BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1444899**
CITY OF LOS ANGELES DEPARTMENT OF GENERAL SERVICES BUREAU OF FLEET SERVICES **111 EAST 1ST STREET** **LOS ANGELES, CA 90012** **Employer**	**DECISION**

Statement of the Case

City of Los Angeles Department of General Services-Bureau of Fleet Services, (Employer) maintains the refuse trucks that operate in the city. Beginning November 7, 2019, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer, Arsen Sanasaryan (Sanasaryan), conducted an accident investigation of the truck maintenance facility also known as the North Central facility located at 425 North San Fernando Road, Los Angles, California (the maintenance facility or North Central site.)

On April 24, 2020, the Division the Division issued two citations to Employer, alleging two violations of California Code of Regulations, title 8.[1] The Division alleges Employer failed to timely report a serious injury, and failed to provide appropriate fall protection for use by employees working in elevated locations.

Employer filed a timely appeal of the citations, contesting the existence of the violations and reasonableness of the penalties as to both Citations 1 and 2. Employer further appealed on the grounds of incorrect classification and reasonableness of the abatement requirements as to Citation 2. Employer also asserted the affirmative defense of independent employee action and

[1] Unless otherwise specified, all references are to sections of California Code of Regulations, title 8.
[2] Except where discussed in the 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).)
[3] The parties stipulate that Citation 1 is settled. A credit of 40 percent was applied to the original penalty (10 percent for History, 30 percent for Good Faith, no reduction for Size). The penalty was reduced to $3,000. The parties further stipulated that the injured employees, Brent Toppen and Andrew Ferguson, both suffered serious injuries which were supported by medical records.

raised a series of affirmative defenses as to both citations.[2] The parties entered into stipulations including settling Citation 1.[3] The hearing proceeded as to Citation 2.

This matter was heard by Leslie E. Murad, II, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, on May 10, 2021, May 11, 2022, June 28, 2022, June 29, 2022, and July 27, 2022. ALJ Murad conducted the video hearing with all participants appearing remotely via the Zoom video platform. Deputy City Attorneys Jorge Otano and Travis Hall of the City Attorney's Office for the City of Los Angeles, represented Employer. Mark Licker, Staff Counsel, represented the Division. The matter was submitted on October 9, 2022.

Issues

1. Did Employer fail to use a fall protection system to protect employees from falling from an elevated work location?

2. Did Employer establish the Independent Employee Action Defense?

3. Did the Division establish a rebuttable presumption that Citation 2 was properly classified as Serious?

4. Did Employer rebut the presumption that Citation 2 was properly classified as Serious by demonstrating that it did not know, and could not, with the exercise of reasonable diligence, have known of the existence of the violation?

5. Did the Division establish that Citation 2 was properly characterized as Accident Related?

6. Is the proposed penalty reasonable?

Findings of Fact

1. Employer owned and operated a refuse truck maintenance facility at the North Central site.

2. Employees working at the North Central site were required to be on top of side loader refuse trucks (trucks) to make repairs.

3. As of October 15, 2019, Employer's North Central site had installed personal fall protection systems (PFPS, or system) for employees to use while working on top of trucks. A PFPS was not installed in all truck repair bays at the facility.

4. Employer's employees received training on the use of the PFPS.

5. The injured truck mechanics, Brent Toppen (Toppen) and Andrew Ferguson (Ferguson) both worked on the night shift at the North Central site.

6. On the date of the accident, October 25, 2019, the day shift for the North Central site was using the PFPS. The night shift was not using the PPFS.

7. The night shift acting manager, Eliceo Meza (Meza), and night shift manager, Sergio Lopez (Lopez) both told the night shift crew that they were awaiting directions and instructions from headquarters before implementing the use of the PFPS for the night shift. Neither manager was aware the day shift had already been using the PFPS.

8. Toppen was assigned to work on top of a refuse truck. Ferguson was assigned to help Toppen. They were working in a bay that did not have a PFPS installed.

