BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1101230**
M T M BUILDERS, INC. **1480 FRONTAGE ROAD** **CHULA VISTA, CA 91911**	**DECISION**
Employer	

Statement of the Case

MTM Builders, Inc. (Employer), is a general contractor in the construction industry. On October 27, 2015, the Division of Occupational Safety and Health (the Division), through Senior Safety Engineer Darcy Murphine commenced an accident investigation of Employer's work site located at 1814 Roosevelt Avenue, National City, California (job site). On March 25, 2016, the Division issued three citations, with a total of seven items, to Employer. At hearing, Employer withdrew its appeals of Citation 1, Items 1, 3, and 5. The items that remain at issue allege: (1) Employer failed to adopt a written Code of Safe Practices which related to its operations; (2) Employer failed to report to the Division a serious injury of an employee occurring in a place of employment or in connection with employment; (3) Employer failed to guard roof or skylight openings; (4) Employer failed to ensure employees used fall protection while exposed to falls in excess of seven and one-half feet from the perimeter of a structure, unprotected sides and edges, leading edges, through shaftways and openings, sloped roof surfaces, or other sloped surfaces not otherwise adequately protected under the provisions of the safety orders.

Employer filed timely appeals of the citations, contesting the existence of the violations, the reasonableness of abatement, and the reasonableness of the proposed penalties. Additionally, for Citations 2 and 3, Employer contested the classification of the citations. Employer also asserted numerous affirmative defenses for each item.[1]

This matter was initially heard by Howard Chernin (Chernin), Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (the Appeals Board), in November of 2018. However, ALJ Chernin became unavailable to hold the remainder of the proceeding and a de novo hearing was held by Christopher Jessup (Jessup), ALJ for the Appeals

[1] Except 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); see also *Western Paper Box Co.*, Cal/OSHA App. 86-812, Denial of Petition for Reconsideration (Dec. 24, 1986).)

Board, in San Diego, California, on September 10, 11, and 12, 2019. The evidentiary record was left open at the close of hearing for the production of documents by Employer.[2] At a telephonic status conference on October 21, 2019, the evidentiary record was closed. Eugene McMenamin, attorney with Ogletree, Deakins, Nash, Smoak & Stewart P.C., represented Employer. Martha Casillas, Staff Counsel, represented the Division. This matter was submitted for Decision on February 21, 2020.

Issues

1. Did Employer fail to adopt a written Code of Safe Practices which relates to Employer's operations?

2. Did Employer fail to report to the Division a serious injury of an employee occurring in a place of employment or in connection with employment?

3. Did Employer fail to guard roof or skylight openings?

4. Did Employer fail to ensure employees used fall protection while exposed to falls in excess of seven and one-half feet from the perimeter of a structure, unprotected sides and edges, leading edges, through shaftways and openings, sloped roof surfaces, or other sloped surfaces not otherwise adequately protected under the provisions of the safety orders?

5. Are the proposed penalties reasonable?

Findings of Fact

1. An accident occurred on September 30, 2015, while Employer's employees, including Marco Rangel (Rangel), were replacing skylight frames at the job site and Rangel fell through an existing skylight. The accident occurred on the second day of the job.

2. The existing skylight that Rangel fell through at the time of the accident was covered by the existing skylight lens. At the time of the accident, Rangel was not wearing his fall protection equipment.

3. Employer's business included working on the structure of buildings.

[2] On the third day of hearing in this matter, September 12, 2019, Elias Terrazas, Employer's chief executive officer, testified that Employer was in possession of photographs of the fall protection equipment used on the day of the accident. The Division indicated it had not received copies of the photographs during discovery. Employer was ordered to produce the photographs amongst other documents. Employer did not submit the photographs and Employer's counsel represented that Employer was unable to locate the photographs.

4. Prior to the accident, Rangel had worked on rooftops on prior occasions and Rangel had been required to wear fall protection equipment on prior occasions. Additionally, at the time of the accident Employer was involved in an operation that included a fall hazard.

5. The roof where Employer's employees were working at the time of the accident was in excess of seven and one-half feet in height.

6. Employer's Code of Safe Practices does not reference fall hazards or fall protection.

7. Rangel was hospitalized at or before 9:00 a.m. on September 30, 2015. Rangel spent the night in the hospital following his hospitalization. Elias Terrazas (Terrazas), Employer's chief executive officer, was aware that Rangel spent the night in the hospital. Rangel was hospitalized for not less than 24 hours, during which time he was subject to medical tests and received medication.

8. Employer did not report Rangel's injury to the Division. However, Terrazas called the Division to determine whether reporting was required.

9. Employer's Code of Safe Practices' failure to address fall hazards could result in injuries requiring medical treatment.

