work alone. Zapien did so.

While he was on top of a loaded trailer to tarp it, Zapien slipped and fell to the ground, a distance of 8 to 9 feet. He was seriously injured. During her investigation of that accident, the Division's inspector observed two Mercer employees putting a tarp over a loaded trailer, standing on the load at a height of 9 feet 2 inches above the pavement. The two men were working without fall protection. The Division cited Employer for both occurrences of working without fall protection, and these administrative proceedings followed.

ISSUES

Whether the Decision correctly upheld the alleged violation of section 3210(c).

Whether the Decision correctly reclassified the violation from Serious to General.

FINDINGS AND REASON FOR DECISION AFTER RECONSIDERATION

I. Existence of the violation.

Section 3210(c) provides: "Where the guardrail requirements of subsections (a) and (b) are impracticable due to machinery requirements or work processes, an alternative means of protecting employees from falling, such as personal fall protections systems, shall be used."

Section 3210(a) applies to buildings, and thus is not applicable to the work location involved here. Section 3210(b) pertains to "[t]he 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[.]" Exception 9 of subsection 3210(b) excepts "mobile vehicles/equipment, where the design or work processes make guardrails impracticable[.]" and further excepts decks and platforms (*inter alia*) of mobile vehicles/equipment where guardrails or handholds are impracticable. It was undisputed that Exception 9 could apply to the trailers, potentially exempting them from the fall protection requirement.

It was also undisputed that Zapien was working at a height exceeding four feet, that the Division inspector observed two men working more than 9 feet above the pavement, and that there were no guardrails, steps, handholds or other structural members on the trailer. (See section 3210(b).) In view of those facts and since the trailers were not buildings (section 3210(a)), if Exception 9 to section 3210(b) does not apply, section 3210(c) applies.

Employer argues in a variety of ways that Exception 9 to section 3210(b) applies, emphasizing in part that it relies on the second sentence of the exception: “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.”⁴ The undisputed evidence, however, is that Zapien was working not “from the deck[]” of the trailer, but on top of the material loaded on the trailer. Therefore, Exception 9 does not apply.

Regarding section 3210(c) itself, Employer advances a number of arguments. It contends that section 3210(c) is an affirmative defense. We disagree. The language of section 3210(c) obligates employers whose employees work at elevated locations where the guardrail requirements of sections 3210(a) and (b) are impracticable to provide an alternative means of fall protection.

We point out, however, contrary to a statement in the Decision, that section 3210(c) does not say or mean that even if an exception to sections 3210(a) or 3210(b) applies fall protection is still required. The language of section 3210(c) does not state that the several listed exceptions do not apply or are superseded, and there is a presumption against repeal by implication. (See *Bill Callaway & Greg Lay dba Williams Redi Mix*, Cal/OSHA App. 03-2400, Decision After Reconsideration (Jul. 14, 2006).) If an exception applies, then fall protection is not required (for example, see Exception 2 to section 3210(b)), or there is no violation if the exception’s requirements are satisfied (for example, see Exception 7 to section 3210(b)). But, in cases where no exception applies and “the guardrail requirements of subsections (a) and (b) are impracticable . . .”, section 3210(c) imposes the obligation to provide an alternative means of fall protection.

Employer also argues that section 3210(c) is too vague to be enforceable. Again we disagree. A safety order will not be held void for uncertainty if any reasonable and practical construction can be given to its language. (*McCurdy Roofing*, Cal/OSHA App. 93-3117, Decision After Reconsideration (Nov. 25, 1997), citing *Novo-Rados Enterprises*, Cal/OSHA App. 75-1170, Decision After

⁴ We assume without deciding that the bed of the trailer is a “deck” or “platform” within the meaning of the quoted sentence.

