

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

In the Matter of the Appeal of:

**WICKS ROOFING, INC.
917 BUCKLEY ROAD
SAN LUIS OBISPO, CA 93401**

Employer

Inspection No.
1454339

DECISION

Statement of the Case

Wicks Roofing, Inc. (Employer) is a roofing company. Beginning January 8, 2020, the Division of Occupational Safety and Health (the Division), through Compliance Officer Stan Rodriguez (Rodriguez), conducted an accident investigation at Employer's worksite located at 2510 Ramada Drive in Paso Robles, California (the site), based on an injury report it received from Employer. On May 27, 2020, the Division issued Citation 1, Item 1 and Citation 2, Item 1, to Employer for alleged violations of the California Code of Regulations, title 8.¹

Citation 1, Item 1, classified as Regulatory, alleges that Employer failed to complete the Cal/OSHA Form 300 for 2019 by not correctly filling out Column F.

Citation 2, Item 1, classified as Serious Accident-Related, alleges Employer failed to prevent an employee from carrying equipment or materials which prevent the safe use of ladders and that Employer failed to ensure that an employee who was ascending or descending a ladder, faced the ladder and maintained contact with the ladder at three-points at all times.

Employer filed a timely appeal contesting the existence of the alleged violations for Citation 1, Item 1, and Citation 2, Item 1. In addition, Employer appealed Citation 2, Item 1, on the ground that the classification is incorrect.

This matter was heard by Howard Isaac Chernin, Administrative Law Judge (ALJ), for the California Occupational Safety and Health Appeals Board (Appeals Board) in Los Angeles, California on November 4, 2021. ALJ Chernin conducted the video hearing with all participants appearing remotely via the Zoom video platform. District Manager Efren Gomez represented the Division, and Michael Schedler, of Morris and Garritano, represented Employer.

¹ Unless otherwise specified, all references are to California Code of Regulations, title 8.

During the hearing, the parties stipulated that Citation 1, Item 1, would be resolved by being changed to a Notice in Lieu of Citation with a \$0 penalty. Good cause having been found, the undersigned ALJ incorporates the above-described resolution of Citation 1, Item 1, into this Decision and it is reflected on the attached Summary Table.

The matter was submitted on January 5, 2022.

Issues

1. Did Employer violate section 3276, subdivision (e)(15), by failing to prevent an employee from carrying equipment or materials which prevent the safe use of ladders, or by failing to ensure that an employee who was ascending or descending a ladder faced the ladder and maintained contact with the ladder at three-points at all times?
2. Did the Division establish that the citation was properly classified as Serious?
3. Did Employer rebut the presumption that the violation was 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?
4. Did Employer's violation of section 3276, subdivision (e)(15), cause a serious injury accident?

Findings of Fact

1. Jose Luis Berrera Camacho (Camacho) was employed by Employer on December 6, 2019, as a foreman.
2. On December 6, 2019, Camacho and co-worker Camilo Valencia (Valencia) were performing roofing activities at the site. Camacho and Valencia were assigned to install CLAD-GARD underlayment on the roof of a building under construction at the site (the building), in anticipation of upcoming rain.
3. The CLAD-GARD underlayment comes in rolls. Each roll is approximately 4 feet wide and weighs approximately 40 to 45 pounds.
4. Camacho was assigned to bring two rolls of CLAD-GARD up to the roof of the building at the site.
5. Camacho and Valencia used a portable metal extension ladder (the ladder) to access the roof of the building.

6. Camacho ascended the ladder while carrying a roll of CLAD-GARD on his shoulder. Doing so prevented Camacho from maintaining three points of contact with the ladder at all times, because he needed to use one hand to hold the roll while ascending.
7. As a result of carrying a roll of CLAD-GARD on his shoulder while ascending a metal extension ladder, Camacho fell off the ladder several feet to the ground, and suffered a serious back injury that required inpatient hospitalization of more than 24 hours for treatment including surgery (hereinafter “accident” or “the accident”).
8. As a foreman, Camacho was responsible for the safety of himself and his crew at the site.