9. Toppen and Ferguson had experience working on top of trucks.

10. Both Toppen and Ferguson would have used the PFPS had they known it was available for their use.

11. Another truck drove by and struck the truck that Toppen and Ferguson were working on, tipping it over and knocking both mechanics off the top of the truck, causing them to fall approximately twelve feet to the ground.

12. Both employees suffered serious injuries, including broken bones, which required hospitalization.

13. The proposed penalty for Citation 2 was calculated in accordance with the Division's policies and procedures.

Analysis

1. Did Employer fail to use a fall protection system to protect employees from falling from an elevated work location?

Section 3210, subdivision (c), provides:

> 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 inspection, including but not limited to, on October 25, 2019 employees were not using approved fall protection systems while they were working on top of the load body of the AMREP Model: AMHASLTPO-19 side loader truck. As a result, on or about October 25, 2019, employees fell from the top of the side loader truck and were seriously injured. [4]

a. Applicability of the Safety Order

To prove the existence of a violation of section 3210, subdivision (c), the Division must demonstrate: (1) employees worked in elevated areas exposing them to a fall of four feet or more (section 3210, subd. (b)); (2) the use of guardrails as fall protection is inapplicable or would be impractical; and (3) no alternate means of fall protection, such as PFPS, were used. (See *Los Angeles City Fire Department*, Cal/OSHA App. 03-6930, Decision After Reconsideration (July 26, 2010).)

First, employees at the North Central site were required to work on top of trucks, well over four feet in height, to perform certain repairs. Second, Employer has not argued that the use of guardrails on top of the trucks would be a practical means of fall protection, nor that subdivision (c) is inapplicable for any other reason. (See *A. L. Gilbert Company*, Cal/OSHA App. 08-1646, Denial of Petition for Reconsideration (Sept. 30, 2010).) Employer was therefore required to provide an alternate means of protecting employees from falling, such as personal fall protection systems, to employees who were exposed to the hazard of falls from elevated work locations.

b. Employee Exposure to the Hazard

In addition to demonstrating the existence of a hazard, the Division has the burden of proving that employees were exposed to the hazard. The Division may demonstrate employee exposure in two ways. First, exposure may be established by showing that an employee was actually exposed to the zone of danger or hazard created by a violative condition. *(Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (Apr. 24, 2003).) Actual exposure is established when the evidence preponderates to a finding that employees actually have been or are in the zone of danger created by the violative condition.

[4] The Citation was amended during the hearing allowing for the plural use of the word "employee" in the AVD since two employees were injured.

(*Dynamic Construction Services, Inc.*, Cal/OSHA App. 14-1471, Decision After Reconsideration (Dec. 1, 2016).) "The zone of danger is that area surrounding the violative condition that presents the danger to employees that the standard is intended to prevent." (*Benicia Foundry & Iron Works, Inc.*, supra, Cal/OSHA App. 00-2976.)

In addition to demonstrating actual employee exposure to the hazard, "the Division may establish the element of employee exposure to the violative condition without proof of actual exposure by showing employee access to the zone of danger based on evidence of reasonable predictability that employees while in the course of assigned work duties, pursuing personal activities during work, and normal means of ingress and egress would have access to the zone of danger." (*Dynamic Construction Services, Inc.*, supra, Cal/OSHA App. 14-1471, citing *Benicia Foundry & Iron Works, Inc.*, supra, Cal/OSHA App. 00-2976.) That is, the Division may establish employee exposure by showing the area of the hazard was "accessible" to employees such that it is reasonably predictable "by operational necessity or otherwise, including inadvertence, that employees have been, are, or will be in the zone of danger." (Id. [citations omitted].)

Here, the zones of danger were elevated work areas such as the roofs of tall trucks. It is undisputed that mechanics at the North Central site were required to work on top of such trucks to perform certain repairs, in the regular course of their job duties. Toppen and Ferguson fell approximately twelve feet while performing a repair that required working on the roof of a refuse truck. It is also reasonably predictable that other mechanics, during the time period in question, would have worked on top of similar trucks in the course of their regular duties.

