BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1462230**
INTELLIGENT TECHNOLOGIES AND SERVICES, INC. **1031 SERPENTINE LANE, SUITE 101** **PLEASANTON, CA 94566** **Employer**	**DECISION**

Statement of the Case

Intelligent Technologies and Services, Inc. (Employer) sells fire detection and suppression equipment to large corporate clients. On February 11, 2020, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Richard "Al" Haskell, commenced an accident investigation at a job site located at 125 West Tasman Drive in San Jose, California (job site), after a report of an injury at the site on February 7, 2020.

On August 4, 2020, the Division issued two citations, alleging three violations: failure to perform scheduled periodic inspections to identify unsafe conditions and work practices; failure to provide training to the injured employee regarding working from elevated work locations; and failure to ensure that an employee wore a personal fall protection system while working at an elevated work location without guardrails.

Employer filed a timely appeal, asserting that the safety orders were not violated, the classifications are incorrect, and the proposed penalties are unreasonable. Employer also asserted a series of affirmative defenses, attached to its original appeal forms, including the Independent Employee Action Defense.[1] During the hearing in this matter, the appeal was amended to assert the "Exposing Employer" defense found in California Code of Regulations, title 8, section 336.11.[2]

This matter was heard by Kerry Lewis, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board. On April 25 through 27, 2023, ALJ Lewis conducted the hearing from Sacramento County, California, with the parties and witnesses appearing remotely via the Zoom video platform. A. Scott Hecker and Adam R. Young, attorneys

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

at Seyfarth Shaw, LLP represented Employer. Jonathan M. Louie, staff counsel, represented the Division. The matter was submitted on July 7, 2023.

Issues

1. Did Employer fail to conduct periodic inspections and provide training to its sales representatives regarding the hazards of working from elevated locations?

2. Did Employer fail to ensure that an employee used personal fall protection when the employee was exposed to a fall while working at an elevated work location?

3. Did Employer establish that it satisfied all five elements set forth in section 336.11 to preclude liability as an "exposing employer"?

Findings of Fact

1. On February 7, 2020, Michael Kitchin (Kitchin), an employee of Employer, suffered fatal injuries when he fell from the top of an anechoic chamber[3] located in a building owned by Cisco Systems, Inc. (Cisco).

2. Kitchin had been a sales representative for Employer for 30 years.

3. Kitchin's sales representative position involved working at Employer's office and visiting clients at their facilities. The office work entailed desk work such as reviewing blueprints and schematics and preparing estimates for clients. The work at client facilities involved meetings and walking through the facilities to obtain more information to provide the clients with estimates on fire suppression and detection equipment.

4. Kitchin accompanied Marcus Ficken (Ficken), an employee of Johnson Controls, Inc. (JCI), to the Cisco building to provide a ballpark estimate for an upgrade of fire detection equipment that Employer had installed in 1999.

5. At the time of the accident, Employer did not have a contract with Cisco to service the job site. Instead, JCI held the contract to provide services for the job site and had held that contract since 2013.

[3] An anechoic chamber is a specialized insulated room designed to allow users to work without interference from sound or other outside signal interference.

6. None of Employer's employees were regularly performing work at the Cisco building.

7. Employer's managers periodically accompany sales representatives to clients' facilities to observe their work processes and ensure compliance with Employer's safety procedures.

8. Employer's sales representatives are not permitted to climb to heights above what can be reached while standing on a six-foot A-frame ladder.

9. Employer's Injury and Illness Prevention Program contains a section on fall protection, which is applicable to Employer's technicians, who are frequently required to work from heights.

10. If Employer's sales representatives need something done that requires access to heights greater than what can be reached from a six-foot A-frame ladder, Employer's procedures require that they request that a dispatcher assign a technician to the task.

11. Employer's sales representatives do not need, and therefore, are not supplied with, ladders to perform their work.

12. Kitchin and Ficken entered the area next to the anechoic chamber through a normally secured area, but the lock on the door had been taped open by an unknown person.

13. After going through the unlocked door, Kitchin accessed the top of the anechoic chamber by climbing an extension ladder that had been left resting against the chamber by an unknown person.

14. Kitchin did not have fall protection equipment when he accessed the top of the anechoic chamber.

15. Employer's employees were not permitted to enter the Cisco building without being accompanied by someone with authorization to access the building.

16. Employer did not have the authority or the ability to install guardrails on the anechoic chamber located in Cisco's building.

17. The fact that the top of the anechoic chamber did not have guardrails was in plain view when looking from the platform below.