Analysis

- 1. Did Employer violate section 3276, subdivision (e)(15), by failing to prevent an employee from carrying equipment or materials which prevent the safe use of ladders, or by failing to ensure that an employee who was ascending or descending a ladder faced the ladder and maintained contact with the ladder at three-points at all times?**

Section 3276 (Portable ladders), subdivision (e) (Care, Use, Inspection and Maintenance of Ladders), found under Article 4 (Access, Work Space, and Work Areas), of Group 1 (General Physical Conditions and Structures) of Subchapter 7 (General Industry Safety Orders), of Chapter 3.2 (California Occupational Safety and Health Regulations) provides:

(e)

...

(15) Climbing and Working on Ladders.

...

(B) Employees shall be prohibited from carrying equipment or materials which prevent the safe use of ladders.

(C) When ascending or descending a ladder, the user shall face the ladder and maintain contact with the ladder at three-points at all times. NOTE: Contact with the ladder at three points means two feet and one hand, or two hands and one foot which is safely supporting the user's weight.

In citing Employer, the Division alleges:

Prior to and during the course of the investigation, including, but not limited to, on January 8, 2020, the employer did not ensure an employee:

- (1) Was prohibited from carrying equipment or materials during climbing and descending of ladder.
- (2) Maintain contact with the ladder during ascent and descent at three-points at all times.

As a result, on or about December 6, 2019, an employee suffered a serious injury from a fall while using a portable ladder.

The Division has the burden of proving a violation, including the applicability of the safety order, by a preponderance of the evidence. (*Coast Waste Management, Inc.*, Cal/OSHA App. 11-2386 and 2386, Decision After Reconsideration (Oct. 7, 2016).) “Preponderance of the evidence” is usually defined in terms of probability of truth, or of evidence that when weighted 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. (*Lone Pine Nurseries*, Cal/OSHA App. 00-2817, Decision After Reconsideration (Oct. 30, 2001), citing *Leslie G. v. Perry & Associates* (1996) 43 Cal.App. 4th 472, 483.) Where multiple instances are alleged, the Division need only establish a single instance to sustain a violation. (*Barrett Business Services, Inc.*, Cal/OSHA Insp. No. 315526582, Decision After Reconsideration (Dec. 14, 2016).)

To establish a violation, the Division must establish either that an employee carried materials or equipment while using a ladder, which rendered the use of the ladder unsafe; or alternatively, that Employer failed to ensure that employees ascended and descended a ladder while facing the ladder and maintaining three points of contact at all times.

Here, the parties do not dispute that Employer’s employees made use of a metal extension ladder (hereafter, “the ladder” or “ladder”) on December 6, 2019, to access the roof of a building at the site in order to lay roofing material. Therefore, section 3276, subdivision (e)(15) applies to the work that was being performed.

- a. Camacho carried material while using the extension ladder, in a manner that prevented safe use of the ladder unsafe.*

Rodriguez testified that he interviewed Camacho on April 30, 2020, as part of his investigation of the accident. The interview was conducted over the phone with the aid of a

Spanish language interpreter. During the interview, Rodriguez asked Camacho how the accident occurred, to which Camacho replied that he fell while climbing a ladder. Camacho told Rodriguez that he was carrying a roll of CLAD-GARD² on his shoulder while ascending the ladder, and that the roll weighed 40 to 45 pounds and was 4 feet wide. Rodriguez conducted a follow-up interview with Camacho after receiving Employer's 1BY response (Exhibit 11), because the response contained a written statement, dated May 8, 2020, and signed by Camacho, in which Camacho contradicted the statement he gave to Rodriguez on April 30, 2020. In his written statement, Camacho asserted that he fell from the roof, and denied that he fell off a ladder (Exhibit 7). When Rodriguez re-interviewed Camacho, Camacho told Rodriguez that he fell from the roof and not from a ladder.

In addition to Rodriguez's testimony, the Division introduced confidential medical records³ pertaining to treatment that Camacho received following the accident. The authenticity of the documents was not challenged during the hearing. A review of Exhibit 12 shows that Camacho arrived at the Emergency Department of a local hospital on December 6, 2019, at approximately 12:20 p.m. Camacho presented with back pain and told medical staff at the Emergency Department that he fell backwards off of a ladder at work at approximately 9:00 a.m. that morning. The medical records indicate that Camacho was alert and oriented, and that he was assisted by a translator while at the hospital. The medical records corroborate Rodriguez's testimony as to what Camacho told Rodriguez occurred when Rodriguez interviewed him on April 30, 2019, and they contradict what Camacho later wrote in his statement and told Rodriguez during his re-interview on May 8, 2020.

