

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

DISH NETWORK
CALIFORNIA SERVICE CORPORATION
10010 Remmet Avenue
Chatsworth, CA 91311

Employer

Docket No. 12-R4D3-0455

**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 the petition for reconsideration filed by Dish Network California Service Corporation (Employer) matter under submission, renders the following decision after reconsideration.

JURISDICTION

Beginning on August 17, 2011, the Division of Occupational Safety and Health (Division) conducted an accident inspection at a residence in Ventura, California where Employer had been installing a satellite television system. On January 20, 2012, the Division issued a citation to Employer alleging a violation of workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.¹

The citation alleged a Serious violation of section 1637(a) [scaffold not provided where work could not be done safely by Employee standing on solid construction at least 20 inches wide].

Employer filed timely appeals of the citation.

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 issued a Decision on June 25, 2013. The Decision denied Employer's appeal and upheld its Serious classification, imposing a civil penalty of \$18,000.

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

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

ISSUE

Did the ALJ correctly interpret the exception to Section 1637(a)?

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 July 11, 2011, Employee John Finerty (Finerty) was engaged in the installation of a cable television dish at a residential location where the homeowners requested the cable wiring be run through the attic. Finerty entered and exited the attic several times as he attempted to drill a hole in the exterior of the home and pull the cord into the attic. On his last visit to the attic, Finerty, who had to crawl at several points in the attic, lost his footing on the joists and fell through the drywall panel forming the ceiling.

The parties do not dispute that Finerty fell slightly over 9 feet through the ceiling and onto bedroom furniture, breaking a lamp before hitting the floor. The attic joists were approximately 2 inches wide and spaced 20 inches apart. Finerty testified that he was hospitalized for four days following the accident, and has permanent damage to his lower back. Finerty also testified that he had been trained to call a supervisor in the event of a work assignment being dangerous, but he had not viewed the attic as dangerous and had worked in attics before, both with his current Employer and in past work in the electrical field. He recalled training he had received from Employer on attics, and specifically recalled that employees were required to contact a manager prior to entering a hot attic, because of the danger of passing out.

Division Associate Safety Engineer Terry Hammer (Hammer) testified that cable installation is considered construction. She explained that a California state contractor's "C-7" license is required to perform the work, and that Federal OSHA also classifies the work as construction.

Forrest Rhodes (Rhodes) testified for Employer. According to Rhodes, there are 100 technicians in the region who report to field managers, who then report to operations managers, who ultimately report to Rhodes. Rhodes was responsible for training Finerty, and testified that Finerty was issued a mobile phone as well as a computer tablet. He stated on cross-examination that if an employee were to call regarding entry to an attic, the first question would be if there is another way to accomplish the work without entering the attic space. If the entry is necessary, Rhodes testified that the supervisor would go over attic training with the employee on the phone prior to the entry. Rhodes testified that it would depend on the circumstances whether or not a

supervisor would physically meet the employee at the location where the attic entry was to occur. Rhodes was located at an office about one hour from the territory where Finerty generally worked.

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 Employer's petition for reconsideration and the Division'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.

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

The Division cited Employer for a violation of section 1637(a), which requires scaffolding for certain work. Employer in its petition for reconsideration does not dispute the applicability of section 1637(a) to the work performed by Employer's installers. At hearing before the ALJ, after much testimony regarding the applicability of the Construction Safety Orders generally to Employer's business, Employer agreed with the Division that the question to be decided by the ALJ was if Employer had proved the exception found in 1637(a)(1). The section 1637 construction safety order reads in full as follows:

- (a) Scaffolds² shall be provided for all work that cannot be done safely by employees standing on permanent or solid construction at least 20 inches wide, except where such work can be safely done from ladders.

² Scaffold is defined in the Construction Safety Orders Section 1504 as: (A) Scaffold. Any temporary, elevated structure used for the support of a platform.

NOTE: The term "scaffold" is used with inclusion of the platform and all supporting members when reference is made to loading factors.

Exceptions:

1. Work of a limited nature and of short duration when the permanent or solid construction is less than 20 inches in width and the fall distance does not exceed 15 feet in height and provided adequate risk control is recognized and maintained under competent supervision.
2. Work of a short duration from joists or similar members at 2 feet or closer centers, planks resting on these members forming a plank platform 12 inches wide or equivalent protection.