Employees at the North Central site were therefore exposed to the hazard of falls from elevated work locations.

c. Existence of the Violation

The Division has the burden of proving all elements of a violation by a preponderance of the evidence. (*C.C. Myers, Inc.*, Cal/OSHA App. 00-008, Decision After Reconsideration (April 13, 2001); *Cambro Manufacturing*, Cal/OSHA App. 84-923, Decision After Reconsideration (Dec. 31, 1986).) Here, the Division had the burden to demonstrate that Employer did not use fall protection to protect employees from falls while working on elevated locations.

The North Central site is a large maintenance facility containing repair bays for the repair of municipal garbage or refuse trucks. These bays face each other across the building. There are two cranes on I-beams which traverse the width of the building and move on electrified tracks ("bus beams") that extend the length of the building on both sides. (Exhibit 16 [Video of Fall Protection System].)

On or about September 23, 2019, two fall protection systems were installed on one of these cranes, providing fall protection in six repair bays. The systems consisted of a harness and lanyard attached to the crane, allowing the user to travel along the top of a truck or travel to multiple bays.

Work at the North Central site was performed on two shifts, the night shift and the day shift. The sign-in sheets for the PFPS training (Exhibit F) indicate that the day shift crew received training on the PFPS on October 15, 2019, and the night shift crew received training on October 16, 2019. The night shift's sign-in sheet indicates that Toppen and Ferguson (the injured employees), and Lopez and Meza (the night shift manager and acting night shift manager, respectively), all attended the training on October 16, 2019. All four testified at hearing and confirmed that they attended the training.

The day shift crew began using the PFPS immediately after the training. At issue is whether the PFPS was in use by night shift employees on or before October 25, 2019.

Meza testified that Lopez told him that use of the PFPS would not be implemented until Lopez received "a policy" from headquarters and approval to begin using the system. Meza further stated that the night shift crew did not begin using the PFPS until after the accident.

Lopez admitted that he did not implement use of the PFPS immediately after the October 16, 2019, training, and did not require the night shift to use the system before the accident on October 25, 2019, because a policy on how to use it had not been handed down from headquarters, due at least in part to concerns about the safe use of the system.

Lopez testified that, before October 25, 2019, he believed the fall arrest system could not be safely used until a procedure was devised to prevent excessive slack in the fall arrest lanyard, caused by mechanics walking too far along the tops of trucks. Excessive slack could cause the system not to arrest a fall in time, or could cause the fallen employee to swing, resulting in injury. As a result, mechanics were not using the system on or before October 25, 2019, because the issue of excess slack in the lanyards had not been solved. Lopez testified that this issue was not resolved until after October 25, 2019, by having mechanics back trucks into bays.

Toppen testified that, following the October 16, 2019, training, he was not told to begin using the PFPS right away. Lopez told Toppen that headquarters had not yet instructed Lopez to implement the use of the PFPS. Although he was never explicitly told not to use the PFPS, he drew the conclusion that it was not available for use. Toppen never saw anyone at North Central on the night shift use the PFPS between the training on October 16 and the accident on October 25. He testified that if he had known the PFPS was available, he would have used it.

Ferguson similarly testified that he had not been instructed to use the PFPS before the accident. He stated that he was waiting for approval from Lopez to use the PFPS. Ferguson did not believe the PFPS was available for his use on October 25, 2019, and testified that if he had known he could use the system, he would have.

Acting Director of Fleet Services Jung Ho (Ho) testified that he expected that the PFPS was being used, and that there was no further "policy" document forthcoming from Employer before implementation of the system. However, the weight of the evidence provided by the employees, as set forth above, preponderates in favor of a finding that the PFPS was not in use at the time of the accident.

