Evergreen Utility Contractors

SAFETY AND HEALTH

Industry-specific standards

A telecommunications employer was cited for fall violations under standards for operations involving construction work. It was not necessary to amend to a fall protection standard specific to the telecommunications industry because the work being performed when the violation occurred met the broad and inclusive definition for construction work found in WAC 296-115-012. ***….In re Evergreen Utility Contractors,* BIIA Dec., 98 W0016 (1999)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under Grant County Cause No. 00-2-00002-9.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: EVERGREEN UTILITY CONTRACTORS INC.	)	**DOCKET NO. 98 W0016**
	)	
CITATION & NOTICE NO. 115241127	)	**DECISION AND ORDER**

APPEARANCES:

Employer, Evergreen Utility Contractors Inc., by
Russ Coxen, Safety Director

Employees of Evergreen Utility Contractors, Inc.,
None

Department of Labor and Industries, by
The Office of the Attorney General, per
Karen Galipeau Forner, Assistant

The employer, Evergreen Utility Contractors Inc., filed an appeal with the Board of Industrial Insurance Appeals on March 30, 1998, from Corrective Notice of Redetermination No. 115241127, issued by the Department of Labor and Industries on March 20, 1998. The Corrective Notice of Redetermination affirmed Citation and Notice No. 115241127 dated January 8, 1998, which cited the employer with one serious and three general violations of safety regulations promulgated under the authority of the Washington Industrial Safety and Health Act (WISHA) with the total penalty assessed equal to $600. **AFFIRMED.**

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on timely Petitions for Review filed by the Department of Labor and Industries and the employer to a Proposed Decision and Order issued on June 7, 1999, in which Corrective Notice of Redetermination No. 115241127, dated March 20, 1998, was affirmed as modified.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed and the rulings are affirmed.

We have granted review in order to affirm the general violations contained in the Citation and Notice, ascertain the appropriate safety standard that is the subject matter of the serious violation, and make corrections to the findings of facts and conclusions of law.

In WISHA appeals, the Department has the burden of initially introducing all evidence in its case in chief. WAC 263-12-115(2)(b). However, when an employer's Notice of Appeal does not contest the occurrence of one or more of the violations for which it was cited, the Department need not introduce evidence establishing the existence of those violations. *In re U.S. Engine, Inc.*, Dckt. No. 98 W1057 (February 10, 1999). Similarly, after filing a Notice of Appeal, an employer may waive any issue it might have regarding one or more violations for which it was cited. In this case, during the June 24, August 5, and October 13, 1998 conferences, the employer specifically waived all issues regarding the three general violations included in Citation and Notice No. 115241127. Therefore, all three general violations are deemed established regardless of the lack of presentation of proof thereon by the Department.

We disagree with the Department's assertion in its Petition for Review that we do not have jurisdiction over the three general violations. The Corrective Notice of Redetermination affirmed all four violations. The employer's Notice of Appeal made reference to appealing from the Corrective Notice of Redetermination without any indication that it wished to limit the subject matter of its appeal. It was only after proceedings before this Board had been commenced that the employer communicated its desire to waive any objection to the citation of those three general violations. Therefore, any restriction on the issues tried before us was due to the waiver or agreement of the parties rather than a lack of subject matter jurisdiction on our part.

With regard to the serious violation, Item 1-1, the safety standard the Department originally cited the employer for violating was codified within WAC 296-155-24510(1)(b) regarding fall restraint systems. Before the hearing in this matter, the Department was allowed to amend the

Citation and Notice to indicate that the safety standard the employer violated was WAC 296-32-290(3)(c). We disagree with the amendment inasmuch as the evidence presented at the hearing showed that the employer violated the standard for which it was originally cited. Amendment of a Citation and Notice or a Corrective Notice of Redetermination at the time of the hearing is permissible so long as the employer is not prejudiced thereby. *In re Jeld-Wen of Everett*, BIIA Dec., 88 W144 (1990); *In re ABB Power Generation, Inc.*, BIIA Dec., 93 W469 (1994). In this case there is no indication the employer was denied notice or an opportunity to be heard or was otherwise prejudiced by either the amendment or by our revival of the citation of the original standard. The subject matter of the violation (inadequate fall protection, i.e., the particular combination of a safety belt and a 5-ft. long lanyard) did not change, nor did the witnesses or exhibits necessary to defend against the cited violation.

