

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

In the Matter of the Appeal of:

PAR ELECTRICAL CONTRACTORS, INC.
440 Carson Mesa Road
Palmdale, CA 93550

Employer

**DOCKETS 13-R4D3-2357
through 2359**

DECISION

Statement of the Case

PAR Electrical Contractors, Inc. (Employer) is an electrical contractor. Between February 25, 2013 and July 17, 2013, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer Arsen Sanasaryan, conducted a safety inspection at a place of employment maintained by Employer at Construction site #54 of SCE TRT Project, Los Angeles, California (the site). On July 17, 2013, the Division cited Employer for six violations of the California Code of Regulations, title 8.¹

Employer filed a timely appeal contesting the existence of the alleged violations, the classifications, and the reasonableness of the proposed penalties. Employer also pleaded numerous affirmative defenses.²

Prior to the hearing on the citations, the Employer and the Division reached a partial settlement in the case, and proceeded to hearing on the sole remaining citation.³

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

² Employer pleaded affirmative defenses as listed in the appeal form but did not present any evidence in support of the affirmative defenses at the hearing. An issue not properly raised on appeal is deemed waived. (See section 361.3 ("Issues on Appeal") and Western Paper Box Co., Cal/OSHA App. 86-812 Decision After Reconsideration (Dec. 24, 1986).)

³ The parties reached settlement on Citation 1, Item 2, Citation 1, Item 3, Citation 1, Item 4, Citation 2, Item 1, and Citation 3, Item 1. Citation 1, Item 1 remained as the sole issue for hearing. The terms of the settlement are listed in the Summary Table Decision *infra*.

This matter came regularly for hearing before Clara Hill-Williams, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at Van Nuys, California on August 25, 2015. Attorney Robert B. Humphreys, of Akin Gump Strauss Hauer & Feld LLP, represented the Employer. James D. Clark, Division Staff Attorney, represented the Division. The parties stipulated to filing post hearing briefs in lieu of closing arguments due on September 25, 2015, with reply briefs due on October 9, 2015. The ALJ extended the submission date to March 11, 2016.

Issues

1. Did Employer violate section 341, subdivision (d)(4), when it did not obtain a Project Permit from Cal/OSHA prior to commencing erection of a structure intended to be more than 36 feet when completed?

Findings of Fact

1. Employer did not obtain a Project Permit before commencing the erection of the steel electrical transmission tower.
2. The steel electrical transmission tower at the site measured more than 36 feet high.
3. Southern California Electric (SCE) hired Employer to erect electrical transmission towers as part of the Tehachapi Renewable Transmission Project (TRTP).⁴
4. SCE had overall responsibility for the entire TRTP project.
5. Employer did not have overall onsite responsibility for the planning, quality, management, or completion of the project.
6. Employer was a subcontractor employer engaged in limited activities that only required obtaining an Annual Permit.⁵
7. The penalty calculations were correctly determined in accordance with the Division's policies and the California Code of Regulations.⁶

Analysis

- 1. Did Employer violate section 341, subdivision (d)(4), when it did not obtain a Project Permit from Cal/OSHA prior to commencing erection of a structure intended to be more than 36 feet when completed?**

⁴ The TRTP is a substantial electrical infrastructure project. The purpose of the project is to build an electrical transmission line to bring renewable energy from wind farms in Kern County into Los Angeles and San Bernardino County.

⁵ Exhibit B.

⁶ The Division submitted this document as Exhibit 2, with no objection from Employer.

Citation 1, Item 1 alleges a regulatory violation of section 341, subdivision (d)(4) that states:

(d) Work activities subject to permit requirements and the types of permits required to conduct the activities.

(4) To conduct any of the following activities on a structure intended to be more than 36 feet high when completed, the Project Administrator shall hold a Project Permit and all other employers directly engaging in these activities shall hold an Annual Permit:⁷
[...]

The Division's AVD (alleged violative description) reads as follows:

During the investigation initiated on February 25, 2013 the Division determined that employer did not have a Project Permit from Cal/OSHA prior to commencing erection of [an] electrical transmission tower, which is intended to be more than 36 feet high when erection completed.