10. Employer had 35 employees during the relevant time period.

Analysis

1. Did Employer fail to adopt a written Code of Safe Practices which relates to Employer's operations?

California Code of Regulations, title 8,[3] section 1509, subdivision (b), requires that "[e]very employer shall adopt a written Code of Safe Practices which relates to the employer's operations. The Code shall contain language equivalent to the relevant parts of Plate A-3 of the Appendix."

Citation 1, Item 2, alleges:

> Prior to and during the course of the inspection, the employer had not established a written Code of Safe Practices which was relevant to the employer's operations. The employer did provide a written Code of Safe Practices when it was requested on a Document Request submitted to the employer on 10/27/15. However, the

[3] All references are to California Code of Regulations, title 8, unless otherwise indicated.

> employer's written Code, which contained general topics of safety including confined spaces, lockout/tag-out, ladders, use of tools, some electrical hazards and guarding of machinery, did not contain language that relates to the employer's operations at the jobsite and on or prior to the accident of 9/30/15. There were no specific instructions for employees working on a roof, having to use fall protection, use a scissor's lift, or working around skylights.

California Code of Regulations, title 8, chapter 4, subchapter 4, Appendix A, Plate A-3 (Plate A-3), contains a list of general safety rules and a parenthetical that provides: "This is a suggested code. It is general in nature and intended as a basis for preparation by the contractor of a code that fits his/her operations more exactly." In *Hood Corporation*, Cal/OSHA App. 89-236, Decision After Reconsideration (June 22, 1990), the Appeals Board explained:

> The parenthetical in Appendix A-3 indicates clearly that mere adoption of the rules set forth there is not enough. The Employer must prepare a code that fits its operations more exactly. Section 1509(b) defines the required amount of 'exactness' by mandating that each code must relate to the employer's operations.

(Emphasis in original.)

a. *Is the alleged hazardous activity a part of Employer's operations?*

To examine a violation of section 1509, subdivision (b), the considerations are: (1) whether the alleged hazardous activity is a part of an employer's operations; and, if so (2) if that employer has a written Code of Safe Practices (CSP) that relates to the activity. (*Id*.) "Section 1509(b) does not contain a litmus test for determining what constitutes an 'operation' for a particular employer. Thus, what constitutes an 'operation' will depend on the facts and circumstances of each case. … The next issue is whether Employer's Code of Safe Practices 'related to' the operation[.]" (*Id.*) For a CSP to relate to the alleged hazardous activity, it must contain rules that "instruct employees how to avoid each of the potentially dangerous tasks[.]" (*Id.)* "The Division has the burden to prove a violation by a preponderance of the evidence." (*Wal-Mart Stores Inc. Store # 1692*, Cal//OSHA App. 1195264, Decision After Reconsideration (Nov. 4, 2019) citing *International Paper Company*, Cal/OSHA App. 14-1189, Decision After Reconsideration (May 29, 2015).)

At the time of the accident, Employer's employees were replacing skylight frames on existing skylights located on the roof of the job site. Therefore, the initial question is whether the activities involved in replacing skylight frames were a part of Employer's operations. Terrazas, Employer's chief executive officer, testified that Employer did work as a general contractor. Terrazas testified that Employer's work included working on the structure of buildings,

described as vertical construction, maintenance or repair work, painting work, and work on doors and frames. The employee injured in the accident, Rangel, testified that the accident took place on the second day of the project.[4] Rangel testified that he had worn fall protection equipment prior to the accident but took it off during a break immediately prior to the accident. Additionally, Rangel testified that he had worked on rooftops prior to the accident and had been required to wear fall protection equipment on prior occasions as well. Employer's involvement in the alleged hazardous activity was more than momentary or de minimis as the accident took place on the second day of the project.

Terrazas alleged that the skylight project was not a normal part of Employer's operations. However, Employer's closing brief implies that the activities involved in the skylight project had parallels to Employer's other work. Employer's closing brief offers the following comments: fall protection used in roof work is similar to the fall protection used for work on an interior floor; a "scissor lift is just another piece of equipment"; and, fall protection used for an exterior painting job is similar to that used for work on a roof. The relevant question is not whether skylight replacement was a particular task that was regularly performed by Employer. Rather, the issue that must be examined is whether Employer's operations included working from heights that require the use of fall protection.

Pursuant to the foregoing, the alleged hazardous activity, working at heights that required fall protection, was a part of Employer's operations.

b. *Does Employer have a Code of Safe Practices related to the alleged hazardous activity?*

Having determined that the alleged hazardous activity, working at a height with a fall hazard, was a part of Employer's operation, it is next necessary to examine whether Employer had a CSP related to that operation. The Division submitted Exhibit 6 to the record, a copy of Employer's CSP. Terrazas testified that Exhibit 6 was a complete copy of Employer's CSP that was in effect at the time of the accident. No additional evidence was submitted demonstrating Employer had anything else to supplement Exhibit 6 as its written CSP. Exhibit 6 does not reference fall hazards or fall protection. Moreover, Exhibit 6 appears to follow the content of Plate A-3 to a high degree.