Camacho testified during the hearing through a qualified Spanish language interpreter. Camacho testified that he carried the rolls of CLAD-GARD one at a time on his shoulder while ascending the ladder, but later changed his testimony and stated that he was carrying the rolls in front of him while ascending the ladder. Camacho's testimony is inconsistent on whether he was carrying the rolls on his shoulder or in front of him. This inconsistency in his testimony was not explained during the hearing. There were no other witnesses who observed the accident.

During the hearing, Camacho denied that he fell off of a ladder. Instead, he testified that he was standing on the roof stretching out a roll of CLAD-GARD when he lost his footing, and fell off the roof. When confronted with the statement that he gave to Rodriguez, Camacho claimed he was "confused" and out of breath when he fell. He also stated he was not sure whether he was assisted by a Spanish language interpreter during his phone interview, although

² The parties did not dispute that CLAD-GARD is material within the meaning of the cited safety order.

³ The undersigned ALJ, in the exercise of his authority pursuant to section 376.6, ordered that Exhibit 12 be placed under seal, and unauthorized observers were excluded while the exhibit was displayed and discussed. The exhibit is discussed here only to the extent necessary to resolve disputed material questions of fact and legal issues presented in this appeal.

he further testified that he understands English. Similarly, when asked on cross-examination to explain the description of his accident recorded in his medical records, Camacho testified that “they didn’t ask much detail” at the hospital, and claimed again that he was “confused” and did not know if he had hit his head. Camacho further stated that the information in his medical records about how the accident occurred was wrong, and stated that at the time he arrived at the Emergency Department he was in pain, so he “just told them something so they could start treating me.”

Camacho’s coworker, laborer Camilo Valencia (Valencia) testified during the hearing that he was assigned to work with Camacho on the day of the accident. Valencia’s testimony, like Camacho’s, was inconsistent. For instance, Valencia testified that he could recall the accident, but later testified that he did not remember that day very well. According to Valencia, Camacho was on one side of the roof, and Valencia was on the other side when the accident occurred. Thus, Valencia did not observe the accident as it occurred. Rather, Valencia testified that he heard an impact, and when he went to Camacho’s side of the roof, observed Camacho on the ground. According to Valencia, Camacho told him that he slipped off the roof, and Valencia observed a roll of CLAD-GARD on the ground near Camacho.

The weight of the evidence supports a finding that Camacho carried the rolls one at a time on his shoulder as he ascended the ladder to the roof. In making this finding, the undersigned ALJ credits the testimony of Rodriguez as well as the testimony of Camacho, who admitted during the hearing that he ascended the ladder while carrying CLAD-GARD on his shoulder. The ALJ further credits the testimony of Valencia that he found Camacho on the ground after he fell and observed a roll of CLAD-GARD near him on the ground. This evidence strongly supports a finding that Rodriguez ascended a ladder while carrying CLAD-GARD on his shoulder.

The weight of the evidence further supports a finding that Camacho fell from the ladder, rather than from the roof. In making this finding, the undersigned ALJ credits the testimony of Rodriguez, as corroborated by Camacho’s statements during his interview⁴. The ALJ further credits the statement Camacho made to the emergency department medical staff that he fell backwards off a ladder. This statement is found to be credible, and the undersigned gives much weight to it, because it was given by Camacho in order to receive medical treatment. Camacho had strong motivation to truthfully and accurately inform the medical staff as to how he was injured, in order to secure proper treatment. In contrast, Camacho’s written statement (Exhibit 7), is found not to be credible, and is afforded no weight, because it contradicts other, stronger evidence including Camacho’s prior statements to Rodriguez. (See *People v. Price* (1991) 1 Cal.4th 324, 474 [“The credibility of a witness may be challenged with evidence of prior

⁴ Because Camacho testified, his statements to Rodriguez outside of the hearing are not hearsay and are may support a finding of fact with or without corroborating evidence.

statements by the witness that are inconsistent with the witness's testimony at the trial.”]; see also Evid. Code, § 780, subd. (h).)