The Division has the burden of proving a violation, including the applicability of the cited safety orders, by a preponderance of the evidence.⁸ (*Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).) "Preponderance of the evidence" is usually defined in terms of probability of truth, or of evidence that when weighted with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence. (*Lone Pine Nurseries*, Cal/OSHA App. 00-2817, Decision After Reconsideration (Oct. 30, 2001), citing *Leslie G. v. Perry & Associates* (1996) 43 Cal.App. 4th 472, 483.)

⁷ Although section 341, subdivision (d)(4) lists activities requiring employers to hold an Annual Permit in subdivision (A) through (E), the Division did not specifically cite or reference any subdivision (A) through (E) in Citation 1, Item 1. This issue was not raised or contested at hearing.

⁸ The parties stipulated to have the Employer present evidence first at the hearing, but agreed this did not shift the burden of proof to the Employer. Additionally, the record reflects Employer explicitly stated it did not in any way assume the burden of proof in this case.

In order to establish a safety order violation, the Division must establish 1) the Employer did not have a Project Permit prior to commencing erection of a structure intended to be more than 36 feet high when completed; and, 2) the Employer was the Project Administrator rather than an employer engaged in the activities involving erection of a structure over 36 feet high when completed.

The first element was undisputed, as both parties provided evidence at the hearing and referenced evidence from the hearing in post hearing briefs that Employer did not have a Project Permit from Cal/OSHA prior to commencing erection of the electrical transmission tower. Additionally, during the hearing the parties stipulated the electrical transmission tower in question was over 36 feet high.

In determining the existence of the second element of whether Employer was the Project Administrator, the Division must show that Employer had overall onsite responsibility for the planning, quality, management, or completion of a project involving the erection of a structure.

Section 341, subdivision (d)(4), as amended in 2006, defines the term Project Administrator under section 341, subdivision (b)(8) stating:

“Project Administrator” means a person or entity that has overall onsite responsibility for the planning, quality, management, or completion of a project involving the erection or demolition of a structure. Examples of Project Administrators include, without limitation, general contractors, prime contractors, owner/builders, joint ventures, and construction managers.

The rules of regulatory construction require courts and this Board “to give meaning to each word and phrase and to avoid a construction that makes any part of a regulation superfluous.” (*California Highway Patrol*, Cal/OSHA App. 09-3762, Decision After Reconsideration (Aug. 16, 2012) citing *Donley v. Davi* (2009) 180 Cal.App.4th 447, 465.) We construe the regulations by according words their common sense meaning based on the evident purpose for which the enactment was adopted. (*California Highway Patrol* citing *In re Rojas* (1979) 23 Cal. 3d 152, 155.) Under accepted canons of statutory construction, we must “give meaning to each word if possible and avoid a construction that would render a term surplusage.” (*California Highway Patrol* citing *Sully-Miller Contracting Company v. California Occupational Safety and Health Appeals Board* (3d Dist. 2006) 138 Cal.App.4th 684, 695.) The same rules of construction and interpretation that apply to statutes govern the construction and interpretation of administrative regulations. (*California Highway Patrol* citing *Auchmoody v. 911Emergency Services* (1989) 214

Cal.App.3d 1510, 1517; *Webcor Builders, Inc.*, Cal/OSHA App. 06-3031, Denial of Petition for Reconsideration (Jan. 11, 2010).) Words within an administrative regulation are to be given their plain and commonsense meaning, and when the plain language of the regulation is clear, there is a presumption that the regulation means what it says. (*AC Transit*, Cal/OSHA App. 08-135, Decision After Reconsideration (June 12, 2013) (Internal citations omitted).)

The Division presented minimal evidence at the hearing with respect to the Project Administrator issue.⁹ The Division's post hearing brief states its argument as follows:

The Division's position is very simple. The keyword in Title 8 CCR Section 341(b)(8) is 'on site'. SCE had overall responsibility for the entire TRTP project. But PAR Electrical had a direct safety control over its workers doing the construction planned by SCE, and this responsibility is non-delegable. The purpose of the project plan [sic] is to provide a safety review of the local sites where the work is actually being done. Thus PAR, in direct control of its workers on the site has that safety responsibility. Since the above interpretation favors workers safety, it should be adopted.