Employer's closing brief asserts that Employer conducted pre-job training covering a plan of action and safe practices with the crew involved in the skylight project. It further asserts that unique hazards require alteration to the CSP but that Employer accomplishes this through

[4] Rangel did not appear for the hearing before ALJ Jessup during the period of September 10, 2019, to September 12, 2019. Rangel testified at hearing on November 8, 2018, in front of ALJ Chernin. The parties stipulated at the de novo proceeding that Rangel was an unavailable witness and to the admission of the transcript of Rangel's prior testimony as a joint exhibit. (See Ex. J1.)

customized training. However, a CSP, a series of rules relating to on-the-job hazards, differs from job training designed to educate employees about how to perform work. Moreover, a CSP is required to be provided in writing pursuant to the plain language of section 1509, subdivision (b). Employer's suggestion that in-person pre-job training suffices to meet the requirements of section 1509, subdivision (b), does not comport with the requirements of the regulation.

As set forth above, Employer failed to adopt a written CSP with rules related to the hazardous activity as required by section 1509, subdivision (b). Accordingly, the Division has met its burden of proof to establish a violation of section 1509, subdivision (b).

2. **Did Employer fail to report to the Division a serious injury of an employee occurring in a place of employment or in connection with employment?**

Section 342, subdivision (a), provides:

> Every employer shall report immediately by telephone or telegraph to the nearest District Office of the Division of Occupational Safety and Health any serious injury or illness, or death, of an employee occurring in a place of employment or in connection with any employment.
>
> Immediately means as soon as practically possible but not longer than 8 hours after the employer knows or with diligent inquiry would have known of the death or serious injury or illness. If the employer can demonstrate that exigent circumstances exist, the time frame for the report may be made no longer than 24 hours after the incident.
>
> Serious injury or illness is defined in section 330(h), Title 8, California Administrative Code.

Section 330, subdivision (h), provides in its relevant part:

> "Serious injury or illness" means any injury or illness occurring in a place of employment or in connection with any employment which requires inpatient hospitalization for a period in excess of 24 hours for other than medical observation or in which an employee suffers a loss of any member of the body or suffers any serious degree of permanent disfigurement[.]

Citation 1, Item 4, alleges:

> At about 8:30 AM on 9/30/2015, an employee was seriously injured when he fell through a skylight from the roof of a building at a jobsite located at 1814 Roosevelt Ave, in National City, CA. The employee fell 15 to 20 feet, and landed on the roof of a car inside the building, and was hospitalized for more than 24 hours. The employer did not notify the Division of a serious injury accident within 8 hours after the accident.

In order to establish a violation of section 342, subdivision (a), the Division must first establish that an employee suffered a serious injury or illness, or death, in a place of employment or in connection with employment. Then the Division must also establish that Employer failed to report that injury, illness, or death to the Division in a timely manner.

a. Did Rangel suffer a serious injury?

On September 30, 2015, Rangel fell through a skylight while working on a job for Employer. It is undisputed that Rangel's injuries were suffered in a place of employment or were in connection with employment. However, there is contention regarding whether Rangel suffered a serious injury. As there was no evidence of amputation or permanent disfigurement, the focus of the dispute revolves around whether Rangel was hospitalized for a period in excess of 24 hours. Therefore it is necessary to determine if Rangel was hospitalized for a period in excess of 24 hours and was hospitalized for other than medical observation. Terrazas testified that the accident happened between 8:00 a.m. to 8:30 a.m., that he was notified about the accident around 8:30 a.m., and that he subsequently went to see Rangel at the hospital. Terrazas testified that he arrived at the hospital at approximately 9:00 a.m. and that Rangel was present at the hospital at that time. Further, the evidence adduced at hearing, including medical records in Exhibit J2, shows that Rangel received CT and X-ray scans, blood tests, and medication while hospitalized. Therefore an inference is drawn that Rangel was admitted for hospitalization at or before 9:00 a.m. for purposes other than medical observation.

The medical records in Exhibit J2 provide further insight as to the duration of Rangel's hospitalization. Exhibit J2 includes a note with a time stamp of 9:21 a.m. on September 30, 2015, that contains a treatment plan requiring a series of medical tests for the subsequent 24 hours. Further, Rangel testified that he stayed overnight in the hospital and Terrazas admitted that he learned Rangel had spent the night at the hospital the day after the accident. Additional supplemental information about the duration of the hospitalization was also presented. Exhibit 5 indicates Rangel was discharged at 3:01 p.m.[5] Additionally, Exhibit 5 supplements Exhibit J2 which shows blood was collected on October 1, 2015, at 6:13 a.m., supporting an inference that Rangel's discharge from the hospital did not take place before 9:00 a.m. on October 1, 2015.

