BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1327187**
ONTARIO REFRIGERATION SERVICE, INC. **635 S. MOUNTAIN AVE.** **ONTARIO, CA 91762** **Employer**	**DECISION**

Statement of the Case

Ontario Refrigeration Service, Inc. (Employer) provides heating, ventilation, and air conditioning services. On June 27, 2018, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Timothy Decker, commenced an inspection of a site located at 6610 Cobra Way in San Diego, California (job site), after report of a fatal injury at the site on June 26, 2018.

On December 4, 2018, the Division cited Employer for three alleged safety violations: failure to provide an employee with heat illness training; failure to establish, implement, and maintain an effective Injury and Illness Prevention Program; and failure to ensure that employees that approached within six feet of unguarded skylights were protected from falling.

Employer filed timely appeals of the citations, contesting the existence of the violations. For Citations 2 and 3, Employer also asserted that the classifications were incorrect and that the proposed penalties were unreasonable. Additionally, Employer asserted numerous affirmative defenses to each of the citations.

This matter was heard by Sam E. Lucas, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (Appeals Board). On July 23, 2020, and January 13, February 4, and February 19, 2021, ALJ Lucas conducted the hearing from Los Angeles, California, with the parties and witnesses appearing remotely via the Zoom video platform. Eugene McMenamin, Attorney, of Ogletree, Deakins, Nash, Smoak & Stewart, P.C., represented Employer. Martha Casillas, Staff Counsel, represented the Division. The matter was submitted for decision on July 31, 2021.

Issues

1. Did Employer fail to provide heat illness training to the injured employee?

2. Did Employer establish, implement, and maintain an effective Injury and Illness Prevention Program?

3. Did the Division establish that Employer failed to protect employees from unguarded skylights at the job site?

4. Did Employer establish that the injured employee's actions were an unforeseeable extreme departure from his job duties?

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

6. Did Employer rebut the presumption that the violation cited in Citation 2 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?

7. Is the proposed penalty reasonable?

Findings of Fact

1. Employer's employees receive comprehensive training when they are initially hired. The training includes heat illness prevention training.

2. The injured employee, Bryan Heredia (Heredia), was provided with Employer's new-hire training and signed an acknowledgement attesting to that fact.

3. Employer's written Injury and Illness Prevention Program (IIPP) provides that supervisors are required to conduct monthly inspections of work areas and maintain records of the inspections for five years.

4. Employer's supervisors did not maintain documentation of, or conduct, monthly safety inspections.

5. Employer's written IIPP contains sections regarding identification, evaluation, and correction of safety hazards.

6. Employer's written IIPP does not contain written procedures for employee and supervisor training.

7. Heredia approached within six feet of an unguarded skylight without fall protection and fell through the skylight, suffering fatal injuries in the fall.

8. Heredia and his co-worker, Robert Celiceo (Celiceo), were tasked with repairing an air-conditioning unit (AC7) at the job site on the date of Heredia's accident.

9. There were no job assignments that involved other air-conditioning units on the date of Heredia's accident.

10. Heredia and Celiceo were on a designated lunch break and had descended from the roof to eat their lunches during their break.

11. Heredia returned to the roof during his lunch break and went to an area more than 30 feet from the area where he had been assigned to work.

12. Employer could not have known that Heredia would return to the roof during his lunch break, to an area where he was not assigned to work, and approach a skylight without using fall protection.

13. Employer provided its employees, including Heredia, with training regarding staying at least six feet from skylights and using fall protection.

14. The failure to conduct scheduled inspections may result in an employee suffering an injury or death if the inspections would have identified hazards to which the employee would be exposed.

15. A failure to establish, implement, and maintain a written IIPP is the responsibility of Employer's managerial and supervisorial employees, whose knowledge thereof is imputed to Employer.

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

Analysis

1. Did Employer fail to provide heat illness training to the injured employee?

California Code of Regulations, title 8, section 3395, subdivision (h)(1),[1] requires that all supervisory and non-supervisory employees be provided with training in a series of topics before the employees begin work that should reasonably be anticipated to result in exposure to the risk of heat illness.

In Citation 1, the Division alleges:

> Prior to and during the course of the inspection, including but not limited to 6/26/18, the employer failed to provide employees performing HVAC services outdoors with effective heat illness training in accordance with (A) through (I) of this section.

The Division has the burden of proving a violation, including the applicability of the cited safety orders, by a preponderance of the evidence. (*Howard J. White, Inc*., 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 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. (*Nolte Sheet Metal, Inc*., Cal/OSHA App. 14-2777, Decision After Reconsideration (Oct. 7, 2016).)

Associate Safety Engineer Timothy Decker (Decker) testified that he did not find any deficiencies in Employer's written Heat Illness Prevention Plan (HIPP). Rather, Decker asserted that he issued Citation 1 because Employer did not provide him with heat illness training records for the deceased employee, Heredia. Decker testified that, although he requested and received heat illness training documentation for "several employees," he did not receive documentation of Heredia's training.[2] Based on this alleged lack of training documentation, Decker asserted that Heredia had not received heat illness training.

