

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

In the Matter of the Appeal of:

**ROCKWELL DRYWALL
1341 W. ARROW HWY
SAN DIMAS, CA 91773**

Employer

Inspection No.

1176128

DECISION

Statement of the Case

Rockwell Drywall, Inc. (Employer) is a construction contractor. On September 9, 2016, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Eva Rosalind Dimenstein, commenced an accident investigation at a job site located at 222 South Main Street in Los Angeles, California, after report of an injury at that location on September 8, 2016. On February 17, 2017, the Division cited Employer for failing to ensure that employees did not sit, kneel, step, or stand on the topcap of their step ladders.

Employer filed a timely appeal of the citation based on the assertion that the safety order was not violated. Additionally, Employer asserted a series of affirmative defenses.¹

This matter was heard by Kerry Lewis, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board. On July 28, 2020, ALJ Lewis conducted the hearing from Sacramento, California, with the parties and witnesses appearing remotely via the Zoom video platform. Kevin Bland, Attorney at Ogletree, Deakins, Nash, Smoak & Stewart, P.C, represented Employer. Eric Compere, Staff Counsel, represented the Division. The matter was submitted on September 11, 2020.

Issues

1. Is it appropriate for the Appeals Board to take official notice of the American National Standards Institute standards for metal and reinforced plastic ladders?
2. Does the piece of equipment for which Employer was cited meet the definition of a step ladder?

¹Except where discussed in this Decision, Employer did not present evidence in support of its affirmative defenses, and said defenses are therefore deemed waived. (*RNR Construction, Inc.*, Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017).)

Findings of Fact

1. Employer's employees use a metal ladder consisting of two identical sections and each section is comprised of two side rails joined by two horizontal rungs, meeting at an eight-inch wide top piece.
2. The ladder is more than 32 inches in length, when measured along the front edge of the rails.
3. The ladder is self-supporting and nonadjustable in length.
4. The ladder does not have a hinged back.
5. The ladder's two sections hinge at the top.
6. The ladder's two sections form equal angles with the base.

Analysis

- 1. Is it appropriate for the Appeals Board to take official notice of the American National Standards Institute standards for metal and reinforced plastic ladders?**

The Appeals Board has held that "the Appeals Board must take official notice of the [American National Standards Institute] ANSI standard incorporated by reference in [the cited safety order]." (*MCM Construction, Inc.*, Cal/OSHA App. 94-246, Decision After Reconsideration (Mar. 30, 2000).) California Code of Regulations, title 8, section 3276, ² incorporates the ANSI standards for design and construction of metal, wood, and reinforced plastic ladders. (§3276, subd. (c).)

The Division's post-hearing brief requested that the Appeals Board take official notice of the ANSI regulations for metal and reinforced plastic ladders: A14.2-2007 and A14.5-2007. The Appeals Board's regulations require that, when a party makes a request to take official notice the other party "shall ... be given reasonable opportunity on request to present information relevant to (1) the propriety of taking official notice, and (2) the tenor of the matter to be noticed." (§376.3, subd. (d).) Employer filed an objection to the Division's request.

² Unless otherwise specified, all references are to sections of California Code of Regulations, title 8.

After review of the request, the objection, and the applicable regulations and case law, the request for official notice is granted to the extent that the ANSI standards are incorporated into section 3276. The only section that incorporates the ANSI standards contains the regulations pertaining to how the various types of portable ladders are to be designed and constructed. As such, official notice is taken of the ANSI standards pertaining to the design and construction of metal and reinforced plastic ladders: A14.2-2007 and A14.5-2007.

However, because there is no issue regarding the design and construction of the piece of equipment at issue, the ANSI standards were not relevant to the findings and conclusions herein.

2. Does the piece of equipment for which Employer was cited meet the definition of a step ladder?

Section 3276, subdivision (e)(15)(E), provides:

(e) Care, Use, Inspection and Maintenance of Ladders.

[...]

(15) Climbing and Working on Ladders.

[...]

(E) Employees shall not sit, kneel, step or stand on the pail shelf, topcap or the step below the topcap of a step ladder.

EXCEPTION: Employees may stand on the step below the topcap provided it is located 18 inches under the topcap.

In Citation 1, the Division alleges:

Prior to and during the course of the investigation, including, but not limited to, 9/9/16, the employer did not ensure that employees did not sit, kneel, step or stand on the pail shelf, topcap or the step below the topcap of their step ladders.

The Division has the burden of proving each element of its case, including the applicability of the safety order cited, by a preponderance of the evidence. (*Teichert Aggregates*, Cal/OSHA App. 04-2982, Decision After Reconsideration (Jan. 21, 2011).)

To establish a violation of the safety order, the Division must demonstrate the applicability of the safety order to the facts of the case. (*Dish Network California Service Corporation*, Cal/OSHA App. 12-0455 (Aug. 28, 2014).) In determining applicability of a safety order, the Appeals Board applies the principles of statutory construction to determine intent of the regulation’s drafters. If the language of the regulation is unambiguous, the plain meaning of the language controls because it is presumed “the legislature meant what it said.” (*Michels Corp, dba Michels Pipeline Construction*, Cal/OSHA App. 07-4274, Denial of Petition for Reconsideration (Jul. 20, 2012).)