[5] It is noted that Employer objected to the admission of Exhibit 5 on the basis of hearsay. Section 376.2 permits the admission of hearsay evidence in Appeals Board proceedings and provides that it may be used for the purpose of supplementing or explaining other evidence.

Pursuant to the foregoing, an inference is drawn that Rangel was hospitalized for more than 24 hours and, therefore, Rangel had a serious injury pursuant to section 330, subdivision (h).

b. Did Employer fail to report a serious injury?

Having established that Rangel suffered a serious injury pursuant to section 330, subdivision (h), it is also established that the injury was reportable. Therefore, it is necessary to examine whether Employer reported the injury to the Division. Terrazas testified that when he visited Rangel at the hospital, he called "Cal OSHA" to ask whether Employer was required to report Rangel's injury. Terrazas testified that he informed the Division representative on the phone that there had been an accident and that an employee was in the hospital. Terrazas testified that he did not call to report, but rather, to ask about the requirement to report. Terrazas testified that he understood that he had not made a report by that call. Terrazas alleged that he was told by the Division staff that Employer was not required to report unless an employee was injured and stayed overnight in the hospital. Terrazas testified that he learned that Rangel had spent the night at the hospital around 4:00 p.m. on October 1, 2015. Terrazas testified that he did not call the Division to report the accident after learning that information. Terrazas testified that he believed that that Employer was not required to report the incident to the Division because Rangel "wasn't injured," despite Rangel's overnight stay in the hospital.

Employer's closing brief argues "[p]lainly, the incident was timely reported." However, Employer's brief does not offer explanation of Terrazas testimony that he did not believe that he was reporting the incident. Additionally, Employer's closing brief alleges that Terrazas "advised the person answering what he knew. This included the fall distance, the use of an ambulance to transport, and the doctor's prognosis that Rangel would be released shortly." This allegation lacks a citation to the record and testimony is not apparent in the record. Rather the record reflects that Terrazas testified that during his call he said "we're employers […] we've had an employee fall; he's in the emergency room. Are we required to report this?" Terrazas continued to explain he was asked a few question and he answered them, but Terrazas provided no details about the questions or answers. Employer's contention that Employer timely reported to the Division stands unsupported by the record.

The evidence adduced at hearing demonstrates that Rangel suffered a serious injury and Employer failed to report that injury pursuant to section 342, subdivision (a). Accordingly, Citation 1, Item 4, is affirmed.

3. Did Employer fail to guard roof or skylight openings?

Section 1632, subdivision (b),[6] provides:

(1) Floor, roof and skylight openings shall be guarded by either temporary railings and toeboards or by covers.

Note: Requirements for guarding existing skylights are found in Section 3212(e) of the General Industry Safety Orders.

(2) Temporary railing and toeboards shall meet the requirements of Sections 1620 and 1621. The railing shall be provided on all exposed sides, except at entrances to stairways.

(3) Covers shall be capable of safely supporting the greater of 400 pounds or twice the weight of the employees, equipment and materials that may be imposed on any one square foot area of the cover at any time. Covers shall be secured in place to prevent accidental removal or displacement, and shall bear a pressure sensitized, painted, or stenciled sign with legible letters not less than one inch high, stating: "Opening--Do Not Remove." Markings of chalk or keel shall not be used.

Citation 2, Item 1, alleges:

Prior to and during the course of the inspection, including but not limited to 9/30/2015, an employee was injured when he fell a total distance of approximately 20 feet through a skylight at a jobsite located at 1814 Roosevelt Ave, in National City. The employee was assisting with the skylight repair project on the commercial building, when he tripped and fell onto the skylight, breaking the skylight lens and falling through the roof hole to the floor below, landing on the roof of a vehicle inside the shop. There were no railings around the roof opening/skylight, and the employee was not wearing fall protection.

In order to establish a violation of section 1632, subdivision (b), the Division must establish that there was a floor, roof, or skylight opening that was unguarded or insufficiently guarded by a temporary railing, toeboard, or cover. Therefore, an essential element of

[6] At hearing, the Division moved to amend it Citation 2, Item 1, from an alleged violation of section 1632, subdivision (h), to an alleged violation of section 1632, subdivision (b)(1). The motion to amend was granted on the record at hearing.

establishing a violation of section 1632 is establishing the existence a floor, roof, or skylight opening at the job site.

