

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

In the Matter of the Appeal of:

WEST VALLEY CONSTRUCTION, INC.
2793 S. Golden State
Fresno, CA 93727

Employer

Docket. 12-R2D5-3526

**DENIAL OF PETITION
FOR RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code hereby denies the petition for reconsideration filed in the above entitled matter by West Valley Construction, Inc. (Employer).

JURISDICTION

Commencing on August 23, 2012, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On November 28, 2012 the Division issued a citation to Employer alleging a general violation of section 1629(c)(3) of the occupational safety and health standards codified in California Code of Regulations, Title 8.¹

Employer timely appealed.

Thereafter administrative proceedings were held before an Administrative Law Judge (ALJ) of the Board, including a duly-noticed contested evidentiary hearing held on November 6, 2013.

On February 24, 2014, the ALJ issued a Decision (Decision) sustaining the alleged violation and denying Employer's appeal.

Employer timely filed a petition for reconsideration.

The Division did not answer the petition.

¹ References are to California Code of Regulations, Title 8 unless specified otherwise.

ISSUE(S)

Was the Decision correct in finding Employer had violated section 1629(c)(3)?

REASON FOR DENIAL OF PETITION FOR RECONSIDERATION

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.

Employer's petition asserts that the ALJ acted in excess of powers, the evidence does not justify the findings of fact, and/or the findings of fact do not support the Decision.

The Board has fully reviewed the record in this case, including the arguments presented in the petition for reconsideration. The Board has taken no new evidence. Based on our independent review of the record, we find that the Decision was based on a preponderance of the evidence in the record as a whole and appropriate under the circumstances.

The Decision provides a detailed summary of the evidence, which we briefly summarize here for convenience. The Division's inspector observed one of Employer's employees working in a manhole, said to be twelve feet deep, below street level. He was standing on top of an A-frame ladder. He entered and exited the manhole by using a different ladder which extended from the bottom of the manhole to a point about a foot below the street surface, which was considered the "landing" level for the ladder. The employee was wearing a harness which was attached by rope or cable to a tripod device which was intended to serve as an emergency rescue device – that is, it could be operated to pull or lift the attached employee out of the manhole in the event the employee was disabled by noxious gases or other hazards down hole. Employer presented testimony that the tripod would also limit the distance the employee would drop or fall, in the event he did so, to less than one foot.

Section 1629(c)(3) states: “Side rails of all ladders shall extend at least 3 feet above the landing or level they serve.” The elements of a violation are (1) use a ladder which (2) does not extend the required distance above the landing level. Those elements were established by the evidence, and are not in dispute.

Employer makes several arguments in its petition. It argues that the Division did not establish any of its employees were exposed to the hazard intended to be addressed by the safety order because the use of the tripod device would have protected the employee from falling; that it was impractical to use a ladder of the required length because of the depth and other dimensions of the manhole; that there is a conflict between § 1629(c)(3) and section 3276(e)(9); and that the Decision engaged in speculation in finding employee exposure.

The purpose of the ladder side rail requirement is to make it safer for employees to mount or dismount a ladder. The extended side rails provide something to hold on to rather than stepping onto or off of a ladder with nothing to use for support.

It is not disputed that Employer’s employee was exposed to the hazard presented by the too short ladder. Other employees at the site who had access to the ladder were also exposed. They were in the “zone of danger” created by the ladder. (*Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (Apr. 24, 2003) [exposure may be proven by showing the hazard accessible to employees].) Although the other employees were not seen to use the ladder, they had access to it. We consider the Decision’s discussion of other employees’ exposure to be an acknowledgment of the zone of danger principle rather than speculation as Employer argues. Moreover, the Decision’s discussing the topic is part of a natural response to Employer’s argument that the tripod device protected the employee from the hazard posed by the too short ladder.

The presence and use of the tripod device itself does not satisfy section 1629(c)(3)’s requirements. That section contains no provision which might allow that substitution. There is no language in section 1629(c)(3) providing an exception to the safety order’s requirement that a ladder extend at least 36 inches above the landing level. And an employer may not substitute its own safety measure for the one required by a safety order. (*Empire Pro-Tech Industries*, Cal/OSHA App. 07-2837, Denial of Petition for Reconsideration (Aug. 19, 2008).)

Employer argues that if it had used a ladder long enough to extend 3 feet above street level, the ladder would have been almost vertical, and thus violated what Employer claims is section 3276(e)(9)’s requirement that ladders be used at an angle or “pitch” such that the horizontal distance from the top of the support to the foot of the ladder is one-quarter of the length from bottom to

top support. The support in this case would be the point at which the longer ladder would have reached the top of the hole, a distance of 12 feet, and thus the foot of the ladder would be 3 feet (one quarter of 12) from the wall of the manhole. (Such a ladder would have been at an angle of about 14.5 degrees from vertical.)

Even if section 3276(e)(9) were to apply, we note that it states that such a pitch be established “where possible[.]” Employer’s argument, therefore does not take into account the full text of the safety order. (*Donley v. Davi* (2009) 180 Cal.App.4th 447, 465 [rules of regulatory construction require each word and phrase be given meaning]; *Sully-Miller Contracting Company v. California Occupational Safety and Health Appeals Bd.* (2006) 138 Cal.App.4th 684, 695.) Further, it appears from the text of § 3276(e)(9) that a ladder long enough to have the necessary side rail length, even if its pitch were more vertical than approximately 14.5 degrees, can be used if it is secured to prevent slipping. Thus, in the context of § 3276(e)(9) it is not the angle which is of concern but the risk of slippage – *i.e.* the stability of the ladder. Moreover, section 3277 [fixed ladders] allows installation and use of vertical ladders, giving further support to the view that the stability, not the angle, of the ladder is the chief safety concern.

The side rail requirement of section 1629(c)(3) can be satisfied without violating section 3276(e)(9). We find, therefore, that in the present circumstances there is no conflict or inconsistency between sections 1629(c)(3) and 3276(e)(9).

DECISION

For the reasons stated above, the petition for reconsideration is denied.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: MAY 5, 2014