Section 3276 is “intended to prescribe rules and establish minimum requirements for the design, construction, selection, care, and use of all self-supporting and non-self-supporting portable ladders, in order to insure safety under normal conditions of usage. This section does not apply to ladder type step stools or other types of step stools except for the definition of ‘step stool (ladder type)’ in subsection (b) and the design and construction requirements of subsection (c)(5).” (§3276, subd. (a).)

The piece of equipment at issue meets the general definition of a ladder: “Ladders. A ladder is an appliance usually consisting of two side rails joined at regular intervals by crosspieces called steps, rungs, or cleats, on which a person may step in ascending or descending.” (§3276, subd. (b).)

Additionally, section 3276, subdivision (b), defines a “step stool (ladder type)” as:

A self-supporting, foldable, portable ladder, nonadjustable in length, 32 inches or less in length, with flat steps and without a pail shelf, designed so that the ladder top cap as well as all steps can be climbed on. The side rails may extend above the top-cap but such extension is not considered as part of the step stool length.

The ladder at issue is more than 32 inches in length, if measured along the front edge of the side rails.³ As such, it is not a ladder type step stool.

As set forth in section 3276, subdivision (a), section 3276 generally applies to the piece of equipment at issue because it is a ladder and does not fit the definition of a ladder type step stool.

³ Associate Safety Engineer Rosalind Dimenstein (Dimenstein) testified that she erroneously measured the height of the ladder rather than the length along the front edge of the side rails. The height was approximately 35 inches and Dimenstein testified that she ascertained that the rails were longer than 35 inches by “using math.” Employer did not dispute this issue.

Because section 3276, subdivision (e)(15)(E), proscribes actions on a step ladder specifically, rather than on ladders generally, the issue to be determined is whether the piece of equipment that was the basis for the citation is a step ladder as defined in section 3276, subdivision (b):

A step ladder is a self-supporting portable ladder, nonadjustable in length, having flat steps and a hinged back. Its size is designated by the overall length of the ladder measured along the front edge of the side rails.

The Division issued the citation to Employer based on the argument that Employer permitted its employees to stand on the top horizontal member, or top cap, of this particular piece of equipment identified as a step ladder. Employer did not dispute that its employees perform work while standing on top of the piece of equipment. Employer's argument was that the safety order is inapplicable because this piece of equipment is not a step ladder.

In order to establish that the ladder at issue is a step ladder, the Division must prove that it is self-supporting, portable, and nonadjustable in length, and that it has flat steps and a hinged back. The ladder meets all the aspects of the step ladder definition except that it does not have a hinged back. Exhibits 10-1 and 10-3 are photographs that show that the hinge for the ladder at issue is in the middle of the top step, which creates two sections forming equal angles with the base. Both sections of the ladder at issue are identical, with neither differentiated as a back versus a front.

Because this is indisputably a portable ladder, it follows that it must meet a description of one of the other ladders defined in section 3276, subdivision (b). A review of those definitions does, in fact, reveal that this ladder more accurately fits the description of a "trestle ladder." Trestle ladder is defined in section 3276, subdivision (b), as:

[A] self-supporting portable ladder, nonadjustable in length, consisting of two sections hinged at the top to form equal angles with the base. The size is designated by the length of the side rails measured along the front edge.

Analyzing the ladder at issue using this definition results in the following: (1) it is self-supporting; (2) it is portable; (3) it is nonadjustable in length; (4) it has two sections hinged at the top; and (5) the sections form equal angles with the base. Exhibit 10 depicts a ladder with a hinge at the top and with sections creating an "A" frame, forming equal angles where the rails meet the floor. In contrast, a step ladder having a hinge on the back section creates unequal angles where the front and back rails meet the floor base.

The drafters of section 3276 used very specific, unambiguous language for the definitions of the various types of ladders. The definitions include the location of the hinge, which makes a significant difference for the step and trestle ladders.

Additionally, the drafters of section 3276 chose to limit the language of subdivision (e)(15)(E). As set forth above, section 3276, subdivision (e)(15)(E), prohibits sitting, kneeling, stepping, or standing, on the pail shelf, top cap or the step below the top cap of a *step* ladder. (Emphasis added.) Notably, after the drafters of section 3276 defined many different types of portable ladders, subdivision (e)(15)(E) explicitly applies to only step ladders. (See *Michels Corp, dba Michels Pipeline Construction, supra*, Cal/OSHA App. 07-4274. [If the language of the regulation is unambiguous, the plain meaning of the language controls.])

Accordingly, the Division failed to establish that section 3276, subdivision (e)(15)(E), applied to the ladder for which Employer was cited. Employer's appeal is granted and Citation 1 is dismissed.

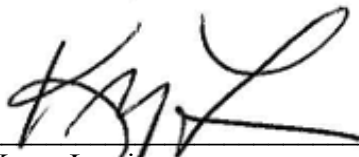
Conclusion

The Division failed to establish that Employer violated section 3276, subdivision (e)(15)(E), because the particular piece of equipment that is the basis of Citation 1 is not a step ladder.

Order

It is hereby ordered that Citation 1, Item 1, is dismissed.

Dated: 10/06/2020



Kerry Lewis
Administrative Law Judge

The attached decision was issued on the date indicated therein. If you are dissatisfied with the decision, you have thirty days from the date of service of the decision in which to petition for reconsideration. Your petition for reconsideration must fully comply with the requirements of Labor Code sections 6616, 6617, 6618 and 6619, and with California Code of Regulations, title 8, section 390.1. **For further information, call: (916) 274-5751.**