The weight of the evidence further supports a finding that Camacho’s act of carrying CLAD-GARD on his shoulder while ascending the ladder prevented the safe use of the ladder. In making this finding, the undersigned ALJ credits the un rebutted testimony of Rodriguez that the roll of CLAD-GARD that Camacho was carrying weighed 40 to 45 pounds and was 4 feet wide. In doing so, it is found that Camacho would have necessarily had to hold onto the roll with one hand to avoid it falling off of his shoulder. It is found that this activity prevented Camacho from maintaining three points of contact at all times with the ladder while ascending. As discussed briefly below, maintaining three points of contact at all times by way of two feet and one hand, or two hands and one foot, is the safe way to ascend a ladder. It would have been impossible for Camacho to ascend the ladder while carrying CLAD-GARD in the manner described above while maintaining three points of contact at all times, because one hand was unavailable due to being needed to support the roll of CLAD-GARD on his shoulder.

Thus, for all of the foregoing reasons, the weight of the evidence supports a legal conclusion that Employer violated section 3276, subdivision (e)(15)(B).

b. Camacho failed to maintain three points of contact at all times while ascending the ladder.

The Division alleges that a violation of section 3276, subdivision (e)(15)(c) exists because Camacho did not maintain three points of contact while ascending the ladder. The note to subsection (B) section 3276, subdivision (e)(15) states that “Contact with the ladder at three points means two feet and one hand, or two hands and one foot which is safely supporting the user's weight.” As discussed above, it is found that Camacho did not maintain three points of contact with the ladder while ascending and holding CLAD-GARD, because the size and weight of the CLAD-GARD would have required the use of one hand at all times to hold it steady. Because Camacho was using one hand to hold the CLAD-GARD, he was left with only his other hand and his two feet to use to ascend the ladder. Common experience demonstrates that it is impossible to ascend a ladder in such a manner while maintaining three points of contact at all times, and the fact that Camacho fell while ascending further supports this conclusion.

Thus, the weight of the evidence supports a conclusion that Employer violated section 3276, subdivision (e)(15)(C). The Division proved by a preponderance of the evidence that Employer violated section 3276, subdivisions (e)(15)(B) and (e)(16)(C). Therefore, Citation 2, Item 1 is affirmed.

2. Did the Division establish that the citation was properly classified as Serious?

Labor Code section 6423, subdivision (a),⁵ in relevant part 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.

“Serious physical harm” is defined 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.

(Lab. Code §6432, subd. (e).)

The Appeals Board has defined the term “realistic possibility” to mean a prediction that is within the bounds of human reason, not pure speculation. (*Sacramento County Water Agency Department of Water Resources*, Cal/OSHA App. 1237932, Decision After Reconsideration (May 21, 2020).) Camacho testified, and Employer does not dispute, that Camacho was hospitalized for more than 24 hours (i.e. inpatient) while he received treatment for the injuries he sustained during the accident. Rodriguez credibly testified⁶ that he has investigated other

⁵ Labor Code section 6432 was amended effective January 1, 2021. The portions discussed herein reflect the version of Labor Code section 6432 as it was in effect at the time of issuance of the citation.

⁶ Rodriguez credibly testified that he is current in his Division-mandated training. Rodriguez further testified that he was hired by the Division as an Assistant Safety Engineer in September 2016, and that prior to that he worked for Caltrans in a safety role. Rodriguez credibly testified that he has opened over 200 investigations, including approximately 60 to 70 involving the construction industry. Based on the above, Rodriguez is found to be competent to testify as to the serious classification for Citation 2, Item 1. (Lab. Code, section 6434, subd. (g).)

accidents involving falls from ladders that have resulted in serious injuries requiring inpatient medical treatment as well as fatalities. Here, it is found that Camacho in fact did suffer a serious injury after he fell from a ladder. Accordingly, the Division established a rebuttable presumption that the citation was properly classified as Serious.