The evidence adduced at hearing thus demonstrates that the night shift managers at the North Central site, Lopez and Meza, had not implemented use of the PFPS as of October 25, 2019. The Board has consistently held that the knowledge and actions of a supervisor are attributed to Employer. (See, e.g., *Ventura Coastal, LLC,* Cal/OSHA App. 317808970, Decision After Reconsideration (Sept. 22, 2017); *Brunton Enterprises, Inc.*, Cal/OSHA App. 08-3445, Decision After Reconsideration (Oct. 13, 2013); *MCI Worldcom, Inc.*, Cal/OSHA App. 00-440, Decision After Reconsideration (Feb. 13, 2008).) Therefore, Employer did not use the PFPS during the night shift, and night shift employees were not provided with the necessary fall protection, on the night Toppen and Ferguson fell from the top of the truck.

The violation is therefore established.

2. Did Employer establish the Independent Employee Action Defense?

There are five elements to the Independent Employee Action Defense (IEAD). An employer must satisfy all five elements in order for the defense to succeed: (1) the employee was experienced in the job being performed; (2) the employer has a well-devised safety program; (3) the employer effectively enforces the safety program; (4) the employer has a policy of sanctions which it enforces against employees who violate the safety program; and (5) the employee(s) caused the safety violation which they knew was contrary to the employer's safety rules. (*Fedex Freight Inc*., Cal/OSHA App. 1099855, Decision After Reconsideration (Sept. 24, 2018); *Synergy Tree Trimming, Inc.*, Cal/OSHA App. 317253953, Decision After Reconsideration (May 15, 2017).)

As the IEAD is an affirmative defense, Employer bears the burden of proof to establish that all five elements of the IEAD are present by a preponderance of the evidence. "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 with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence. [Citations.]" (*International*

Paper Company, Cal/OSHA App. 14-1189, Decision After Reconsideration (May 29, 2015).)

Employer asserts that it was not responsible for the violation alleged in Citation 2 because Toppen and Ferguson knowingly and deliberately failed to use the PFPS on October 25, 2019, despite having been trained in its use.

Element One: Were the employees experienced in the job being performed?

Element one is satisfied when an employer shows that the employee had sufficient experience performing the work that resulted in the alleged violation. (*West Coast Communication,* Cal/OSHA App. 05-2801, Decision After Reconsideration (Feb. 4, 2011).)

Toppen had been a mechanic for Employer for approximately 16 years at the time of the accident. His regular duties included repairing and servicing garbage trucks. He testified that he had performed the type of repair that he was doing at the time of the accident approximately once or twice a week, and estimated that he had done so at least a hundred times during the course of his employment. Ferguson had been a mechanic with Employer for approximately two years and was also familiar with performing repairs on top of trucks. He estimated he performed such tasks approximately once a week.

Both Toppen and Ferguson were experienced in performing the type of task they were assigned when the accident occurred. This element is satisfied.

Element Two: Does Employer have a well-devised safety program?

The second element of the IEAD requires the employer to have a well-devised safety program, which includes training employees in matters of safety respective to their particular job assignments. "This element should be analyzed by taking a realistic view of the written program and policies, as well as the actual practices at the workplace." (*Glass Pak,* Cal/OSHA App. 03-750, Decision After Reconsideration (Nov. 4, 2010); *Fedex Freight Inc.*, supra, Cal/OSHA App. 1099855.)

It is undisputed that Toppen and Ferguson received training on the use of the PFPS, on October 16, 2019. (Exhibit F.) Both stated that they felt they would have been able to use the PFPS based on that training. However, this element requires evidence not just of training, but of actual workplace practices.

Significantly here, the use of the PFPS was not implemented consistently between the day shift and the night shift. Due to the aforementioned safety concerns regarding the potential electrocution risk from the bus bar and excess lanyard slack, Lopez was waiting for information from his superiors providing a policy for safe use of the system.

By contrast, the day shift manager, Jon Johnson (Johnson), reached out to Ho with his concerns, and came up with solutions to these problems after the training, such as backing trucks into the bays to properly angle them to avoid excess slack in the lanyards, and proceeded with implementing use of the system.

This evidence supports a conclusion that Employer lacked a well-devised safety program. In a well-devised safety program, managers of different shifts would not be left to their own ad hoc devices as to when, or if, to implement the use of safety equipment. This element therefore fails.

Element Three: Did Employer effectively enforce its safety program?