Analysis

1. Did Employer fail to conduct periodic inspections and provide training to its sales representatives regarding the hazards of working from elevated locations?

Section 3203, subdivision (a),[4] provides, in relevant part:

(a) Effective July 1, 1991, every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program (Program). The Program shall be in writing and, shall, at a minimum:
[…]

(4) Include procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices. Inspections shall be made to identify and evaluate hazards[.]
[…]

(7) Provide training and instruction[.]

In Citation 1, the Division alleges:

Prior to and during the course of the investigation, including but not limited to, on February 7, 2020, the employer failed to implement and maintain an effective Injury & Illness Prevention Program in the following instances[:]

Instance 1
The employer failed to perform scheduled periodic inspections to identify unsafe conditions and work practices.

Instance 2
The employer failed to provide training and instruction to an employee regarding the hazards and safety precautions applicable to working from the unprotected sides of elevated work locations.

[4] On September 29, 2022, Citation 1 was amended from alleging a violation of section 1509, subdivision (a), with a reference to section 3203, subdivision (a), to instead directly allege a violation of section 3203, subdivision (a). (Ex. 42.)

The Division has the burden of proving a violation by a preponderance of the evidence. (*Howard J. White*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).) "Preponderance of the evidence" is usually defined in terms of probability of truth, or of evidence that, when weighed with that opposed to it, has more convincing force and greater probability of truth. (*Lone Pine Nurseries*, Cal/OSHA App. 00-2817, Decision After Reconsideration (Oct. 30, 2001).)

Instance 1

The Division issued Citation 1 based on the allegation that Employer did not conduct periodic safety inspections of the Cisco building where the accident occurred. There was no allegation that Employer did not conduct inspections of its own facility. Employer's witnesses testified that they conduct regular inspections of Employer's Pleasanton facility. Additionally, Employer conducted inspections and job hazard analyses when its technicians were installing or otherwise servicing equipment for a client at a particular job site. There was no dispute that this citation was specifically related to inspections of the Cisco building.

The Appeals Board has consistently held that an employer who sends its employees to work at another location has a duty to ensure that the remote worksite is safe for its employees. However, the Appeals Board's own long-held policy is to "adopt the reasonable meaning of the standard," and to reject interpretations that would lead to "an absurd result." (*Home Depot USA, Inc.*, Cal/OSHA App. 1011071, Decision After Reconsideration (May 16, 2017).)

Here, the Division alleges that Employer was required to conduct "scheduled periodic safety inspections" of the Cisco building prior to its salesperson, Kitchin, arriving at the building for a job walk with the JCI representative, Ficken. Employer argued that this requirement should not be applied to the circumstances of the instant matter.

Employer did not have an active contract with Cisco and had not had one since 2013, when JCI took over the service contract with Cisco. As such, Employer was not performing any fire suppression or detection work at the Cisco building. Ficken asked Kitchin for assistance because some of the equipment that Cisco wanted upgraded had been originally installed by Employer's technicians when they were under contract with Cisco many years prior. Employer's General Manager Frank Peluso (Peluso) testified that the equipment was installed in 1999, with an inspection contract that continued until JCI took over the contract in 2013. Thus, Employer did not have a regular presence at the Cisco building, nor did it have an expectation that any of its employees would be regularly, or even occasionally, performing services there.

Employer's Injury and Illness Prevention Program (IIPP) provides that Employer's "[i]nspections shall include a review of the work habits of employees in all work areas." (Ex. J-2,

p. 42.) As part of Employer's regular practice, its supervisors periodically accompany sales representatives when they visit various job sites. Service Sales Manager Lola Abdoun (Abdoun) testified that she had observed Kitchin's work habits at job sites, either performing a job walk or in an office attending a meeting, and she had never seen him violate Employer's safety policies. Abdoun testified that she had never observed or heard of Kitchin climbing more than six feet up a ladder, nor had she ever seen any other sales representatives take such actions. Peluso testified that he and his sales managers accompany sales representatives on job walks or other site visits and, during those visits, it is the regular practice to make observations regarding safety issues as well as ensuring that the sales representatives are complying with Employer's safety procedures. Peluso had never seen any sales representatives working from heights or climbing a ladder more than six feet high.

The Division's interpretation of section 3203, subdivision (a)(4), creates an absurd mandate that an employer visit and inspect every single remote location that one of its field employees might visit in the course of his duties, even if the employer did not have employees regularly working at that location.[5]

In the instant matter, as required by section 3203, subdivision (a)(4), Employer's implementation of its IIPP included periodic observation of Kitchin and its other sales representatives to "identify unsafe conditions and work practices." No unsafe work practices were identified. The sales representatives were given extensive training, as discussed below, about how to identify and avoid unsafe conditions, such as working from heights.