The industry specific or vertical safety standards most often applicable to the employer's industry, telecommunications, are codified in Chapter 296-32, WAC. These are not the only safety and health standards that this employer or other telecommunications employers must meet. Other safety standards, listed within WAC 296-32-200 (3) and (4), which could apply to this employer, include the general safety and health standards (Chapter 296-24, WAC), construction standards for operations involving construction work (Chapter 296-155, WAC), general occupational health standards (Chapter 296-62, WAC) and electrical workers' safety rules (Chapter 296-45, WAC). At the time of the inspection, the employer's work crew was erecting or extending communication lines by using an aerial lift in which employees hung overhead communications cables on utility poles (See Exhibit No. 2). This work activity is aptly described as "field" telecommunications work within the meaning of WAC 296-32-200(1). However, the work activity also meets the extremely broad

and inclusive definition of "construction work" found in WAC 296-155-012. Pursuant to WAC 296-32-200(2)(a) and (3), the appropriate safety regulations to apply in this situation are those found in Chapter 296-155, WAC.

At hearing, the Department presented the testimony of the safety inspector who conducted the inspection that led to the issuance of the Citation and Notice. The safety inspector testified that employees in the bucket of the aerial lift were exposed to the risk of a fall of 12 feet. The fall restraint device used by the workers while in the bucket was a safety belt attached to the bucket by a 5-ft. lanyard. In this situation, if an employee fell out of the bucket, the force of the fall would be absorbed by the area of the body immediately adjacent to the safety belt, with the likely result being a broken back or severe injuries to the internal organs located in the abdomen. The inspector stated that the lanyard should have only been two feet long or a safety harness should have been in use. Clearly the Department has presented enough evidence to show that a serious violation of WAC 296-155-24510(1)(b) occurred and that the $600 penalty assessed was appropriate. The employer presented no persuasive evidence to the contrary. Thus, the serious violation and its penalty must be affirmed.

FINDINGS OF FACT

1. On July 31, 1997, the Department of Labor and Industries conducted an inspection of a worksite of Evergreen Utility Contractors Inc., the employer, at Central and "A" Street in Quincy, Washington. On January 8, 1998, the Department issued Citation and Notice No. 115241127, which alleged one serious and three general violations of safety regulations promulgated under the authority of the Washington Industrial Safety and Health Act (WISHA), with the total penalty assessed equal to $600. On January 28, 1998, the employer filed a Notice of Appeal from the Citation and Notice with the Department. On February 5, 1998, the Department reassumed jurisdiction of the matter. On that same date the Department and the employer jointly agreed to extend the reassumption process to no later than April 1, 1998, and executed a document to that effect. On March 20, 1998, the Department issued Corrective Notice of Redetermination No. 115241127, which affirmed the Citation and Notice bearing the

same number. On March 30, 1998, the employer filed a Notice of Appeal with the Board of Industrial Insurance Appeals. On March 31, 1998, this Board issued its notice of filing of a WISHA appeal, and assigned the matter Docket No. 98 W0016. On April 7, 1998, the Department transmitted its file to this Board.

2. On July 31, 1997, two workers for the employer were hoisted 12 feet above ground level by an aerial manlift, or bucket, attached to a truck. These workers were engaged in the process of erecting or extending communication lines by hanging cables through the air on utility poles. Each worker wore a safety belt, but not a full-body harness, which was attached to the boom or bucket by a 5-ft. long lanyard, in violation of WAC 296-155-24510(1)(b).

3. Wearing the combination of a safety belt, but not a full-body harness, with a 5-ft. long lanyard exposed each worker to serious bodily injuries in the event he or she fell out of the bucket or aerial manlift.

