

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

In the Matter of the Appeal of:

VERNON MELVIN ANTONSEN &  
COLLEEN K. ANTONSEN, individually  
and dba ANTONSEN CONSTRUCTION  
19223 Hollow Lane  
Redding, CA 96003

Employer

Dockets 06-R2D3-1272 and 1273

**AMENDED  
DECISION AFTER  
RECONSIDERATION**

The Occupational Safety and Health Appeals Board, pursuant to the authority vested in it by the California Labor Code, after review of the record and the Petition for Reconsideration filed by the Division of Occupational Safety and Health (Division), issues this Amended Decision After Reconsideration.

**REASON FOR AMENDMENT**

The original Decision After Reconsideration in this proceeding was improvidently issued due to the Board's having inadvertently lost or misfiled information regarding the parties' stipulation and agreement to settle. While this matter was pending reconsideration, the parties proposed a settlement agreement which was acceptable to the Board but which was misplaced by the Board before its Decision After Reconsideration was issued. As a result of that clerical error, our initial decision did not embody the terms of the parties' agreement. (*Mission Flavors & Fragrances, Inc.*, Cal/OSHA App. 05-693, Denial of Petition for Reconsideration (June 22, 2010) citing *Kaufman v. Shain* (1896) 111 Cal. 16 [amendment may be made at any time]; *Bastajian v. Brown* (1941) 19 Cal.2d 209, 214; *Russell v. Superior Court In and For Placer County* (1967) 252 Cal.App.2d 1; 7 Witkin, California Procedure, 5th Ed., Judgment, §§ 67-70.)

**AMENDMENTS TO INITIAL DECISION**

The parties' stipulation, as accepted by the Board, included the following terms: The Division withdrew Citation 1, Item 1, and its associated penalty; the Division amended Citation 2, Item 1, by removing the "accident-related"

classification of the alleged violation, and the parties agreed that the violation occurred; and that the civil penalties would remain as assessed by the Administrative Law Judge (ALJ), \$4,220.

The Board, in accepting the parties' stipulation, determined that it would nonetheless issue a Decision After Reconsideration to correct the error of law the ALJ had committed error in finding there was no violation as alleged in Citation 2, Item 1. In view of the parties' stipulation, however, no additional penalty is assessed for Citation 2, Item 1.

## JURISDICTION

On March 26, 2006, the Division issued two citations alleging four violations of the Occupational Safety and Health Standards contained in Title 8, California Code of Regulations, against Vernon Melvin Antonsen and Colleen K. Antonsen dba Antonsen Construction (Employer). After a hearing was held, the Administrative Law Judge (ALJ) assigned to the matter issued a Decision denying Employer's appeals as to the three violations contained in Citation 1, and granting Employer's appeal as to Citation 2. Citation 2 alleged a violation of section 1670(a) [failure to provide personal fall arrest system]<sup>1</sup>.

The Division timely filed a petition for reconsideration asserting the failure to uphold Citation 2 was an act in excess of the ALJ's powers, asserting a legal error was committed by the ALJ in concluding the cited safety order did not apply. (See Labor Code section 6617(a).) The Employer filed no response to the petition for reconsideration. Although Employer asserted during its appeal that it was not an employer, the Decision concluded Employer was an employer of the injured employee. Neither the Division nor the Employer preserved for reconsideration the issue of whether Employer was an employer. The ALJ's determination of the issue is thus final. (Labor Code section 6618.)

## EVIDENCE

The citations arose out of an accident occurring at a place of employment maintained by employer resulting from a fall by an employee engaged in residential construction framing activity. The employee was installing small trusses on the second story of a wood-framed house under construction. In doing so he stood on the "top plate" of a framed wall, described as the 2 by 4 piece of wood that forms to top of a framed wall. When he stepped on an unsecured portion of one truss that was being installed on the top plate, it became dislodged, causing the worker to lose his balance and fall approximately 18 feet to the surface below, sustaining serious injury. The employee was wearing no fall protection, and none was available at the work location. The parties stipulated that a serious injury resulted from this

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<sup>1</sup> All references are to Title 8, California Code of Regulations unless otherwise noted.

violation. The Division inspector testified he has investigated over 50 falls from 18 feet, and the most common injuries are serious, such as a compound fracture. In his experience-based opinion, there is a substantial probability of serious physical harm resulting from falls of approximately 18 feet.