Here, the Division argues the keyword in section 341, subdivision (b)(8) is "on-site", and thereby implies the remaining portion of the regulation is superfluous. The Division's statutory interpretation of section 341, subdivision (b)(8) would mean the words in the phrase "overall...responsibility for the planning, quality, management, or completion of a project involving the erection or demolition of structure" should not be given meaning and, therefore, do not contribute to the interpretation of the regulation. The Division, however, has not provided any credible evidence to support its argument.¹⁰ In essence, the Division presents an arbitrary and unsupported interpretation of section 341, subdivision (b)(8), that ignores relevant statutory language and confuses the issue. Employer addresses just this point in its post hearing reply brief, stating ".....the Division is asking the Board to ignore the words "overall" and "responsibility," and focus entirely on

⁹ The Division did not present witnesses of its own during the hearing, but instead cross examined the Employer's witness and introduced Exhibits 1 through 3.

¹⁰ In fact the Division's evidence works against its argument. During the Division's cross-examination of Chris Galm (Galm), Employer's Executive Director of Transmission for the Western Region, credibly testified that SCE had weekly construction meetings to discuss the project as a whole and SCE and its construction management firm Burns & McDonnell would come on site every day. SCE hired Burns & McDonnell to help SCE oversee the work of various contractors on the project. Burns & McDonnell played a significant role in assessing the quality of the construction, it could direct Employer to correct any issues it found with the work, and Employer's work was not complete until Burns & McDonnell certified it. (Employer's Post-Hearing Brief pgs. 5, 6).

one question: was PAR on site at TRTP?” (Employer’s Post-Hearing Reply Brief, pg.2). By failing to address the language of section 341, subdivision (b)(8) in its entirety and offering no credible evidence or legal reasoning to support its rationale for doing so, the Division’s position cannot be sustained.

Notwithstanding the fact that the Division bears the burden of proving a violation by a preponderance of the evidence, Employer provided credible evidence to support its position that it did not need to obtain a Project Permit. Only Project Administrators, who have overall on-site responsibility for the planning, quality, management, or completion of the project, are required to obtain a Project Permit. The Employer maintains it did not have overall onsite responsibility for any of the criterion; therefore, it did not violate section 341, subdivision (d)(4).

Through direct examination of Galm and Employer’s Post Hearing Briefs, Employer explained in great detail how it did not have overall onsite responsibility for the planning of the project. Galm credibly testified that SCE obtained regulatory approval of the TRTP prior to Employer bidding for the fixed price construction services contract for the TRTP.¹¹ The planning decisions made prior to Employer bidding included: the location of the towers, the design of the towers, the materials used to build the towers, the location of the supply yards, environmental mitigation, and timetable for completion. (Employer’s Post-Hearing Brief, pg. 3-4.)¹² The Division essentially confirms this position by admitting SCE had overall responsibility for the entire TRTP project.

Galm credibly testified SCE had the authority to enter the worksite, and direct Employer to fix issues SCE discovered on inspection (Exhibit A section 3.6 pgs. 20-21). SCE could correct any issues it found upon inspection at Employer’s expense (Exhibit A section 3.8 pg. 22). SCE provided detailed drawings and set quality specifications that Employer was obliged to follow when building the towers (Exhibit A section 3.1(a) through (f)). When Employer completed a tower it would notify SCE and SCE would have Burns & McDonnell inspect the tower and assess the quality of construction. In fact, Employer would only be paid after the towers were completed and had met SCE’s quality requirements. The Employer, therefore, provided rebuttal

¹¹ During direct examination, Galm credibly testified that before Employer even bid on the project, SCE had to plan for and receive approval from the California Public Utilities Commission (CPUC), the United States Government (part of the project would pass through federal land), and local governments (right of ways and traffic closures).

¹² Employer had no ability to change the location of the towers. Employer could not alter the design of the towers. SCE supplied all the materials used to build the towers, except concrete, and Employer could not use any other materials to erect the towers. SCE determined the directions on environmental mitigation and when Employer would start and complete construction.

evidence to establish it did not have overall onsite responsibility for the quality of the project.

Galm credibly testified that SCE hired other parties, Wilson Utility Construction (Wilson) and Henckels & McCoy (Henckels), to participate in the construction of the electrical transmission towers. Employer had no authority to, nor did it in fact, supervise either Wilson or Henckels work. By contract, Employer could generally manage its own workforce (Exhibit A, section 3.11 (h) pg. 25). SCE, however, could direct Employer to dismiss any employee or independent contractor of Employer, it deemed was causing a breach of the contract, delaying the project, or affecting safety of the project. (Exhibit A section 3.11(k) pg. 25). Employer had to receive SCE's consent in advance to any hire subcontractors Employer wished to bring onsite (Exhibit A section 2.3(b) pg. 15 to 16). The Employer, therefore, provided credible rebuttal evidence to establish it did not have overall onsite responsibility for the management of the project.