Section 1504 defines an opening as "[a]n opening in any floor or platform, 12 inches or more in the least horizontal dimension. It includes: stairway floor openings, ladderway floor openings, hatchways and chute floor openings." The Appeals Board explained in *Morrow Meadows Corporation*, Cal/OSHA App. 09-2295, Decision After Reconsideration (Sept. 4, 2014), that an existing skylight is different than a skylight opening. "In other words, a cover is generally understood to cover an existing skylight, and the [Appeals] Board understands the term in this usual and ordinary way. Had the Standards Board meant to refer to a roof opening where a skylight was to be placed in the future, the term 'skylight opening' would have been more accurate, and indeed, the Standards Board does use the term in section 1632, to refer to the [opening] in the roof where a skylight will be installed." (*Id.*) Additionally, in *Bostrom-Bergen Metal Products*, Cal/OSHA App. 00-1012, Decision After Reconsideration (Jan. 10, 2003), the Appeals Board explicitly rejected the premise that a skylight and skylight opening may be considered synonymous for the purpose of section 1632, subdivision (b). The Appeals Board stated:

> We disagree with the ALJ's view of the term "skylight opening" as synonymous with "skylight" since both are openings in the roof with the immaterial distinction that the latter is simply covered with transparent or translucent material[.] Under section 1632(b), it is the *opening* that is the subject […] of the standard and must be given primary effect for any interpretation of the safety order. While a skylight may be ordinarily defined as an opening in a roof covered with translucent or transparent material, the ordinary meaning cannot be imposed to thwart the intent of the regulation. As discussed above, we find that it is quite clear that the Standards Board sought different standards to apply to "skylight openings" and "existing skylights."

(*Bostrom-Bergen Metal Products*, *supra*, Cal/OSHA App. 00-1012, fn. 7, emphasis in original.)

In the instant matter, the evidence adduced at hearing demonstrates that Rangel fell through an existing skylight. Notably, Rangel was asked "was there anything covering the skylight?" Rangel testified in response: "No. It was just – it was just the framing of the skylight and the – the material that the skylight is made out of, this brittle old plastic-type skylight." Rangel elaborated that he was referring to "a dome type of skylight." Additionally, Rangel testified that the work he was performing at the job site was rebuilding the skylight frames. Rangel's testimony does not suffice to establish that the plastic material of the existing skylight was removed for the skylight involved in the accident or for other skylights at the job site. Further, Murphine testified, "the hole in this case on the roof… is covered by a lens, a skylight

lens." Murphine's testimony demonstrated that she did not allege that the skylight "lens" was removed in the process. Pursuant to the foregoing, an inference is drawn that an existing skylight structure, described as a lens, a dome, and as a plastic-type skylight, was in place over the skylight involved in the accident at the time of the accident. The Division did not put on additional evidence demonstrating that there were other skylights without such structures at the job site. Therefore, as examined in *Bostrom-Bergen Metal Products, supra,* Cal/OSHA App. 00-1012, and *Morrow Meadows Corporation, supra,* Cal/OSHA App. 09-2295, the Division failed to meet the burden of proof to establish that the job site had skylight openings instead of existing skylights.

Without establishing that skylight openings or roof openings were present at the job site, the Division is unable to establish a violation of section 1632, subdivision (b). Accordingly, Citation 2 is dismissed as the Division failed to meet its burden of proof.

a. Should Citation 2 be amended post-submission to allege a violation of another safety order?

Section 386 provides:

> (a) The Appeals Board may amend the issues on appeal or the Division action after a proceeding is submitted for decision.
>
> (b) Each party shall be given notice of the intended amendment and the opportunity to show that the party will be prejudiced thereby unless the case is continued to permit the introduction of additional evidence in the party's behalf. If such prejudice is shown, the proceeding shall be continued to permit the introduction of additional evidence.

In Employer's post-hearing brief, Employer asserts that the Division "brazenly refuses to charge [section] 3212, which specifically addresses the fall hazards associated with this skylight rehabilitation work."

Section 3212, subdivision (e),[7] as effective at the time of the citation, provides in its relevant part:

[7] Section 3212 was initially made effective in 1975 and amended on a number of subsequent occasions. More specifically, the version of section 3212 in effect at the time of the accident as well as on the date of issuance of the Citation 2, was amended effective January 7, 2005. A subsequent amendment to section 3212 was made effective on July 1, 2016, however, as that amendment was not effective during the operative time period it is not discussed further herein.

(e) Any employee approaching within 6 feet of any skylight shall be protected from falling through the skylight or skylight opening by any one of the following methods:
(1) Skylight screens. […], or
(2) Guardrails meeting the requirements of Section 3209, or
(3) The use of a personal fall protection system meeting the requirements of Section 1670 of the Construction Safety Orders, or
(4) Covers meeting the requirements of subsection (b) installed over the skylights, or
(5) A fall protection plan as prescribed in Section 1671.1 of the Construction Safety Orders when it can be demonstrated; that the use of fall protection methods as contained in subsections (e)(1-4) of this Section is impractical or creates a greater hazard.
EXCEPTION: When the work is of short duration and limited exposure such as measuring, roof inspection, electrical/mechanical equipment inspection, etc., and the time involved in rigging and installing the safety devices required in subsections (e)(1) through (e)(4) equal or exceed the performance of the designated tasks of measuring, roof inspection, electrical/mechanical equipment inspection, etc.; these provisions may be temporarily suspended provided that adequate risk control is recognized and maintained.