4. The severity of the injuries likely to be sustained due to this hazard is most accurately rated as a "5" on a scale of "1 to 6" where a "1" represents little or no injury and a "6" represents death or serious permanent disabilities. The probability of an accident as a result of this hazard is most accurately rated as a "2" on a scale of "1 to 6" where a "1" represents little or no likelihood of an accident and a "6" represents a very high likelihood that the hazard will result in an accident. The employer manifested "good faith" and a "history" that are both most accurately rated as "good." As of July 31, 1997, the employer employed between 26 and 100 employees.

5. At conferences held on June 24, 1998, August 5, 1998, and October 13, 1998, the employer agreed that the only issue it was litigating in this appeal was Item 1-1 of the Corrective Notice of Redetermination, the alleged serious violation of WAC 296-155-24510(1)(b). The employer did not contest the validity of the three general violations affirmed by the Corrective Notice of Redetermination.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the subject matter and parties to this appeal.

2. The employer waived any objection or appeal to the three general violations alleged by Citation and Notice No. 115241127 and affirmed by the Corrective Notice of Redetermination bearing that same number. Under the circumstances, the Department need not present evidence regarding any of those violations in order for them to remain affirmed.

3. Corrective Notice of Redetermination No. 115241127 is affirmed in all respects.

It is so ORDERED.

Dated this 17th day of December, 1999.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

/s/_____
FRANK E. FENNERTY, JR. Member

DISSENT

While I agree with the majority's conclusions regarding the general violations, I disagree with its determination to affirm the serious violation. The Department originally cited the employer for violating WAC 296-155-24510(1)(b)(vii), one of the fall protection standards applicable to the construction industry. During the hearing process, the Department was allowed to amend its Corrective Notice of Redetermination to change the cited regulation to WAC 296-32-290(3)(c), a telecommunications safety standard. The majority has determined that the construction injury standard is the one that is applicable in this instance and has affirmed the violation. I believe that Item 1-1, the serious violation, should be vacated regardless of whether it is cited under the telecommunications industry safety standards, Chapter 296-32, WAC, or under the construction industry standards, Chapter 296-155, WAC.

There is no factual support for a violation of WAC 296-32-290(3)(c). That regulation, applicable to fall protection/prevention for telecommunication industry workers who perform work while in aerial manlifts, only requires that, "the worker wear a safety belt attached to the boom." This standard is essentially identical to another safety standard, WAC 296-45-65041(15), which is contained within the electrical workers' safety standards. These standards are also applicable to

the telecommunications industry. WAC 296-32-200(4). Mr. Krause, the Department employee who conducted the inspection at this employer's worksite, directly testified that, "They [the workers] had the safety belt attached to the boom." Clearly the employer complied with the relevant standard in both the telecommunications industry safety standards and the electrical workers' safety standards.

My quarrel with the citation of Item 1-1 against this employer is that it is for violation of a safety standard that does not apply to the telecommunications industry. An employer should be able to rely on its compliance with its own industry-specific, vertical safety standards. It is unreasonable to require, in effect, that an employer search other industries' vertical standards for safety provisions that may expand upon or be contrary to those within its own vertical standards, and then try to ascertain if it also must comply with those standards. A telecommunications employer, engaged in what the safety inspector described as "aerial-type line work" consisting of hanging communication cables through the air on telephone poles, is not engaged in construction work. It should not be required to comply with regulations that were designed for work practices and conditions within that other industry. If the Department desires that the construction industry's fall protection standards be applied to telecommunications field work, then it should have incorporated those standards within the telecommunications industry vertical standards or specifically made the telecommunications industry subject to the construction standards. To do so would have given this employer and other employers within the telecommunications industry fair and reasonable notice of the safety standards with which they must comply. In this case, it is not fair to require this employer to comply with a standard that it could not reasonably be expected to know would be applied to it.

Dated this 17th day of December, 1999.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
JUDITH E. SCHURKE Member