Reconsideration (May 29, 1981); *Teichert Construction v. California Occupational Safety and Health Appeals Board* (2006) 140 Cal. App. 4th 883.) Section 3210(c) in context requires some means of fall protection be provided. The hazard in question is clear. Section 3210(c) also gives one example of an alternative means an employer may use to provide fall protection. Other possible alternatives in the instant circumstances are to use a two-person crew, to provide ladders or platforms from which to work, or to require employees to stand on the bed of the trailer rather than on the loaded materials when placing a tarp over the loaded trailer. (See *Los Angeles City Fire Department*, Cal/OSHA App. 03-3960, Decision After Reconsideration (Jul. 26, 2010) [listing some alternative fall protection methods].) In this respect, section 3210(c) is a “performance standard.” Its goal is to protect against fall hazards, and it states the way to achieve that goal – providing fall protection – while leaving it to employers to select an appropriate means of doing so, so that the employers can choose the means best suited to the nature of the hazard and the working conditions. (See *MCM Construction, Inc.*, Cal/OSHA App. 94-247, Decision After Reconsideration (Mar. 30, 2000); *Mladen Buntich Construction Co.*, Cal/OSHA App. 85-1668, Decision After Reconsideration (Oct. 14, 1987).)

Employer argues the Division had the burden to show the existence and effectiveness of alternative means of fall protection as part of its prima facie case. Such a requirement would be contrary to the purpose of the safety order, which, as noted above, is to give employers flexibility in selecting the means to achieve the regulatory goal. Moreover, imposing such a requirement risks causing a hearing to devolve into an argument over the feasibility of any option or options the Division might put forth as potential means of compliance, and the further argument that the Division did not exhaustively list *all* options. We do not interpret section 3210(c) to impose such a burden of proof on the Division. Further, given the undisputed evidence that Employer had provided no fall protection at all, and had even instructed Zapien to go on tarping alone even after he expressed concern over the safety of the working conditions and requested someone be assigned to help him, we hold that the Division did not have to prove what Employer could have done.

The foregoing discussion also relates to Employer’s claim that the Division’s abatement requirements were unreasonable. As Employer’s petition itself points out, “the Division did not specify in any manner” what Employer should do to abate the condition. (Petition, p. 6.) Leaving the method of abatement up to Employer is wholly consistent with section 3210(c), in which the California Occupational Safety and Health Standards Board left the means of compliance to be chosen by employers.

We accordingly hold that the Decision correctly determined that Employer was in violation of section 3210(c).

II. Classification of the Violation

The Division alleged the violation of section 3210(c) to be “serious.” The ALJ’s Decision held that the Division had not met its burden of proof regarding the classification, and therefore reduced it to “general” and recalculated the penalty accordingly. The Division petitioned for reconsideration of those aspects of the Decision.

Labor Code section 6432(a) as in effect at the time of the violation⁵ provided in pertinent part that “a ‘serious violation’ shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a violation[.]” Labor Code section 6432(c) further provided: “As used in this section, ‘substantial probability’ refers not to the probability that an accident or exposure will occur as a result of the violation, but rather to the probability that death or serious physical harm will result assuming an accident or exposure occurs as a result of the violation.” Labor Code section 6302(h) defines “serious injury or illness” to “mean any injury or illness occurring in a place of employment or in connection with any employment which requires inpatient hospitalization for a period in excess of 24 hours for other than medical observation or in which an employee suffers a loss of any member of the body or suffers any serious degree of permanent disfigurement[.]”

The Division has the burden of proving the correctness of a “serious” classification of a violation. (*Trio Metal*, Cal/OSHA App. 03-0317, Decision After Reconsideration (Feb. 25, 2009).) Each element of an alleged violation must be established by a preponderance of the evidence. (*Ross Plastering, Inc.*, Cal/OSHA App. 10-2401, Denial of Petition for Reconsideration (May 19, 2011).) Thus, in order to meet its burden of proof that the violation of section 3210(c) was serious, the evidence had to show that it was more likely than not that a fall from the loaded material would result in a serious injury or death. We find there are two reasons why the Division’s evidence was insufficient.