As to element three, Employer must show that it effectively enforced its safety program. (*Synergy Tree Trimming, Inc*., supra, Cal/OSHA App. 317253953.) "Proof that Employer's safety program is effectively enforced requires evidence of meaningful, consistent enforcement." (*FedEx Freight, Inc.,* Cal/OSHA App. 317247211, Decision After Reconsideration (Dec. 14, 2016).)

As discussed with regard to the second element, the use of the PFPS was not implemented consistently between the day shift and the night shift. Mechanic Salvador Hernandez, who worked during the day shift prior to October 25, 2019, and transferred to the night shift approximately one week after the accident, testified that the day shift immediately began using the PFPS after training, but the night shift did not begin using it until sometime in November, 2019. Neither Lopez nor Meza was aware that the day shift had begun using the PFPS immediately after training.

Ho was not aware until after the accident that the day shift at North Central had been using the system, but the night shift had not. He never followed up with Johnson, or inquired whether Lopez had similar concerns.

Thus, shift managers were left largely on their own to solve problems with the system and implement its use. This is sufficient evidence that Employer did not effectively enforce its safety program. Employer failed to consistently and meaningfully enforce the use of the fall protection system. This element therefore fails.

Element Four: Did Employer enforce a policy of sanctions against employees who violated the safety program?

"Element four requires a demonstration that the employer has a policy of sanctions which it enforces against employees who violate the safety program." (*Synergy Tree Trimming, Inc.,*

supra, Cal/OSHA App. 317253953.) The Appeals Board has determined that employers may show compliance with this element through producing records of disciplinary actions related to safety. (*Paramount Farms, King Facility*, Cal/OSHA App. 2009-864, Decision After Reconsideration Mar. 27, 2014).) An employer may also show that it implements other means of promoting safety other than discipline, such as retraining, verbal coaching, and positive recognition of employees who follow the safety program. (*Synergy Tree Trimming, Inc.*, supra, Cal/OSHA App. 317253953.)

Here, Employer provided evidence that Toppen and Ferguson both received verbal discipline over a year after the accident. (Exhibit J [Brent Toppen Discipline]; Exhibit I [Andrew Ferguson Discipline].) Toppen received this discipline on November 25, 2020; Ferguson on March 10, 2021. They were both read the following identical statement:

> On 10-25-2019 @ around 11:00 PM you engaged in an unsafe work practice which resulted in you suffering serious injuries. Prior to the injury on 10-16-2019 you received training on how to safely use the Fall Restraint System installed at the North Central Repair Facility. On 10-25-2019 you made the decision to climb on top of a truck without the use of the Fall Restraint System and while you were on top of the truck it was struck by another vehicle ejecting you from the top of the truck, which resulted in you receiving serious injuries. The City is concerned about your safety and therefore you are being directed to adhere to safe work practices, which includes the use of a Fall Restraint System when working on elevated surfaces.

Ho testified that he wrote this script and directed to it to be read to Toppen and Ferguson by Acting General Automotive Supervisor, Greg Navarro (Navarro).

Both Toppen and Ferguson testified that they asked for a copy of this statement and were refused one. Both also testified that they attempted to explain to Navarro that, to the best of their knowledge and belief, the PFPS was not available for their use on the date of the accident, but received no meaningful response from Navarro. Both further testified that they felt these verbal warnings were an attempt to shift the blame onto them for Lopez's failure to timely implement the use of the PFPS.

As established, both Toppen and Ferguson presented credible testimony, supported by the testimony of Meza, and of Lopez, that the PFPS was not in use by the night shift on or before October 25, 2019. As such, there is validity in the Division's argument that these verbal warnings were pretextual. There was no further evidence that Employer enforced its safety program through sanctions or otherwise promoted safety through any other means. Employer did not establish Element Four.

Element Five: Did the employees intentionally violate Employer's safety rules?

The final element requires the employer to demonstrate that the employee or employees causing the infraction knew they were acting contrary to the employer's safety requirements. (*Synergy Tree Trimming, Inc.*, supra, Cal/OSHA App. 317253953.)