#### ISSUE PRESENTED:

Does section 1670(a) apply?

#### DECISION

Citation 2 Item 1 alleges the following facts in support of a violation of section 1670(a):

On August 28, 2005, an employee was working at the 18 feet level of a two story building without wearing a safety belt, body belt, or body harness with a lanyard. The employee did not have any means to prevent his fall to the ground. The employee was working at the perimeter of the two story structure 18 feet above the ground without wearing approved personal fall arrest, personal fall restraint, or positioning system.

Section 1670(a) states:

Approved personal fall arrest, personal fall restraint or positioning systems shall be worn by those employees whose work exposes them to falling in excess of 7 ½ feet from the perimeter of a structure, unprotected sides and edges, leading edges, through shaftways and openings, sloped roof surfaces steeper than 7:12, or other sloped surfaces steeper than 40 degrees not otherwise adequately protected under the provisions of these orders.

The evidence presented was that employee Jobe fell 18 feet from an unprotected edge of a structure under construction. He fell from the top plate of the front exterior wall of a residential building in the framing stage. He was positioned there to install the last two trusses that constituted the frame of the portion of the second story roof that covered a balcony. This work is both accurately described as being performed at the perimeter of the building, as well as at an unprotected edge, both of which fall within the locations requiring fall protection for work at 17-18 feet, under section 1670(a). Employer, who witnessed the accident, testified the worker was not on the roof, but at the ceiling level of the second story, on top of the exterior wall, when he fell. Thus, the safety order applied to the work activity which exposed the worker to falls

in excess of the allowed distance (of 7 ½ feet)<sup>2</sup>. No fall protection measures of any kind were provided by Employer. A violation was thus established.

The Decision concludes the safety order does not apply to the hazard because the evidence does not establish the employee was working at the “perimeter” of the structure. A “perimeter” is one such covered location, but so are interior edges that pose the same hazard, such as shaftway openings. “Perimeter” is not defined in the safety orders. The non-mathematical definition of “perimeter” is “a line or strip bounding or protecting an area; outer limits.” (Miriam Webster’s Collegiate Dictionary, 10<sup>th</sup> ed.) Regarding a building under construction, the reasonable meaning of “perimeter” refers to the outer edge of the building, which includes the exterior walls being framed. The top plate of a framed exterior wall of a residence is thus a work location at the perimeter of the structure.

In addition to “perimeters”, the safety order applies to work locations that are “unprotected sides and edges, and leading edges.” A “leading edge” is “[t]he edge of a floor, roof, or formwork for a floor or other walking/working surface (such as deck) which changes location as additional floor, roof, decking, or form work sections are placed, formed or constructed. A leading edge is considered to be an ‘unprotected side and edge’ during periods when it is not actively and continuously under construction.” (§ 1504.)

“Unprotected sides and edges” are defined as “[a]ny side or edge (except at entrance 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.” The conclusion in the Decision that section 1670(a) does not apply because the worker was not located on the perimeter is in conflict with the evidence. It was also error to fail to consider whether the other terms in the safety order applied to this situation. Other unprotected locations, in addition to the perimeter of a building, also require fall protection according to section 1670(a). These definitions merit consideration when determining if the condition established by the evidence constitutes a violation. “We neither read words in to nor out of a safety order.” (*E.L. Yeager Construction Company, Inc.*, Cal/OSHA App. 01-3261, Decision After Reconsideration (Nov. 2, 2007).) By failing to consider whether the top of the exterior wall is an “unprotected walking/working surface,” the decision effectively reads this term out of the safety order.

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<sup>2</sup> The evidence conflicted as to whether the employee fell 18 feet from the top of the first floor wall in to a trench surrounding the structure, or whether the employee fell 18 feet from the top of the second story on to the grade below. Employer witnessed the fall. He testified the employee was standing on top of the second story framed wall. The injured worker stated he fell from on top of the first story wall in to the trench. However, the employee testified he recalls nothing about the fall or his being transferred via ambulance to the hospital, and only recalls waking up in the hospital sometime later. The ALJ accepted Employer’s version of events as being more probably correct, and we do as well.