First, as noted above in the summary of evidence and as pointed out in the Decision, although Zapien was working at about 8 feet above the pavement and the other two workers were at about 9 feet, the Division’s witness testified that the consequences of a fall of 10 feet or more would likely be serious. She did not testify that the consequences of falls of 8 or 9 feet would more likely than not be serious. The Board may not assume the existence of a dispositive fact which is not in evidence. (*Barbagelata Farms*, Cal/OSHA App. 09-2083, Denial of Petition for Reconsideration (Sep. 23, 2010).)

⁵ Labor Code section 6432 was amended in 2010, effective January 1, 2011. We apply the statute as in effect prior to the amendment.

Second, a trailer will typically be loaded with materials of different heights. Therefore, falling onto another portion of the load or to the trailer bed itself, as well as to the ground or pavement as happened to Mr. Zapien, was possible, and a fall onto other material or the trailer bed would be of less height. (Decision, pp. 3, 10.) There was no evidence as to how high above other materials on the trailer he was working, or what the consequences of a fall of those lesser distances would likely have been.⁶

Similarly, as to the other two employees later observed to be working without fall protection, the Division's evidence again did not extend to what other fall distances could have occurred. The Division did not show that if a fall were to occur, what the fall distance was likely to be, or that it was more likely than not to be a fall to the ground, or of a distance which would more likely than not result in serious injury. (See *MV Transportation, Inc.*, Cal/OSHA App. 02-2930, Decision After Reconsideration (Dec. 10, 2004) [evidence must show the types of injuries which would more likely than not result from the violative condition].) The Division's evidence covered only one of the several possible falls Zapien or the other two workers might have experienced.⁷ Given the evidence of the manifold varieties of loaded materials, configurations, and heights, we cannot say that the more likely result of any particular fall would be a serious injury, as that term is defined by Labor Code section 6432(a). (*Ross Plastering, Inc.*, *supra*; *Blue Diamond Materials, a Division of Sully Miller Construction*, Cal/OSHA App. 02-1268, Decision After Reconsideration (Dec. 9, 2008).)

The Division argues that the Board must assume a worst case event, in this case that the fall would be to the pavement, citing *Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (Apr. 24, 2003). In *Benicia Foundry, supra*, the Board upheld a violation alleging exposure to the hazardous condition of a dust or particulate explosion. Employer argued that since no explosion had occurred one could not assume the hazard involved exposure to a serious hazard. The Board disagreed. It held that when analyzing the likely effects of an accident, Labor Code section 6432 requires assuming an accident occurs. In *Benicia Foundry, supra*, the choice was binary: there either would or would not be an explosion, and the Labor Code required the assumption that an explosion would occur. In the instant situation, however, there was a multiplicity of possible accidents – i.e. falls of varying distances – which could have occurred, but no evidence regarding the relative probability of each, or of the consequences of each. Therefore, *Benicia Foundry, supra*, is inapposite.

⁶ We can infer that if Zapien was about 8 feet about the ground when he fell, and the trailer bed was 4 feet high, the farthest he could have fallen to the truck bed itself was about 4 feet. If he fell onto other loaded material, they of course, being on the trailer bed, would have resulted in a shorter fall.

⁷ As the Decision noted, "The fall distance may range from 4 feet to a little over 9 feet. It is not necessarily true that an employee working on the top of a load will fall to the surface on which the truck is parked. . . . Thus, there is a wide range of possible injuries, some more severe than other." (Decision, p. 20.)

Accordingly, we hold the ALJ correctly held that the Division did not meet its burden of proof respecting the serious classification of the violation, and also affirm his recalculation of the civil penalty.

DECISION

The Decision of the ALJ finding Employer had violated section 3210(c) and reducing the classification of the violation to “general” and reducing the civil penalty therefor to \$450 is affirmed and reinstated.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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