Here, Employer contends that Ferguson and Toppen made the deliberate choice not to use the PFPS while working on top of the truck, despite being aware that they were required to use it.

Employer points to its Supervisor Investigation Accident Reports (Exhibit L [Ferguson]; Exhibit M [Toppen]) as evidence that use of the PFPS had been implemented on the night shift at the time of the accident, and Toppen and Ferguson knowingly and deliberately failed to use the system. These forms are identical except for the employees' names. They state, under Question 16 (What could be done differently to prevent this injury from occurring again?), "Use installed fall arrest harness system." Under Question 23 (Employee factors), the boxes "Adequate equipment provided but not used" and "Personal protective equipment not used" are checked. Under Question 24 (Were all safety rules followed?), the forms state, "No. Fall arrest harness system should have been used."

These exhibits do not outweigh the probative value of the cumulative witness testimony indicating that the PFPS had been installed, but was not in use by the night shift, on October 25, 2019. Meza, in fact, testified that he did not agree with the statement that the "[f]all harness arrest system should have been used," and stated that he would not fill out the form the same way if he were to do it again. He testified that he did not believe Toppen and Ferguson had violated any safety rules. In addition, the Division's inspector, Sanasaryn, testified that, during his investigation, he interpreted the forms to mean the system was installed but not yet in use, based on the information he had gathered from the employee interviews.

Because the hearing testimony demonstrated that Lopez had not implemented the use of the PFPS for night shift mechanics as of October 25, 2019, Toppen and Ferguson could not have intentionally violated Employer's safety rules. The fifth element therefore fails.

Employer failed to present evidence establishing four of the five required elements of the IEAD. Employer therefore cannot escape liability for the violation of section 3210, subdivision (c) on that basis.

3. Did the Division establish a rebuttable presumption that Citation 2 was properly classified as Serious?

Labor Code section 6432, subdivision (a), states:

> There shall be a rebuttable presumption that a "serious violation" exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation. The demonstration of a violation by the division is not sufficient by itself to establish that the violation is serious. The actual hazard may consist of, among other things:
> [...]
> (2) The existence in the place of employment of one or more unsafe or unhealthful practices that have been adopted or are in use.
> [...]
>
> Labor Code section 6432, subdivision (e), defines "serious physical harm" as an injury or illness occurring in the place of employment that results in:
>
> (1) Inpatient hospitalization for purposes other than medical observation.
> (2) The loss of any member of the body.
> (3) Any serious degree of permanent disfigurement.
> (4) Impairment sufficient to cause a part of the body or the function of an organ to become permanently and significantly reduced in efficiency on or off the job, including, but not limited to, depending on the severity, second-degree or worse burns, crushing injuries including internal injuries even though skin surface may be intact, respiratory illnesses, or broken bones.

The Appeals Board has defined the term "realistic possibility" to mean a prediction that is within the bounds of human reason, not pure speculation. (*A. Teichert & Son, Inc. dba Teichert Aggregates,* Cal/OSHA App. 11-1895, Decision After Reconsideration (Aug. 21, 2015), citing *Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (Sep. 27, 2001).)

Here, the actual hazard created by the violation was the risk of injuries from falls due to Employer's failure to implement the use of the PFPS on the night shift. Toppen and Ferguson did, in fact, suffer serious physical harm, including broken bones and injuries requiring inpatient hospitalization, as a result of Employer's failure to implement the use of the PFPS. The presumption that the citation was properly classified as Serious is therefore established.

4. Did Employer rebut the presumption that Citation 2 was properly classified as Serious by demonstrating that it did not know, and could not, with the exercise of reasonable diligence, have known of the existence of the violation?

> Labor Code section 6432, subdivision (c), provides that an employer may rebut the presumption that a serious violation exists by demonstrating that Employer did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation. In order to satisfactorily rebut the presumption, Employer must demonstrate both:

> (1) The employer took all the steps a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation, taking into consideration the severity of the harm that could be expected to occur and the likelihood of that harm occurring in connection with the work activity during which the violation occurred. Factors relevant to this determination include, but are not limited to, those listed in subdivision (b) [; and]
> (2) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered.