The ALJ found that the Employer had not met the exception and a violation of the safety order was established.

The Division must first establish a violation of the safety order, and as part of this showing must demonstrate the applicability of the safety order to the facts of the alleged violation. (*Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (Jun. 16, 1983), *C.A. Rasmussen*, Cal/OSHA App. 95-943, Decision After Reconsideration (Aug. 26, 1997).) The Board applies the principles of statutory interpretation when determining the intent of the drafters of a regulation such as the one before us in this instance. "If the statutory language is unambiguous, 'we presume the Legislature meant what it said, and the plain meaning of the statute governs.' (Citations.)" (*Michels Corp, dba Michels Pipeline Construction*, Cal/App. 07-4274, Denial of Petition for Reconsideration, (Jul. 20, 2012), citing *People v. Toney* (2004) 32 Cal.4th 228, 232).

The safety order alleged by the Division is classified as a Construction safety order (or "CSO"). The CSOs govern certain activities:

- (a) These Orders 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.

It is undisputed that Employer was required to hold a valid state contractor's license to engage in the dish installation work. Moreover, Employer utilized various tools which altered the fixed structure (the home) in order to install the dish and its cable. While other safety orders may be more applicable, the work at issue does fall under the construction safety orders.³

³ The Board notes that the Division's reliance on OSHA STD 03-00-001 *Interim Fall Protection Compliance Guidelines for Residential Construction* is misplaced. The guidance, which lists installation of certain

However, the Board finds that the Division has not shown the applicability of the safety order to the facts herein. The plain language of section 1637(a) requires an employer to erect a scaffold during construction work. As the Division's inspector Hammer testified during cross-examination, erection of a scaffold in the attic was not possible. There is little in the record related to scaffolding outside of Hammer's concession that it could not be used in an attic. As the safety order requires scaffolding to be provided as a platform on which an employee may safely stand to work (or alternately a ladder), and a scaffold is not suitable for the work space at issue, the safety order on its face does not apply to these facts. The language of section 1637(a) does not appear to contemplate application to the low attic of a finished residence.

The Board has consistently held that it cannot read terms into or out of a safety order that the Standards Board has crafted, and in this instance the parties have read the term "exception" out of section 1637. (See, *Webcor Construction LP*, Cal/OSHA App. 08-2365, Denial of Petition for Reconsideration (Sept. 2, 2010).) Before an exception to a rule may be asserted, the actual rule must be shown to be applicable to the situation at hand. While scaffolding is an appropriate means of fall protection in various construction activities, the Division has failed to show how scaffolding is applicable to the enclosed, finished attic described in this case. The Board may not read the safety order so that the exception "consumes the rule". (See, *Thyssenkrupp Elevator Corp.*, Cal/OSHA App. 11-2217, Denial of Petition of Reconsideration (Mar. 11, 2013) [Reading of exception that "consumes the rule" is an absurd interpretation and is disfavored under rules of statutory construction]).

The ALJ, in reading the "exception" out of the safety order and converting it into the rule, noted that the safety order was "awkwardly drafted". (Decision, p. 6). This re-working of the plain language of the safety order in order to apply it to the facts of the citation is not within the authority of the Board. An exception to a safety order is an affirmative defense, by which the Employer may demonstrate that it is in compliance with an authorized exception to the general rule—after the Division has shown a violation of the cited safety order. (*California Erectors, Bay Area, Inc.*, Cal/OSHA App. 93-503, Decision After Reconsideration (Jul. 31, 1998).) Here, the Division has failed to meet its initial burden of demonstrating the applicability and a violation of the safety order cited; the Board need not reach the issue of Employer's compliance or noncompliance with the exception. In this instance, the appropriate recourse

electrical systems "when performed in attics and on roofs" as subject to alternative fall protection standards, was repealed by Federal OSHA effective June 16, 2011. (Div. Ex. 8). Federal OSHA's general fall protection standards vary significantly from those promulgated by the Cal/OSHA Standards Board, and include language requiring Employers to determine if walking/working surfaces in attics have the strength and structural integrity to support workers safely. (See, 29 CFR 1926.501(a)(2)).

for the Division may be to the Standards Board, to request promulgation of a standard, rule, or regulation which addresses the alleged hazard at issue.

Therefore, we grant Employer's appeal.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: AUGUST 28, 2014