Under both definitions, this work location fell within the terms of the cited safety order. (§ 1670(a).) Thus, it was error to conclude this work location was not a “perimeter” and it was error, after reaching such a determination, not to consider the other terms of the safety order in light of the evidence.

In addition to these legal errors, the Decision mis-states the evidence in the record. The Decision states, “Antonsen testified Jobe was ‘up on the top plate’ when he fell; an area Antonsen described to Barker as ‘a beam on the top of the roof.’ There is no evidence on this record that Jobe was working ‘at the perimeter of a structure’; (sic) leading edge: (sic) or any other location covered by § 1670(a).” The record does not support this conclusion. The reference to the “top plate” is accurate, but the location was never described as being on the roof. And, a “top plate” is not a “beam on top of the roof.” A “top plate” is defined in section 1716.2(b)(13) as a “Top horizontal member of a frame wall supporting ceiling joists, rafters or other structural members.” The term was used as such by the witnesses. Here, roof trusses were being installed on to the top plate. Employer clarified that Jobe was standing at the ceiling level of the framed house, and not on the roof. The conclusion that Employer asserted Jobe was standing on a beam on the roof misstates the testimony. The only conclusion to draw from the record was that the injured worker was standing on the top plate of the exterior wall when he fell.

Employer witnessed the accident. He identified on a photograph that Jobe was standing on top of the front exterior wall of the framed house at the time of his fall. Such location is the boundary, or perimeter, of the building. Section 1670(a) applies to this work location. Employer estimated the fall distance to be 17 feet. The Division inspector testified he measured the distance at 18 feet. Both measurements establish a violation of 1670(a).

Employer raised as a defense that the wrong safety order was cited. If a different safety order applies to the work activity other than, or in addition to the one cited, an employer may only be relieved of a citation if it establishes that another safety order is more applicable, and that it also complied with that safety order. (*Gal Concrete Construction Co.*, Cal/OSHA App. 91-271, Decision After Reconsideration (Feb. 28, 1992).)<sup>3</sup>

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<sup>3</sup> In the case of the cited safety order addressing a hazard other than the one cited, such that the cited safety order does not address the hazard in the alleged violative description, failure of the Division to amend the citation to allege a violation of the proper safety order can result in the appeal being granted. See *Carris Reels of California*, Cal/OSHA App. 95-1456, Decision After Reconsideration (Dec. 6, 2000).) However, such mistakes in a citation should be corrected with an amendment. (See *A. Teichert & Son, Inc dba Teichert Aggregates*, Cal/OSHA App. 04-0850, Decision After Reconsideration (Oct. 6, 2011).) Moreover, here both the cited safety order and another safety order address the hazard of working from heights above 15 feet without fall protection, which is the hazard to which employer’s employee was exposed. Citing one of several applicable safety orders is sufficient for purposes of due process. (*Gaehwiler Construction Co.*, Cal/OSHA App. 78-651, Decision After Reconsideration (Jan. 7, 1985); *Structural Shotcrete System*, Cal/OSHA App. 03-986, Decision After Reconsideration (Jun. 10, 2010).)

“We have long recognized that the fact that one safety order may be more specific or more particular to a given set of facts than another is immaterial; only when an actual conflict between them exists will the more specific safety order control over the general. (*Pacific Gas and Electric Company*, Cal/OSHA App. 82-1102, Decision After Reconsideration (Dec. 24, 1986).” (*Bostrom-Bergen Metal Products*, Cal/OSHA App. 00-1012, Decision After Reconsideration (Jan. 10, 2003).)<sup>4</sup> Here, the Decision considers the possible application of section 1669(a), in addition to 1670(a)<sup>5</sup>. Both prohibit working at 17 or 18 feet without any fall protection, and do not have conflicting requirements. Both are construction industry safety orders that require personal fall protection if guardrail use is impractical. One allows unprotected work at higher elevations than the other, but both prohibit the work activity at the height shown here. We have never granted an appeal when the Division cites one of several applicable safety orders, and the evidence shows an employer failed to comply with any of them.