The Division focused on the management issue in its Post Hearing Brief. The Division's position is that Employer had direct safety control over its workers doing the construction planned by SCE; and, that is a non-delegable responsibility. The Division, however, does not offer any credible evidence to demonstrate its position is accurate or supported by law. The Employer did address this point on direct examination. Galm credibly testified that Burns and McDonnell could supervise and direct Employer on safety issues, and give direct instructions to Employer's employees for work safety stoppage. Additionally, SCE approved Employer's management team and Employer could not alter the management team without SCE's consent, this approval extended to Employer's safety managers. (Exhibit A section 3.12(a) and (b) pg. 26). The Division's position, therefore, cannot be sustained.

Galm provided credible testimony that Employer did not have overall responsibility for completion of the structure. Rather, SCE determined when Employer was required to begin and complete its work.¹³ SCE required Employer to file progress reports, and if Employer fell behind on its work, SCE required further reporting on how Employer intended to get back on schedule. Importantly, until SCE determined that the work was complete, Employer was not fully paid. (Employer's Post Hearing Brief pg. 7). The Division did not offer credible evidence to the contrary. The Employer, therefore, provided credible rebuttal evidence that SCE had overall onsite responsibility for the completion of the project.

In weighing the evidence presented, the Division has failed to show that Employer had, at any point, overall onsite responsibility for the planning, quality, management, or completion of the project, and therefore, the

¹³ Exhibit A section 5.3 pg. 38.

Employer cannot be the Project Administrator. Because the Division offered no credible evidence to demonstrate Employer was the Project Administrator responsible for obtaining the Project Permit, a logical inference to draw is that Employer was, in fact, a subcontractor employer engaged in limited activities that only required obtaining an Annual Permit in accordance with section 341, subdivision (d)(4)(A).¹⁴

Under the section 341 scheme as amended in 2006, a Project Administrator, who remains with the job from beginning through completion, is responsible for obtaining the Project Permit, while those subcontractors who engage in permit-required activities, but have no broad authority over the entire project, are only required to have an Annual Permit for their work. (*Ferma Corporation*, Cal/OSHA App. 12-1669, Decision After Reconsideration (July 31, 2014), citing Initial Statement of Reasons, Proposed Amendments to Section 341 Permit Requirements and Section 341.1 Issuance of Permits.¹⁵).

Here, Employer installed some of the structural steel on some of the identical electrical towers for the TRTP.¹⁶ Installation of structural steel on some of the electrical towers is an Annual Permit required activity contemplated in section 341, subdivision (d)(4)(A). The parties do not dispute that Employer had an Annual Permit. The Division admitted in its post hearing brief that SCE had overall control of the TRTP. Employer presented credible evidence, including Galm's testimony and Exhibit A, demonstrating it did not have broad authority over the entire project. All evidence presented by the Division to the contrary is not credible to show otherwise. Employer, therefore, was a subcontractor employer engaged in Annual Permit required activities and was not required to obtain a Project Permit.

For the foregoing reasons, The Division, therefore, did not establish a violation of section 341, subdivision (d)(4), by a preponderance of the evidence.

Conclusion

The Division did not establish the existence of a violation of section 341, subdivision (d)(4) by a preponderance of the evidence.

¹⁴ Erection and placement of structural steel or erection and placement of structural members made of materials other than steel.

¹⁵ [Where language may be subject to multiple interpretations, Legislative history is an appropriate resource to determine what the enactment does. (*SDCCD – Continuing Education NC Center*, Cal/OSHA App. 11-1196, Decision After Reconsideration (Dec. 4, 2012), citing *Jensen v. BMW of North America, Inc.* (1995) 35 Cal. App.4th 112, 122-123).

¹⁶ Employer's Reply Brief pg. 3.

