

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

In the Matter of the Appeal of:

CABRILLO ECONOMIC
DEVELOPMENT CORP.
702 County Square Drive
Ventura, CA 93011

Employer

Dockets. 11-R4D3-3185 and 3186

**DECISION AFTER
RECONSIDERATION
and
REMAND**

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) matter under submission, renders the following decision after reconsideration.

JURISDICTION

Beginning on August 15, 2011, the Division of Occupational Safety and Health (Division) conducted an accident inspection at a construction site in Piru, California maintained by Cabrillo Economic Development Corporation (Employer). On December 9, 2011 the Division issued two citations to Employer alleging violations of workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.¹

This Decision After Reconsideration concerns Citation 2, alleging a Serious violation of section 1632(b)(1), failure to guard a floor opening.

Employer filed timely appeals of the citations.

Administrative proceedings were held, including a contested evidentiary hearing before an Administrative Law Judge (ALJ) of the Board. After taking testimony and considering the evidence and arguments of counsel, the ALJ

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

issued a Decision on March 29, 2013. The Decision granted Employer's appeal of Citation 2.²

The Division timely filed a petition for reconsideration of the ALJ's Decision.³ The Employer filed an answer to the petition.

ISSUE

Are the terms of Section 1632(b)(1) and Section 1716.2(f) inconsistent safety orders which precludes compliance with both requirements?

EVIDENCE

The Decision summarizes the evidence adduced at hearing in detail. We summarize that evidence briefly below, focusing on the portions relevant to the issue presented.

On August 3, 2011, David Martinez Ochoa (Martinez) was engaged in work on the second floor of a four-unit residential building project.⁴ Martinez testified that he was working with a brace and a nail gun, looking for a spot to install a brace, when he stepped into the empty space where the stairs would later be located, and fell approximately 12 feet to the cement foundation.

Division Inspector Jeff Magro (Magro) testified that the working surface where Martinez was working on the day of the accident was 11 feet from the first floor. Senior Safety Engineer Joel Foss (Foss) explained that residential framing generally begins with layout of walls. Framers then follow the layout and assemble the wall, placing the studs, nailing the pieces together, put blocking in, and then stand the walls and temporarily brace them. Next, a plumb and line crew will line the walls, put in beginning hardware, set beams, and prepare the walls for installation of trusses or ceiling joists. Magro also stated that in his experience, fall protection systems are not used to guard against falls through floor openings, and that workers generally orient themselves to the edges of a building, but may be less aware of floor openings in an interior.

² The parties agreed to bifurcate the case, and to accept the decision in a companion case, *Mid-Coast Builders Supply, Inc., dba Mid Coast Builders, Inc.* on the legal question in Citation 2: if section 1632(b)(1) or section 1716.2(f) applied to the violation. Should the ALJ find for the Division, the parties agreed they would hold further proceedings to determine whether Cabrillo Economic Development Corp. had been correctly cited. As the ALJ found for the employer in that case, no further proceedings were held.

³ The Board found that the Division did not timely file its petition for reconsideration in the companion case, *Mid-Coast Builders Supply, Inc., dba Mid Coast Builders, Inc.* (*Mid-Coast Builders Supply, Inc., dba Mid Coast Builders, Inc.*, Cal/OSHA App. 11-2780, Denial of Petition for Reconsideration (Apr. 10, 2013).)

⁴ The parties agreed to submit the transcript from the *Mid-Coast Builders Supply, Inc.*, matter into evidence. (Ex. 4). That transcript was used to establish basic facts related to the accident and investigation which followed. (Decision, p. 3).

DECISION AFTER RECONSIDERATION

In making this decision, the Board relies upon its independent review of the entire evidentiary record in the proceeding. The Board has taken no new evidence. The Board has also reviewed and considered Division's petition for reconsideration and the Employer's answer to it.

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.

Division petitioned for reconsideration on the basis of Labor Code section 6617(c) and (e).