The Division did not establish a violation of section 3203, subdivision (a)(4).

Instance 2

The Division also asserted that Employer's training was insufficient based on the allegation that Employer "failed to provide training and instruction to an employee regarding the hazards and safety precautions applicable to working from the unprotected sides of elevated work locations."

In *FedEx Freight Inc*., Cal/OSHA App. 1099855, Decision After Reconsideration (Sept. 24, 2018), the Appeals Board analyzed an employer's IIPP for effectiveness of its training program. In its discussion of section 3203, subdivision (a)(7), the Appeals Board stated:

> The purpose of section 3203, subdivision (a)(7), is to provide employees with the knowledge and ability to recognize, understand, and avoid the hazards they may be

[5] Consider also: The creation of an obligation for every law firm to send a supervisor to perform safety inspections at every office or hearing venue where its attorneys meet with clients; requiring an inspection of every home where a cable television installer performs services; or, mandating an inspection for a pharmaceutical sales representative's visits to every doctor's office.

exposed to via their work assignment. (*Siskiyou Forest Products*, Cal/OSHA App. 01-1418, Decision After Reconsideration (Mar. 17, 2003).)

Although training is not defined in the regulations, the Appeals Board has previously held that training, "when used to describe the process of providing employees with that knowledge and ability in this context, is to instruct so as to make proficient or qualified." (*Siskiyou Forest Products*, *supra*, Cal/OSHA App. 01-1418.) The occurrence of an accident, by itself, is not sufficient proof that an employer's overall training program is deficient. (*Michigan-California Lumber Company*, Cal/OSHA App 91-759, Decision After Reconsideration (May 20, 1993).)

The Division argued that Employer's sales representatives were not trained how to use fall protection despite the fact that Employer's IIPP contains a section about fall protection. Peluso and Abdoun testified that this section in the IIPP pertains to the work performed by the technicians, not the sales representatives. Abdoun and Peluso testified that sales representatives work at a desk in an office, attend meetings with clients, walk around clients' buildings looking at control panels at eye level, occasionally climb a few feet up a six-foot A-frame ladder to get a closer look at something on a wall, and then prepare written estimates based on a review of blueprints and schematics. As such, the fall protection section of the IIPP is not relevant to the sales representatives' work tasks.

Indeed, a review of the IIPP reveals numerous sections that would not be part of a sales representative's training, such as scaffold safety, lock out/tag out procedures, confined spaces, and forklifts. There can be no reasonable expectation for Employer to train its sales representatives on every section of its IIPP if those tasks are not part of the work assignments of a sales representative.

Employer's training program provides its sales representatives with the knowledge and ability to recognize and avoid the hazards of their particular job duties. (*FedEx Freight Inc*., *supra*, Cal/OSHA App. 1099855.) Employer's witnesses testified unequivocally that the sales representatives are instructed that they are not permitted to climb above six feet. If they need to access something that cannot be reached with a six-foot A-frame ladder, sales representatives are required to contact a technician to perform the work. Unlike sales representatives, who are not provided with ladders to perform their work, Employer's technicians are supplied with ladders and fall protection, and they are trained how to safely access heights.

Training employees to avoid working from heights and prohibiting work from heights, in combination, is the most effective way of protecting employees from exposure to the hazards associated with working from heights. It would be antithetical if a sales representative was given strict instructions forbidding him to work from heights and then Employer gave him a harness and taught him how to use fall protection for working at heights. Training the sales representatives how to use fall protection is contrary to the more protective training they receive. In accordance

with the Appeals Board's interpretation of section 3203, subdivision (a)(7), in *Siskiyou Forest Products*, *supra*, Cal/OSHA App. 01-1418, Employer provided its sales representatives with "the knowledge and ability to recognize, understand, and avoid the hazards they may be exposed to via their work assignment." As stated previously, the fact that an accident occurred when Kitchin climbed atop the anechoic chamber is not sufficient proof that an employer's overall training program is deficient. (*Michigan-California Lumber Company*, *supra*, Cal/OSHA App 91-759.)

Accordingly, the Division failed to establish that Employer's training did not meet the requirements of section 3203, subdivision (a)(7), with regard to training its sales representatives about the hazards of working from heights. Additionally, Employer's periodic oversight of its sales representatives as they worked at various remote locations was sufficient to satisfy the requirements of section 3203, subdivision (a)(4). Therefore, Citation 1 is dismissed.