As noted above, section 386 provides that the Appeals Board may amend the issues on appeal or the Division action after a proceeding is submitted for decision. Section 386 is notably permissive in nature and ultimately at the discretion of the Appeals Board. In the instant matter, the equities do not favor further amendment of Citation 2 on the Appeals Board's own action. The Division had an opportunity to amend Citation 2 when presented with both the evidence adduced at hearing and Employer's direct and explicit argument that section 3212, subdivision (e), should have been cited. Additionally, at hearing, the Division exercised its opportunity to amend by requesting to amend Citation 2 from an alleged violation of section 1632, subdivision (h), to an alleged violation of section 1632, subdivision (b)(1), and the Division's request to amend was granted. Notably, the Division did not seek to further amend Citation 2 in its post-hearing brief.

Although an accident occurred in a place of employment, "the Board does not have a duty to 'fashion a remedy' when a hazard is proven that is not addressed by the cited safety order." (*Devcon Construction, Inc.*, Cal/OSHA App. 09-3398, Denial of Petition for Reconsideration (Feb. 16, 2012).) Here the Division will not be forced to proceed on a theory of the case that it has intentionally declined to follow. Therefore, Citation 2 is not amended to allege a violation of section 3212, subdivision (e).

4. **Did Employer fail to ensure employees used fall protection while exposed to falls in excess of seven and one-half feet from the perimeter of a structure, unprotected sides and edges, leading edges, through shaftways and openings, sloped roof surfaces, or other sloped surfaces not otherwise adequately protected under the provisions of the safety orders?**

Section 1670, subdivision (a), provides, in relevant part:

> (a) 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 1/2 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.

Citation 3, Item 1, alleges:

> Prior to and during the course of the inspection, including but not limited to 9/28 thru [*sic*] 9/30/2015, an employee was injured when he fell a total distance of approximately 15 to 20 feet through a skylight at a jobsite located at 1814 Roosevelt Ave, in National City where he was performing work on the roof of the building on 9/30/15. The employee exposed to a fall hazard in excess of 7 ½ feet was not wearing an approved fall protection device.

In order to establish a violation of section 1670, subdivision (a), the Division must establish: (1) that an employee did not wear approved personal fall arrest, personal fall restraint, or positioning systems; (2) while exposed to a fall in excess of seven and one-half feet; (3) 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 not otherwise adequately protected under the provisions of the safety orders.

In the instant matter, Rangel testified that he did not wear his fall protection equipment while on the roof immediately prior to the accident. Additionally, although the record is not clear on the precise height of the roof where the employees were working, Employer's opening statement at hearing conceded that the roof was in excess of seven and one-half feet. Therefore the remaining issue is whether there was exposure to a fall hazard at 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 not otherwise adequately protected under the provisions of the safety orders.

At hearing, Murphine testified that the Division cited for a fall hazard at a skylight opening. However, as discussed above, the Appeals Board has construed the term existing skylight as distinct from a skylight opening. (*Morrow Meadows Corporation, supra*, Cal/OSHA App. 09-2295.) The record does not support that employees were exposed to skylight openings as the record indicates that the skylights in place at the job site were existing skylights that were being reframed. Further, the record does not contain sufficient evidence to conclude that the employees at the job site were exposed to fall hazards without fall protection from the perimeter of a structure, unprotected sides and edges, leading edges, through shaftways, sloped roof surfaces steeper than 7:12, or other sloped surfaces not otherwise adequately protected under the provisions of the safety orders. As the Division has not demonstrated all of the requisite elements to evidence a violation of section 1670, subdivision (a), Citation 3 is dismissed.

5. Are the proposed penalties reasonable?

a. Are the penalties for Citation 1, Item 2, reasonable?

Penalties calculated in accordance with the penalty setting regulations set forth in sections 333 through 336 are presumptively reasonable and will not be reduced absent evidence that the amount of the proposed civil penalty was miscalculated, the regulations were improperly applied, or that the totality of the circumstances warrant a reduction. (*RNR Construction, Inc., supra*, Cal/OSHA App. 1092600, citing *Stockton Tri Industries, Inc*., Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).)

However, the Appeals Board has held that "while there is a presumption of reasonableness to the penalties proposed by the Division in accordance with the Director's regulations, the presumption does not immunize the Division's proposal from effective review by the Board... ." (*DPS Plastering, Inc*., Cal/OSHA App. 00-3865, Decision After Reconsideration (Nov. 17, 2003).) Nor does the presumptive reasonableness of the penalty calculated in accordance with the penalty-setting regulations relieve the Division of its duty to offer evidence in support of its determination of the penalty since the Board has historically required proof that a proposed penalty is, in fact, calculated in accordance with the penalty-setting regulations. (*Plantel Nurseries*, Cal/OSHA App. 01-2346, Decision After Reconsideration (Jan. 8, 2004); *RII Plastering, Inc*, Cal/OSHA App. 00-4250, Decision After Reconsideration (Oct. 21, 2003).)

