

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

In the Matter of the Appeal of:

HERMAN WEISSKER INC.
1645 Brown Avenue
Riverside, CA 92509

Employer

Docket. 13-R3D1-3279

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code issues the following Decision After Reconsideration in the above entitled matter.

JURISDICTION

Commencing on June 10, 2013, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Herman Weissker Inc. (Employer).

On September 24, 2013, the Division issued a citation to Employer alleging a violation of occupational safety and health standards codified in California Code of Regulations, title 8, section 2943, subdivision (f)(3).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.

On March 19, 2015, the ALJ issued a Decision (Decision) which upheld the citation.

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.

The Board took Employer's petition under submission by order of June 10, 2015.

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 hold that the Decision erred in finding section 2943, subdivision (f)(3) applicable in these circumstances and now reverse.

ISSUE

Does section 2943, subdivision (f)(3) apply to the work at issue?

EVIDENCE

The facts are well described in the Decision. We summarize them as pertinent here.

Employer is an electrical contractor which was retained by Southern California Edison (SCE) to remove electric cables from an underground electric utility vault owned and operated by SCE, and then demolish the vault.² SCE is a public utility subject to the jurisdiction of the California Public Utilities Commission (PUC). The work at issue involved "high voltage" equipment as that term is defined in the high voltage safety orders (sections 2700 through 2983). (§ 2700.) Due to miscommunication or misunderstanding between two of Employer's employees, one of the two was injured while attempting to disconnect one of the 600 volt "dead break elbow" cables in the vault. He believed the cable to have been de-energized when in fact it was energized.

FINDINGS AND REASON FOR DECISION AFTER RECONSIDERATION

In her Decision the ALJ quotes part, but not all, of section 2706, subdivision (a). It states:

"(a) These High-Voltage Electrical Safety Orders apply to all electrical installations and electrical equipment operating or intended to operate on systems of more than 600 volts between conductors and to all work performed directly on or in proximity to such electrical installations, equipment or systems in all places of

² Section 2700 defines "vault" as "A room (including manholes) of fire-resistant construction, primarily used to house electrical equipment." Section 2700 states, "The following definitions of frequently used terms shall be accepted as the intended meanings of these terms whenever used in these High-Voltage Electrical Safety Orders." Accordingly, the Decision's citation of a dictionary definition is not necessary. (Decision, p. 2.)

employment in the State of California as defined in Labor Code section 6303. These orders do not apply to:

- (1) Installations or conductors and equipment in ships, watercraft, railway rolling stock, or aircraft.
- (2) Installations of conductors, equipment, and associated enclosures subject to the jurisdiction of the California Public Utilities Commission, that are owned and maintained by an electric, communication of electric railway utility.

Exception: No. 1. These orders apply to conduit, vaults, and other like enclosures containing the conductors and equipment of such a utility when located indoors on premises not used exclusively for utility purposes, but do not apply to the utilities conductors and the equipment therein.

Exception: No. 2. Article 36, Work and Operating Procedures; and Article 38, Line Clearance Tree Trimming Operations apply to all work performed by electric utilities and electric railways.

The first step in our analysis is to understand how applicability of subdivision (a)(2), above, is affected by Exception 2.

Section 2706, subdivision (a) in plain language states that the high-voltage safety orders “apply to all electrical installations and electrical equipment operating [at] more than 600 volts[.]” Subdivision (a)(2) then provides that the high voltage safety orders do not apply to “conductors, equipment, and associated enclosures subject to the jurisdiction of the [CPUC] that are owned and maintained by an electric . . . utility.” “Exception No. 2,” however, then goes on to state that Article 36, of which section 2943 is part, “appl[ies] to all work performed by electric utilities[.]”

Employer’s petition contends that the exception in section 2706, subdivision (a)(2) means that the work at issue was not subject to section 2943. Employer then seeks to avoid the effect of Exception No. 2, quoted above, by further arguing that, because Employer itself is not an electric utility, Exception No. 2 does not apply to its work for SCE.