2. Did Employer fail to ensure that an employee used personal fall protection when the employee was exposed to a fall while working at an elevated work location?

Section 3210, subdivision (c), provides:

Guardrails at Elevated Locations.

(c) Where the guardrail requirements of subsections (a) and (b) are impracticable due to machinery requirements or work processes, an alternate means of protecting employees from falling, such as personal fall protection systems, shall be used.

In Citation 2, the Division alleges:

Prior to and during the course of the investigation, including, but not limited to, on February 7, 2020, the employer failed to ensure a personal fall protection system was used when an employee was working at the elevated work location (the top of an anechoic chamber) and exposed to a fall of 21 feet. As a result, an employee fell from the chamber and received fatal injuries.

Section 3210, subdivision (a), requires guardrails on elevated working areas more than 30 inches above the ground or other working area below. Subdivision (c) addresses circumstances where it is impracticable to have guardrails on those areas due to either machinery or work processes on the elevated location, and provides that an employer does not need to have guardrails as long as there are alternate fall protection methods in place.

Section 3210, subdivision (c), references "personal fall protection systems" as just one example of an alternative means an employer may use to provide fall protection. However, section 3210, subdivision (c), is a "performance standard." Its goal is to protect against fall hazards while leaving it to employers to select an appropriate means of doing so, so that the employers can choose the means best suited to the nature of the hazard and the working conditions. (*Mladen Buntich Construction Co.*, Cal/OSHA App. 85-1668, Decision After Reconsideration (Oct. 14, 1987).) In *Estenson Logistics LLC*, Cal/OSHA App. 05-1755, Decision After Reconsideration (Dec. 29, 2011), the Appeals Board listed examples of alternatives the employer could have implemented to protect its employees who were working from heights while putting tarps over materials on flatbed trucks:

> Other possible alternatives in the instant circumstances are to use a two-person crew, to provide ladders or platforms from which to work, or to require employees to stand on the bed of the trailer rather than on the loaded materials when placing a tarp over the loaded trailer.

(*Estenson Logistics LLC*, Cal/OSHA App. 05-1755, Decision After Reconsideration (Dec. 29, 2011).)

Peluso testified about the fall protection harness and lanyard that Employer would have provided to a technician that was sent to the Cisco building to perform work on top of the anechoic chamber. Peluso testified that its technicians wear fall protection if they are working at heights over six feet where there are no guardrails.

However, the "alternate fall protection method" implemented by Employer's sales representatives is that they do not work on elevated locations. In the Appeals Board's description of possible alternative fall protection methods in *Estenson Logistics LLC*, *supra,* Cal/OSHA App. 05-1755, a permissible option was to have the employees stand in a location (the bed of the trailer) where they were not exposed to the hazard of falling from heights atop the materials while affixing a tarp. Similarly, by requiring its sales representatives to perform their work from the ground, Employer has chosen "the means best suited to the nature of the hazard and the working conditions" of the sales representatives in the instant matter. (*Id.*) When there is an elevated location without guardrails, the sales representatives are protected from falling by staying off the elevated location and calling a technician to perform the task instead.

Accordingly, the Division did not establish a violation of section 3210, subdivision (c). Citation 2 is dismissed.

3. Did Employer establish that it satisfied all five elements set forth in section 336.11 to preclude liability as an "exposing employer"?

In further support of dismissing Citation 2, Employer provided extensive testimony and argument regarding the "exposing employer" defense set forth in section 336.11.

The Division asserts that it did not cite Employer as an "exposing employer." (Division Post-Hearing Brief.) Presumably, the Division means that the citation was not issued pursuant to the Multi-Employer Worksite regulations in sections 336.10 and 336.11. However, the citation issued to Cisco indicated that the Division was citing Cisco under the multi-employer regulations for its role in the fatal accident. (Ex. HH.) The Cisco citation identified Cisco as the controlling employer, and JCI and Employer were identified as exposing employers. (*Id*.) As such, the fact that the words "multi-employer worksite" or "exposing employer" were not used on Citation 2 does not preclude a finding that the Division did, in fact, issue Citation 2 to Employer because it was determined to be the exposing employer.

Section 336.10 defines "exposing employer" as "[t]he employer whose employees were exposed to the hazard[.]" (§336.10, subd. (a).) Kitchin was exposed to the hazard of an unguarded elevated work location and Kitchin was Employer's employee. As such, Employer is properly identified as an exposing employer.