Although the Division submitted its Proposed Penalty Worksheet, there was no testimony that the penalties were calculated in accordance with the Division's policies and procedures based on the penalty-setting regulations. (See *M1 Construction, Inc*., Cal/OSHA App. 12-0222, Decision After Reconsideration (Jul. 31, 2014), and *Ventura Coastal, LLC*, Cal/OSHA App.

317808970, Decision after Reconsideration (Sept. 22, 2017).) As such, it is necessary to examine the evidence adduced at hearing to determine the reasonableness of the penalties.

Section 336, subdivision (b), provides that a base penalty will be set initially based on the Severity of the violation and thereafter adjusted based on the Extent and Likelihood. Section 335, subdivision (a), provides in part:

> (a) The Gravity of the Violation--the Division establishes the degree of gravity of General and Serious violations from its findings and evidence obtained during the inspection/investigation, from its files and records, and other records of governmental agencies pertaining to occupational injury, illness or disease. The degree of gravity of General and Serious violations is determined by assessing and evaluating the following criteria:
>
> (1) Severity.
>
> (A) General Violation.
>
> […]
>
> ii. When the safety order violated does not pertain to employee illness or disease, Severity shall be based upon the type and amount of medical treatment likely to be required or which would be appropriate for the type of injury that would most likely result from the violation. Depending on such treatment, Severity shall be rated as follows:
>
> LOW-- Requiring first-aid only.
>
> MEDIUM-- Requiring medical attention but not more than 24-hour hospitalization.
>
> HIGH-- Requiring more than 24-hour hospitalization.
>
> […]
>
> (2) Extent.
>
> […]
>
> ii. When the safety order violated does not pertain to employee illness or disease, Extent shall be based upon the degree to which a safety order is violated. It is related to the ratio of the number of violations of a certain order to the number of possibilities for a violation on the premises or site. It is an indication of how widespread the violation is. Depending on the foregoing, Extent is rated as:

LOW-- When an isolated violation of the standard occurs, or less than 15% of the units are in violation.

MEDIUM-- When occasional violation of the standard occurs or 15-50% of the units are in violation.

HIGH-- When numerous violations of the standard occur, or more than 50% of the units are in violation.

(3) Likelihood.

Likelihood is the probability that injury, illness or disease will occur as a result of the violation. Thus, Likelihood is based on (i) the number of employees exposed to the hazard created by the violation, and (ii) the extent to which the violation has in the past resulted in injury, illness or disease to the employees of the firm and/or industry in general, as shown by experience, available statistics or records. Depending on the above two criteria, Likelihood is rated as:

LOW, MODERATE OR HIGH

In the instant matter, Murphine testified that Severity was rated as medium because issues with safety rules could result in injuries requiring medical treatment. Murphine testified that the Division made no adjustments to the base penalty for Extent or Likelihood. Murphine testified that Extent was rated as medium because the CSP "applies to all employees." However, Murphine's testimony as to Likelihood failed to explain the criteria contemplated in section 335 as she merely offered, "[t]he Likelihood was moderate, they're doing construction activity."

The Board has held that maximum credits and the minimum penalty allowed under the regulations are to be assessed when the Division fails to justify its proposed penalty. (*Armour Steel Co.,* Cal/OSHA App. 08-2649, Decision After Reconsideration (Feb. 7, 2014); *Plantel Nurseries, supra,* Cal/OSHA App. 01-2346.) Where the Division does not provide evidence to support its proposed penalty, it is appropriate that Employer be given the maximum credits and adjustments provided under the penalty-setting regulations such that the minimum penalty provided under the regulations for the violation is assessed. (*RII Plastering, Inc, supra*, Cal/OSHA App. 00-4250.)

Pursuant to section 336, the Division established that a base penalty of $1,500 was assessed correctly on the basis of medium Severity, which was not adjusted further by the Division for Extent. However, as the Division failed to establish that the Likelihood was based

on the factors set forth in section 335, the Likelihood shall be assessed as low, for a 25 percent reduction to the base penalty, resulting in a Gravity-based penalty of $1,125.

Section 336 also provides adjustment factors for Good Faith, Size, and History.

Good Faith

Section 335, subdivision (c), provides:

> Good Faith of the Employer – is based upon the quality and extent of the safety program the employer has in effect and operating. It includes the employer's awareness of Cal/OSHA, and any indications of the employer's desire to comply with the Act, by specific displays of accomplishments. Depending on such safety programs and the efforts of the employer to comply with the Act, Good Faith is rated as: GOOD—Effective safety program; FAIR—Average safety program; POOR—No effective safety program.