The Division cited employer for a violation of section 1632(b)(1), a construction safety order, which states in full: Floor, roof and skylight openings shall be guarded by either temporary railings and toeboards or by covers. Employer argues that the appropriate, and more specific, safety order is 1716.2(f):

Work on Floors and Other Walking/Working Surfaces. When working on floors and other walking/working surfaces that will later be enclosed by framed exterior walls, employees directly involved with the layout and construction of framed stud walls shall be protected from falling by standard guardrails as specified in Section 1620 around all unprotected sides or edges, or by other means prescribed by CSO Article 24, Fall Protection, when the floor or walking/working surface is over 15 feet above the surrounding grade or floor level below.

Testimony and photographic evidence establish that Martinez fell through a stairway floor opening, which had only been in place for two days prior to his accident.⁵ (See, *G.T. Alderman, Inc.*, Cal/OSHA App. 05-3513, Decision After

⁵ The parties dispute whether the gap in the floor, which Martinez fell through, was an "opening" under the terms of 1632. In section 1504, the "definitions" section of the Construction Safety Orders, "opening" is defined as follows: An opening in any floor or platform, 12 inches or more in the least horizontal dimension. It includes: stairway floor openings, ladderway floor openings, hatchways and chute floor

Reconsideration (Nov. 22, 2011). [Stairway openings specifically listed in definition of opening], *Duke Pacific, Inc.*, Cal/OSHA App. 08-574, Decision After Reconsideration (Aug. 30, 2012) [Definition of opening encompasses leaving a portion of a surface “open” while covering surrounding area].) At the time of the Division’s investigation, a stairway had been installed in the opening. (Ex.s 3B, 3C, 3D). “Plumb and line work” includes aligning walls and studs, installing hardware, setting beams, and preparing walls for installation of trusses or ceiling joists. Plumb and line work-- in this instance aligning a stud wall-- is one of the steps or operations involved in residential framing. Thus, the Board finds that Martinez was performing framing work when he fell through a floor opening and was seriously injured.

Employer is correct that where two safety orders apply to the same hazard and there is a conflict in the safety orders, the Division is obligated to cite the more specific safety order. (*Tutor-Saliba-Perini*, Cal/OSHA App. 97-3209, Decision After Reconsideration (Apr. 24, 2003).) Both safety orders address the hazard of employee falls, with section 1632(b)(1) having no trigger height, and section 1716.2 creating a fifteen foot trigger height for utilization of fall protection equipment in residential framing activities. (Ex. C, *Notice of Public Meeting/Public Hearing/ Business Meeting of the Occupational Safety and Health Standards Board and Notice of Proposed Changes to Title 8 of the CA Code of Regulations*, Nov. 20, 2003).⁶ Employer argues that the two safety orders are inconsistent, and therefore the more specific safety order should be applied. (See, *Stacy & Witbeck, Inc.* Cal/OSHA App. 05-1142, Decision After Reconsideration (May 12, 2011).

The rulemaking file from the Occupational Safety and Health and Safety Standards Board establishes that the purpose of amendments to section 1716.2 were to create a uniform fall protection trigger at 15 feet for residential wood and light gage steel frame construction, to promote compliance and lessen confusion as to when fall protection equipment is required. (Ex. C). Section 1632(b)(1) cited by the Division, however, both serves to protect employees and keep tools and equipment from falling into unguarded openings, protecting those who may be crossing or working in the area below, and contains no height trigger. (*MCM Construction, Inc.*, Cal/OSHA App. 89-482, Decision After Reconsideration (Feb. 21, 1991).) This purpose is stated in section 1632(a), and is reiterated throughout section 1632.

It is not uncommon for more than one safety order to apply to a particular set of facts. Applying principles of statutory construction, the Board will only find that a more specific safety order is controlling where there is an

openings. (Emphasis added.) An “unprotected side and edge” on the other hand, is defined by section 1504 as: Any side or edge (except at entrances to points of access) of a walking/working surface, e.g., floor, roof, ramp, or runway where there is no wall or standard guardrail or protection provided.