Section 336.11 provides that the Division shall evaluate a series of defenses prior to issuing a citation to an exposing employer:

> If the Division concludes that all five defenses have been met, the citation shall not be issued. These defenses are:
>
> (a) The employer did not create the hazard.
>
> (b) The employer did not have the responsibility or the authority to have the hazard corrected.
>
> (c) The employer did not have the ability to correct or remove the hazard.
>
> (d) The employer can demonstrate that the creating, the controlling and/or the correcting employers, as appropriate, were specifically notified or were aware of the hazards to which his/her employees were exposed.

(e) The employer took appropriate feasible steps to protect his/her employees from the hazard, instructed them to recognize the hazard and, where necessary, informed them how to avoid the dangers associated with it. For the purposes of this section, where an extreme hazard is involved, appropriate feasible steps include removing the employer's employees from the job, if there is no other way to protect them from the hazard.

Whether the Division follows this pre-citation procedure or not, the Appeals Board is vested with the authority to resolve an appeal from the issued citation. (*Airco Mechanical, Inc.*, Cal/OSHA App. 99-3140, Decision After Reconsideration (Apr. 25, 2002).) An exposing employer cited for a violation of a safety order may assert section 336.11 as an affirmative defense in an appeal proceeding. (*Id.*)

The hazard in the instant matter is an unguarded elevated work location atop the anechoic chamber in the Cisco building. Employer asserted that the factors in section 336.11 relieved it of liability for the alleged violation.

The employer did not create the hazard.

Employer had no role in the maintenance or creation of the anechoic chamber in the Cisco building.

The employer did not have the responsibility or the authority to have the hazard corrected.

Employer had no employees working in the Cisco building. Indeed, Employer did not even have a contract with Cisco, so there was no expectation of Employer's employees working in the Cisco building. Employer's employees could not even enter the building without being accompanied by someone with authority escorting them. In fact, when Peluso attempted to visit the site after the accident, he was denied access entirely, thus demonstrating Employer lacked authority to access the job site. Employer had no responsibility or ability to perform any safety upgrades or construction activities to erect guardrails on top of Cisco's anechoic chambers.

The employer did not have the ability to correct or remove the hazard.

The anechoic chamber was a large, fixed structure and the addition of guardrails or other structural changes was not within Employer's control.

The employer can demonstrate that the creating, the controlling and/or the correcting employers, as appropriate, were specifically notified or were aware of the hazards to which his/her employees were exposed.

The Appeals Board has regularly held that hazards in plain sight impute knowledge of their existence on the employer that had access to view the hazards. (*National Steel and Shipbuilding Company*, Cal/OSHA App. 10-3791, Decision After Reconsideration (Nov. 17, 2014).) In this case, that knowledge can be imputed to Cisco because the unguarded perimeter of the anechoic chamber located in Cisco's building was in plain sight.

As such, the controlling employer was aware of the hazard of the unguarded top of the anechoic chamber.

The employer took appropriate feasible steps to protect his/her employees from the hazard, instructed them to recognize the hazard and, where necessary, informed them how to avoid the dangers associated with it. For the purposes of this section, where an extreme hazard is involved, appropriate feasible steps include removing the employer's employees from the job, if there is no other way to protect them from the hazard.

Employer presented evidence that its sales representatives were trained not to access anything at heights beyond what could be reached using a six-foot A-frame ladder. Sales representatives were expressly forbidden from climbing anything other than a six-foot A-frame ladder. Employer trained its sales representatives to recognize the hazard of working at heights above six feet and informed them that the way to avoid the dangers associated with working from heights is to not work from heights. Thus, Employer took appropriate steps to protect its employees from the hazard.

Employer established the affirmative defense set forth in section 336.11. Thus, even if a violation of section 3210, subdivision (c), had been established, Citation 2 would be dismissed.[6]

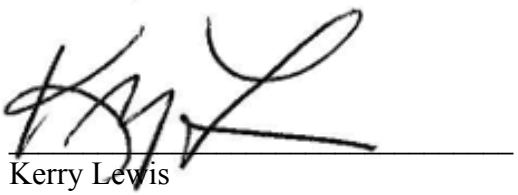
Conclusions

The Division did not establish that Employer violated sections 3203, subdivision (a), or section 3210, subdivision (c).

[6] Additionally, although it was not asserted in Employer's list of affirmative defenses, there was a significant amount of evidence and argument regarding the "Unforeseeable Extreme Departure" defense. It is not addressed here because Employer did not seek to amend its appeal during or after the hearing.

Order

It is hereby ordered that Citations 1 and 2 are dismissed and the penalties vacated.



Dated: 08/01/2023

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.**