Order

It is hereby ordered that the appeal of Citation 1, Item 1 is granted, as indicated above and as set forth in the attached Summary Table Decision.¹⁷

It is hereby ordered that Citation 1, Items 2, 3, 4; Citation 2, Item 1; and Citation 3, Item 1, are resolved pursuant to the parties' stipulated settlement prior to the hearing which includes a Non-Admissions Clause.¹⁸

Dated: March 30, 2016
CHW:ml

CLARA HILL-WILLIAMS
Administrative Law Judge

¹⁷ The total penalties in the amount of \$9,000 are assessed as set forth in the attached Summary Table Decision.

¹⁸ It is stipulated by and between the parties that the terms and conditions set forth in the above-described agreement, are not intended to be and shall not be construed by anyone or any proceeding as an admission of negligence, fault, or wrongdoing whatsoever by Employer.

The parties further stipulate that neither Employer's agreement to compromise this matter nor any statement contained in this agreement shall be admissible in any other proceeding, either legal, equitable, or administrative, except for purposes of administration and enforcement of the California Occupational Safety and Health Act and in proceedings before the Appeals Board.

The parties further stipulate that no findings or conclusions have been made by any trier-of-fact regarding the citations and fines at issue herein.

APPENDIX A

SUMMARY OF EVIDENTIARY RECORD

**PAR Electrical Contractors, Inc.
Dockets 13-R4D3-2357 through 2359**

Date of Hearing: August 25, 2015

Division's Exhibits

Number	Exhibit Description	Admitted
1	Jurisdictional Documents	X
2	State of California Department of Industrial Relations Division of Occupational Safety and Health Proposed Penalty Worksheet	X
3	Photo of a Tower (Typical Tower)	X

Employer's Exhibits

Exhibit Letter	Exhibit Description	Admitted
A	Copy of Terms and Conditions for Fixed Price Construction Services Between Southern California Edison Company and PAR Electrical Contractors, Inc. Dated January 28, 2010 Modified July 23, 2010	X
B	Copy of PAR Electrical Contractors Inc. Annual Permit for SE-ANNUAL STRUCTURAL STEEL ERECTION	X

Attachments

Exhibit Letter/Number	
A/1	Email from the parties to the ALJ memorializing the proposed settlement terms for Citation 1, Item 2, Citation 1, Item 3, Citation 1, Item 4, Citation 2, Item 1, and Citation 3, Item 1

Witnesses Testifying at Hearing

1. Chris Galm

CERTIFICATION OF RECORDING

I, CLARA HILL-WILLIAMS, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hear the above matter, hereby certify the proceedings therein were electronically recorded. The recording was monitored by the undersigned and constitutes the official record of said proceedings. To the best of my knowledge, the electronic recording equipment was functioning normally.

CLARA HILL-WILLIAMS

Date

**SUMMARY TABLE
DECISION**

In the Matter of the Appeal of:

**PAR ELECTRICAL CONTRACTORS, INC.
DOCKETS 13-R4D3-2357 through 2359**

Abbreviation Key: Reg=Regulatory	
G=General	W=Willful
S=Serious	R=Repeat
Er=Employer	DOSH=Division
AR-Accident Related	

IMIS No. 316669092

DOCKET	CITATION	SECTION	TYPE	MODIFICATION OR WITHDRAWAL	APPEALED	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT HEARING	FINAL PENALTY ASSESSED BY BOARD
13-R4D3-2357	1	1	Reg	ALJ granted appeal.	X	\$1,000	\$1,000	\$0
		2	Reg	DOSH recl. to Notice in Lieu.	X	\$400	\$0	\$0
		3	G	DOSH recl. to Notice in Lieu.	X	\$600	\$0	\$0
		4	G	DOSH recl. to Notice in Lieu.	X	\$300	\$0	\$0
13-R4D3-2358	2	1	S,AR	DOSH withdrew citation - new evidence showing lack of violation.	X	\$18,000	\$0	\$0
13-R4D3-2359	3	1	S,AR	DOSH recl. to S - new information provided by Er. Penalty reduced.	X	\$18,000	\$9,000	\$9,000
Sub-Total						\$38,300	\$10,000	\$9,000
Total Amount Due*								\$9,000

(INCLUDES APPEALED CITATIONS ONLY)

NOTE: *Please do not send payments to the Appeals Board. All penalty payments should be made to:*
 Accounting Office (OSH)
 Department of Industrial Relations
 P.O. Box 420603
 San Francisco, CA 94142

*You will owe more than this amount if you did not appeal one or more citations or items containing penalties.

**ALJ: CHW/ml
POS: 03/30/16**