⁶ The Board finds that the ALJ properly took official notice of rulemaking materials from the CA Division of Occupational Safety and Health Standards Board, under evidence code section 1280.

actual conflict between the two safety orders. (*Vernon Melvin Antonsen & Colleen K. Antonsen, individually and dba Antonsen Construction*, Cal/OSHA App. 06-1272, Amended Decision After Reconsideration (Aug. 30, 2012).) Where it is possible to read the safety orders so that they are in harmony with one another, the Board will do so. (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 476-478). Employer has failed to demonstrate a true conflict between the two safety orders. (*Tudor-Saliba-Perini*, Cal/OSHA App. 97-3209, Decision After Reconsideration (Apr. 24, 2003).

Section 1632 applies to “the static hazard of an existing opening”, which creates both the danger of an employee accidentally walking into the hole, as well as debris sliding onto the lower level, injuring those who may be below. (*The Herrick Corp.*, Cal/OSHA App. 07-0495, Decision After Reconsideration (Mar. 26, 2012).) As discussed by the Board in *Vance Brown, Inc.*, Cal/OSHA App. 00-3318, Decision After Reconsideration (Apr. 1, 2003), unlike section 1716.2(f), “in addition to fall protection, section 1632(b) provides protection against other objects, such as tools, falling below the floor, roof, or skylight openings.” By definition, the area where the employee fell was a stairwell floor opening. (See, section 1504). As such, section 1632 applies to the opening. While there are overlapping purposes to the two safety orders, the hazards identified by the two orders are not identical, and create no direct conflict. The Board interprets safety orders in a manner consistent with the purpose of the Act, which is to achieve a safe working environment for all Californians. (*Davey Tree Service*, Cal/OSHA App. 08-2708, Denial of Petition for Reconsideration (Nov. 15, 2012).)

Section 1716.2(f), which mandates use of guardrails or personal fall protection when framing work is being done over 15 feet, does not create any inherent conflict with the requirement to guard openings found in section 1632. There was no violation of the section, as the employee who fell was not required to wear fall protection at the height he was working at. Nor were the unprotected sides or edges of the building required to be guarded, as the framing was not being done at a height over 15 feet. However, section 1632(b)(1), which applies to stairwell openings, includes no such height trigger, nor does it exclude framing work from its mandate; the Division properly alleged a violation of this safety order, and the Board finds a violation.

While the Board recognizes that interpreting the safety orders is not always a simple task, in this instance compliance with the terms of section 1632(b)(1) by covering or guarding floor openings does not prevent an employer from also complying with section 1716.2. It is both possible, and reasonable, to give concurrent effect to both safety orders. (See, *Garcia v. McCutchen* (1997) 16 Cal. 4th 469, 476-478). Only where there is an actual conflict between the orders will a more specific safety order control over the more general; that not being shown in this instance, Employer’s defense therefore

fails. (*Bostrom-Bergen Metal Products*, Cal/OSHA App. 00-1012, Decision After Reconsideration (Jan. 10, 2003).)

Additionally, the Board is not convinced that section 1716.2(f) is more specific than section 1632(b)(1). Section 1632(b)(1) requires guarding of “[f]loor, roof and skylight openings...” Section 1504 defines “opening” to include “stairway floor openings.” In short, section 1632(b)(1) specifically pertains to protecting stairway floor openings such as the one that Martinez fell through. In contrast, section 1716.2(f) requires guardrails (or other appropriate protection) around “all unprotected sides or edges...” over fifteen feet in height during framing activities. The latter regulation appears to be a more-generalized guideline, applicable during the framing process, whether the working floor contains openings or not, and does not specifically address the floor opening hazard. Under the circumstances of this case, we conclude there is no conflict among the two regulations, and so Employer must comply with both.

The Board finds that section 1632(b)(1) was appropriately cited in this instance. We return the issue to hearing operations for further proceedings to determine whether Employer was the properly cited entity, as per the stipulation of the parties.

ART CARTER, Chairman
ED LOWRY, Board Member
JUDITH S. FREYMAN, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: OCTOBER 16, 2014