“When an employer has failed to comply with the safety order it asserts is more particular or appropriate, it cannot argue the inappropriateness of the cited safety order as a defense.” (*Sheedy Drayeage, supra*, citing *California Erectors, Bay Area, Inc.*, Cal/OSHA App. 84-1254, Decision After Reconsideration (Sept. 30, 1986) and *Pacific Gas & Electric Co.*, Cal/OSHA App. 82-1102, Decision After Reconsideration (Dec. 24, 1986).) (Accord, *Davis Brothers Framing*, Cal/OSHA App. 03-0114 Decision After Reconsideration (Jun. 10, 2010).)

Since the circumstances establish a violation of section 1670(a), and might establish a violation of 1669(a) since one foot was on the unsecured truss at the time of the fall, though the other was on the top plate, Employer has not shown the Division cited the wrong, or an inapplicable, safety order. Employer has not shown it complied with a more-applicable safety order. As such, the defense of the Division citing the wrong safety order fails.

The Serious classification is established by the record. The parties stipulated that the worker sustained a serious injury as a result of the fall. The record contains additional evidence of the substantial probability of serious injury resulting from the violation.

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<sup>4</sup> The significant differences in the safety orders, and the potential defenses that led the Board to grant an appeal for the Division’s failure to cite the correct safety order in *Bostrom-Bergen Metal Products, supra*, do not exist here.

<sup>5</sup> At the time of the citation, fall protection was required of all construction workers at heights of 7 ½ feet. Also, residential-type framing activities of this nature required fall protection for workers exposed to 15 foot falls. (§ 1716.2(e)(1).) Since this worker was exposed to an 18 foot fall hazard, the citation of either section is proper as Employer was shown to violate them both here. We note § 1617.2(e)(1) has an exception for work occurring at a distance of 6 feet or more from the edge of the building. An exception is an affirmative defense, and Employer neither raised this defense nor produced evidence to support the exception. It is thus inapplicable. (*Tutor-Saliba-Perini*, Cal/OSHA App. 97-2799, Decision After Reconsideration (Mar. 2, 2001).) In any event, Employer’s testimony confirms the injured worker was not working within the interior of the structure, but rather atop the front exterior wall.

To prove a violation was serious, the Division must produce evidence to show there was a substantial probability the violation could cause death or serious physical harm. (Labor Code section 6432(a).)<sup>6</sup> Labor Code section 6432(c) goes on to state that “substantial probability” refers not to the probability of an accident occurring because of the violation, but rather, assuming an accident or exposure occurs, to the probability that the result will be death or serious physical harm. (*Anning-Johnson Company*, Cal/OSHA App. 06-1976, Decision After Reconsideration (Jan. 13, 2012).) When the Division witness provides an opinion, based on his experience in the field of safety, that if an accident were to occur as a result of the violation, the result would more likely than not be serious injury, and there is no evidence to controvert such testimony, the Division has met its burden of proof to show the serious classification is correct. (*Forklift Sales of Sacramento, Inc.*, Cal/OSHA App, 05-3477, Decision After Reconsideration (Jul. 7, 2011).)

The evidence established Mr. Jobe fell 18 feet from the top of the second story exterior wall of a residential structure in the framing stage. He fell on to the grade below and suffered serious injuries. The parties stipulated Mr. Jobe sustained serious injury. We have previously concluded that falls of 18 feet from atop a second story wall of framed residential construction on to the grade below would have a substantial probability of the causing serious injury. (*Davis Brothers Framing, supra.*) The testimony of the Division witness, Mr. Barker, was consistent with our previous conclusions regarding the likely severity of injury resulting from the lack of fall protection in these circumstances. He also stated he concluded the cause of the fall was the lack of fall protection. The record contains substantial evidence to support the classification of the violation. We therefore affirm the Serious classification of Citation 2, Item 1.<sup>7</sup>

Penalties for the violations are indicated on the attached Summary Table, which is incorporated herein by reference.

ART R. CARTER, Chairman  
ED LOWRY, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
FILED ON: August 30, 2012

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<sup>6</sup> Labor Code section 6432 was amended effective January 1, 2011, without retroactivity. We apply the rule in effect at the time of the violation.

<sup>7</sup> Since the parties have stipulated to the penalties for the two citations and we have accepted that stipulation, no penalty for Citation 2, Item 1 is imposed.