We do not agree with that interpretation. Doing so would result in a gap in worker protection because a utility’s own employees would be subject to the safety order but the employees of a contractor hired to do the same work on the same installation would not be subject. (*Preston Pipelines, Inc.*, Cal/OSHA App. 11-2530, Denial of Petition for Reconsideration (Jan. 3, 2013).) And, it would be an absurd result to read section 2706, subdivision (a) as applying to employees of a regulated utility but not employees of a contractor it hires to do the same work in place of its own personnel. Interpretations yielding absurd results are to be avoided. (*Shimmick Construction Co. & Obayashi Corporation*,

JV, Cal/OSHA App. 06-1136, Denial of Petition for Reconsideration (Nov. 20, 2008), citing *Flannery v. Prentice* (2001) 26 Cal. 4th 572, 578.)

Even though we reject Employer's argument that the high-voltage safety orders did not apply to the work at issue, we agree that section 2943, subdivision (f)(3) does not apply to the work under these operative facts.

Section 2943, subdivision (a) provides: "Application. This section applies to all work on or in proximity to underground high-voltage cables, conductors or equipment, and to the operations necessary to raise or lower cables, conductors or equipment to such underground locations." In turn, section 2943, subdivision (f)(3) provides: "Where more than one cable exists in an excavation, the cable to be worked on shall be identified by electrical means or spiking unless its identity is obvious." The work was being done in a vault, not an "excavation."

The term "excavation" is not defined in the high-voltage safety orders, but is defined in section 1540, subdivision (b), one of the construction safety orders. That definition states: "Excavation. Any man-made cut, cavity, trench, or depression in an earth surface, formed by earth removal." While an excavation may have been required to construct the underground vault, the vault filled the void which had been "formed by earth removal" in order to construct it. Thus the cable removal work was not being done in an excavation, but rather in a type of underground room. The work here was not being done in an "excavation" per se, and section 2943, subdivision (f)(3) does not apply.

An examination of all of section 2943 supports the foregoing analysis. Subdivision (a), provides that the "section applies to all work on in proximity to underground high-voltage cables, conductors or equipment[.]" Subdivision (b) refers to vaults and other underground structures, showing the Standards Board knows the difference between an underground structure and an "excavation," and demonstrating it can address matters pertaining to vaults when it intends to do so. Subdivision (c) addresses trenching and excavating operations, again indicating awareness of the distinction between creating an excavation, for example to expose or install and bury cables, and an underground structure such as a vault. Subdivision (d) addresses working on cables, conductors, etc., which are (as here) energized at 7,500 volts or less. Subdivision (e) addresses work on equipment energized at more than 7,500 volts. Subdivision (f), cited here, addresses work on "de-energized" cables and equipment.

The above overview of the subdivisions of section 2943 shows that the Standards Board established a regulation which imposed various requirements on different types of underground environments and work conditions where underground conductors are located. The subdivision cited by the Division, by

its terms, does not apply to the work being done, because the cables were in a vault, not in an “excavation.” Vaults and other underground structures are specifically dealt with in another portion of section 2943, namely subdivision, (b).

DECISION

The Decision of the ALJ is reversed and Employer’s appeal is granted.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: AUG 25, 2015

SUMMARY TABLE DECISION AFTER RECONSIDERATION

In the Matter of the Appeal of:

HERMAN WEISSKER, INC.
Docket No. 2013-R3D1-3279

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

IMIS No. 315534222

Site: Rimhurst & Trabuco, Lake Forest, CA 92630

Date of Inspection: 06-10-2013

Date of Citation: 09/24/2013

DOCKET	C I T A T I O N	I T E M	SECTION	T Y P E	ALLEGED VIOLATION DESCRIPTION MODIFICATION OR WITHDRAWAL AND REASON	A F F I R M E D	V A C A T I O N	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY ASSESSED BY ALJ	FINAL PENALTY ASSESSED BY BOARD
13-R3D1-3279	1	1	2943(f)(3)	S	Failure to conduct testing in vault to confirm all conductors' electric energy has been de-energized and properly identified prior to allowing employees to do any work. Board determined incorrect portion of section 2943 was cited.		x	\$22,500	\$22,500	\$0
Sub-Total								\$22,500	\$22,500	\$0

Total Amount Due*

(INCLUDES APPEALED CITATIONS ONLY)

\$0

NOTE: Payment of final penalty amount 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.
Please call (415) 703-4291 if you have any questions.

POS: 8/25/2015