Section 336, subdivision (d)(2), allows for a reduction of 15 percent for "fair" Good Faith. Murphine testified that Employer had an injury and illness prevention program that "had some issues," and that Employer "had some issues with the [CSP]." As nothing was presented to demonstrate a deficiency with this determination or to warrant rating Employer's safety program as more than average, Good Faith is determined to be fair and the Gravity-based penalty shall be reduced by 15 percent.

Size

Section 335, subdivision (b), and section 336, subdivision (d)(1), provide that a Gravity-based penalty shall be reduced by 20 percent for employers with 26 to 60 employees. Here, Murphine testified that Employer had 35 employees. As such, the Gravity-based penalty shall be reduced by an additional 20 percent.

History

Section 335, subdivision (d), and section 336, subdivision (d)(3), provide that if an employer has not had a negative history of violations in the past three years, based upon specified criteria, the employer warrants a 10 percent reduction of the penalty. Murphine testified that Employer's history entitled it to a 10 percent reduction.

The additional adjustment factors result in a total of 45 percent adjustment to the Gravity-based penalty, the result is reduced by 50 percent pursuant to section 336, subdivision (e). Next, the result is rounded down to the next whole dollar and adjusted downward to the next lower five dollar value, pursuant to section 336, subdivision (j), resulting in a final penalty of $305.

b. Are the penalties for Citation 1, Item 4, reasonable?

Labor Code section 6409.1, subdivision (b), provides in relevant part:

> (b) In every case involving a serious injury or illness, or death, in addition to the report required by subdivision (a), a report shall be made immediately by the employer to the Division of Occupational Safety and Health […]. An employer who violates this subdivision may be assessed a civil penalty of not less than five thousand dollars ($5,000). Nothing in this subdivision shall be construed to increase the maximum civil penalty, pursuant to Sections 6427 to 6430, inclusive that may be imposed for a violation of this section.

Section 336, subdivision (a)(6), provides:

> For Failure to Report Serious Injury or Illness, or Death of an Employee - Any employer who fails to timely report an employee's injury or illness, or death, in violation of section 342(a) of Title 8 of the California Code of Regulations, shall be assessed a minimum penalty of $5,000.

In *Central Valley Engineering & Asphalt*, Cal/OSHA App. 08-5001, Decision After Reconsideration (Dec. 4, 2012), the Appeals Board determined that Labor Code section 6409.1, subdivision (b), allows for modification to the proposed $5,000 penalty for a late report of a serious injury or illness pursuant to California Code of Regulations, title 8, section 342, subdivision (a). However, "[t]o fulfill the Legislative intent contained in the language of the enactment, and the legislative history, we conclude that a failure to report violation must carry a penalty of [$5,000]." (*Id.* See also *Allied Sales and Distribution, Inc.*, Cal/OSHA App. 11-0480, Decision After Reconsideration (Nov. 29, 2012).)

In the instant matter, the record does not support that Employer made a report, late or otherwise, to the Division, as discussed above. Accordingly, as a violation of section 342, subdivision (a), was found herein, no adjustment to the $5,000 base penalty is available and it is found reasonable.

Conclusion

The evidence supports a finding that Employer violated section 1509, subdivision (b), by failing to establish a Code of Safe Practices related to hazardous activities that are a part of Employer's operations. The proposed penalty, as amended, is reasonable.

The evidence supports a finding that Employer violated section 342, subdivision (a), by failing to report a serious injury or illness suffered by an employee to the Division. The proposed penalty is reasonable.

The evidence does not support a finding that Employer violated section 1632, subdivision (b), by failing guard floor, roof, and skylight openings.

The evidence does not support a finding that Employer violated section 1670, subdivision (a), by failing to ensure employees used fall protection while exposed to falls in excess of seven and one-half 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 not otherwise adequately protected under the provisions of the safety orders.

ORDER

It is hereby ordered that Citation 1, Item 1, is affirmed due to Employer's withdrawal of its appeal of this item, and the associated penalty remains as issued.

It is further ordered that Citation 1, Item 2, is affirmed and the associated penalty is modified to $305.

It is further ordered that Citation 1, Item 3, is affirmed due to Employer's withdrawal of its appeal of this item, and the associated penalty remains as issued.

It is further ordered that Citation 1, Item 4, is affirmed and the associated penalty of $5,000 is sustained.

It is further ordered that Citation 1, Item 5, is affirmed due to Employer's withdrawal of its appeal of this item, and the associated penalty remains as issued.

It is further ordered that Citation 2 and Citation 3 are dismissed and the penalties are vacated.

It is further ordered that the penalties indicated above and set forth in the attached Summary Table be assessed.

Dated: 03/19/2020

Christopher Jessup
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.**