The evidence adduced at hearing demonstrates that the night shift managers at the North Central site, Lopez and Meza, were aware that the PFPS was not in use by night shift employees at the time of the October 25, 2019, accident. Use of the PFPS was not implemented and enforced on the night shift until after October 25, 2019.

The knowledge of a supervisor is imputed to an employer, who thus cannot argue pursuant to Labor Code section 6432, subdivision (c), that it "did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation." (*Webcor Construction LP*, Cal/OSHA App. 08-2499, Denial of Petition for Reconsideration (Oct. 12, 2009); *Mountain F. Enterprises*, Cal/OSHA App. 1113595, Decision After Reconsideration (Feb. 14, 2018).) Employer therefore failed to rebut the presumption that Citation 2 was properly classified as Serious.

5. Did the Division establish that Citation 2 was properly characterized as Accident-Related?

In order for a citation to be characterized as Accident-Related, the Division must demonstrate a "causal nexus between the violation and the serious injury." The violation need not be the only cause of the accident, but the Division must make a "showing [that] the violation more likely than not was a cause of the injury." (*RNR Construction, Inc.*, Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017); *MCM Construction, Inc*., Cal/OSHA App. 13-3851, Decision After Reconsideration (Feb. 22, 2016).)

Labor Code section 6302, subdivision (h), provides that a "serious injury" includes, among other things, 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.

In the instant matter, pursuant to the stipulation of the parties, both Toppen and Ferguson suffered serious injuries requiring hospitalization in excess of 24 hours. Toppen and Ferguson

were seriously injured when they fell from the top of a truck on which they were performing repair work, while not wearing fall protection.

The evidence adduced at hearing demonstrated that a causal nexus existed between Employer's failure to implement the use of the PFPS by the night shift crew at the North Central site, and Toppen's and Ferguson's resulting serious injuries. Accordingly, the citation was properly characterized as Accident-Related.

6. Is the proposed penalty 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. (*Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).)

Sanasaryn testified that an initial penalty of $ 18,000 is assessed for all serious violations. (section 336, subd. (c).) When the violation results in a serious injury, as the case is here, the only permissible downward adjustment is for employer size. (Labor Code, section 6319, subd. (d); *Sherwood Mechanical, Inc.*, Cal/OSHA App. 08-4692, Decision After Reconsideration (June 28, 2012).) Here, Employer had more than 100 employees; therefore, no downward adjustment for employer size was applicable.

Employer did not provide any evidence to demonstrate that Sanyasaryn miscalculated the penalty, or that circumstances warranted a further reduction of the final proposed penalty. The final proposed penalty of $18,000 is therefore reasonable

Conclusion

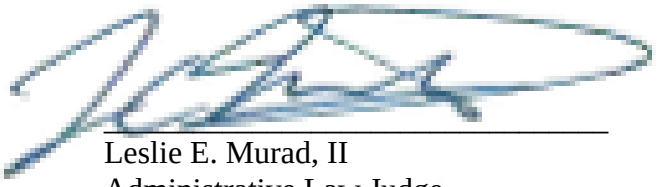
The Division established a violation of section 3210, subdivision (c). The evidence shows that Employer did not have a fall protection system in use for night shift employees on October 25, 2019, and as a result, two employees fell from an elevated work station and sustained serious physical injuries. The violation was properly classified as Serious and Accident-Related, and the penalty of $18,000 is reasonable.

Order

It is hereby ordered that Citation 2 is affirmed as issued and the associated penalty is sustained.

The settlement of the remaining citation, Citation 1 is resolved by stipulation as a late report, with a credit of 40 percent reduction being applied to the original penalty, (10 percent for History, 30 percent for Good Faith, no reduction for Size). The penalty was reduced from $5,000.00 to $3,000 and is approved.

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



Dated: 11/08/2022

Leslie E. Murad, II
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.**