3. Did Employer rebut the presumption that the violation was 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 the 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, the 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 Appeals Board has consistently held employers accountable for the acts and knowledge of their foremen. (See, e.g. *Greene and Hemly, Inc.*, Cal/OSHA App. 76-435, Decision After Reconsideration (April 7, 1978).) An employer's failure to exercise supervision adequate to insure employee safety is equivalent to failing to exercise reasonable diligence, and will not excuse a violation on the basis of lack of employer knowledge. (See *Stone Container Corporation*, Cal/OSHA App. 89-042, Decision After Reconsideration (March 9, 1990).) Reasonable diligence includes the obligation by foremen or supervisors to oversee the entire work site where safety and health hazards are present if exposure to an unsafe condition exists (See *A. A. Portanova & Sons, Inc.*, Cal/OSHA App. 83-891, Decision After Reconsideration (March 19, 1986), pp. 4-5.).

Rodriguez testified that during his interview, Camacho identified himself as a foreman and acknowledged that he was responsible for assigning work for his crew, and for supervising his crew. Camacho further told Rodriguez that he possessed the authority to discipline employees and admitted that he was responsible for their safety on the job. Rodriguez testified that,

following his interview of Camacho, he requested a copy of Camacho's duty statement from Employer. (See Exhibit 4.) The duty statement provided by Employer to Rodriguez (Exhibit 6), which is titled "Foreman Duties" says in the second bullet point that Camacho, as a foreman, was responsible for "identifying safety related issues and correcting those issues". Camacho's testimony that he was a foreman responsible for the safety of his crew, which is corroborated by Exhibit 6, is found credible and is credited.

Here, as discussed, Camacho fell from a ladder while ascending it in a manner that prevented its safe use. Camacho, as a foreman, was aware of what he was doing, and his knowledge is imputed to Employer. Therefore, Employer, through foreman Camacho, was aware that Camacho was ascending the ladder in an unsafe manner when the accident occurred. Accordingly, Employer failed to rebut the presumption that the Division correctly classified Citation 2, Item 1 as Serious.

4. Did Employer's violation of section 3276, subdivision (e)(15) cause a serious injury accident?

In order for a citation to be classified as Accident-Related, there must be a showing by the Division of a "causal nexus between the violation and the serious injury". (*RNR Construction, Inc.*, Cal/OSHA Insp. No. 1092600, Denial of Petition for Reconsideration (May 26, 2017) quoting *Webcor Construction*, Cal/OSHA App. 317176766, Denial of Petition for Reconsideration (Jan. 20, 2017).) "Where the Division presents evidence which, if believed, is of such a nature as to support a finding if unchallenged, then the burden of producing evidence shifts to Employer to present convincing evidence to avoid an adverse finding as to Employer." (*RNR Construction, Inc.*, Cal/OSHA Insp. No. 1092600, Denial of Petition for Reconsideration (May 26, 2017), citing *Paramount Scaffold, Inc.*, Cal/OSHA App. 01-4564, Decision After Reconsideration (Oct. 7, 2004).)

Here, it is found that Camacho suffered a serious injury when he fell while ascending a ladder. It is further found that Camacho was carrying material while ascending, and that carrying the material prevented him from safely ascending the ladder. Specifically, doing so prevented Camacho from maintaining three points of contact at all times while ascending. As a result, Camacho fell and suffered a serious injury that required eight days of hospital treatment by Camacho's own admission. The evidence as summarized is sufficient to support a finding of a causal nexus between the violation and the serious injury sustained by Camacho.

As discussed above, Employer had the opportunity to present evidence at the hearing, including evidence that the accident was not caused by the alleged violation of section 3276, subdivision (e)(15). Employer did not present any evidence during its case in chief, and the evidence received during hearing that would otherwise tend to contradict the Division's evidence

supporting the accident-related classification was weaker than the Division's evidence and was found to be much less credible, as previously discussed.

Thus, for all of the foregoing reasons, the Division properly classified Employer's violation of section 3276, subdivision (e)(15), as Accident-Related.

Conclusions

The evidence supports a finding that Employer violated section 3276, subdivision (e)(15), by permitting employees to carry equipment or materials which prevent the safe use of ladders, and by failing to ensure its employees face the ladder and maintain contact with the ladder at three-points at all times. The violation was properly classified as Serious and as Accident-Related.

Orders

Citation 1, Item 1, is affirmed as a Notice in Lieu of Citation, and the associated penalty is vacated in accordance with the parties' agreement and as set forth in the attached Summary Table.

Citation 2, Item 1, is affirmed and the associated penalty is affirmed and assessed as set forth in the attached Summary Table.

Dated: 02/02/2022



Howard I Chernin
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.**