However, the testimony and documentary evidence presented at the hearing contradicts Decker's assumption that Heredia was not trained. Employer's Executive Vice President of Operations, Scott Gray (Gray), testified that all employees are provided with extensive training during the first three days of their employment. Gray testified that the training for all new employees encompasses Employer's written HIPP, included in an Associate Handbook. Gray further testified that Heredia's acknowledgement of receipt of the Associate Handbook and training thereon, submitted as Exhibit P, is further evidence that Heredia received heat illness training.

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

[2] In fact, Decker only requested training records for the two employees that were present at the job site on the date of the accident.

The preponderance of the evidence presented weighs in favor of finding that Heredia did, in fact, receive training on Employer's HIPP. Not only was there testimony regarding the extensive training program, but the documentation proves that Heredia acknowledged having received the training. The Division did not establish a violation of section 3395, subdivision (h)(1). Accordingly, Citation 1 is dismissed.

2. Did Employer establish, implement, and maintain an effective Injury and Illness Prevention Program?

Section 3203, subdivision (a), 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:
[…]
(B) Whenever new substances, processes, procedures, or equipment are introduced to the workplace that represent a new occupational safety and health hazard; and
(C) Whenever the employer is made aware of a new or previously unrecognized hazard.

(5) Include a procedure to investigate occupational injury or occupational illness.

(6) Include methods and/or procedures for correcting unsafe or unhealthy conditions, work practices and work procedures in a timely manner based on the severity of the hazard:
[…]

(7) Provide training and instruction:
[…]
(C) To all employees given new job assignments for which training has not previously been received;
(D) Whenever new substances, processes, procedures or equipment are introduced to the workplace and represent a new hazard;

(E) Whenever the employer is made aware of a new or previously unrecognized hazard; and,
(F) For supervisors to familiarize themselves with the safety and health hazards to which employees under their immediate direction and control may be exposed.

In Citation 2, the Division alleges:

Prior to and during the course of the inspection including, but not limited to June 27, 2018, the employer failed to establish, implement and maintain an effective Injury and Illness Prevention Program (Program) including, but not limited to:

1. The employer failed to implement Section VI of their Program in that Supervisors did not conduct and document a monthly safety inspection of the work areas under their supervision. The employer also failed to effectively identify and evaluate work place hazards, including but not limited to employees being exposed to falls through unguarded skylights. [3203(a)(4)]
2. The employer failed to include written procedures to identify and evaluate hazards whenever new substances, processes, procedures, or equipment are introduced to the workplace that represent a new occupational safety and health hazard. [3203(a)(4)(B)]
3. The employer failed to correct unsafe conditions, work practices and work procedures, including but not limited to employees being exposed to unguarded skylights. [3203(a)(6)]
4. The employer failed to establish written procedures for providing training and instruction to employees given a new job assignment for which training has not previously been received [3203(a)(7)]; whenever new substances, processes, procedures or equipment are introduced to the workplace and represent a new hazard [3203(a)(7)(D)]; and, whenever the employer is made aware of a new and previously unrecognized hazard. [3203(a)(7)(E)]
5. The employer failed to establish written procedures for providing training and instruction for supervisors to familiarize themselves with the safety and health hazards to which employees under their immediate direction and control may be exposed. [3203(a)(7)(F)]

The Appeals Board has consistently held that a failure to implement or maintain an IIPP cannot be based on an isolated or single violation. (*Cal Pac Sheet Metal, Inc.*, Cal/OSHA App. 13-0547, Denial of Petition for Reconsideration (Oct. 8, 2014); *David Fisher, dba Fisher*

Transport, a Sole Proprietorship, Cal/OSHA App. 90-726, Decision After Reconsideration (Oct. 16, 1991).)

Instance 1: Monthly safety inspections to identify hazards pursuant to subdivision (a)(4)

While an employer may have a comprehensive IIPP, the Division may still demonstrate an IIPP violation by showing that the employer failed to implement that plan. (*DPR Construction, Inc., et al. dba DPR Construction*, Cal/OSHA App. 1206788, Decision After Reconsideration (Feb. 19, 2021).) "While Employer had various written programs in place, those written programs were not implemented--the scheduled periodic inspections required by [section 3203,] subdivision (a)(4) to identify unsafe work practices and by Employer's [safety program] did not take place." (*ABM Facility Services, Inc. dba ABM Building Value*, Cal/OSHA App. 12-3496, Decision After Reconsideration (Dec. 24, 2015).)

Decker testified that the basis for Instance 1 in Citation 1 was Employer's failure to implement its own inspection process set forth in its IIPP. Employer's IIPP provides, in relevant part:

> At least once a month, all Department Managers/Supervisors shall be responsible for conducting a formal safety self-inspection of the work areas under their supervision for the presence of physical hazards that could cause employee injuries if not corrected…

(Ex. 5, Sec. VI.)

Evidence Code section 413 provides, "In determining what inferences to draw from the evidence of facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto, if such be the case." While not dispositive, the lack of records may be used to support an inference that Employer failed to complete the inspections called for in its IIPP. (*ABM Facility Services, Inc. dba ABM Building Value, supra*, Cal/OSHA App. 12-3496; *Crop Production Services*, Cal/OSHA App. 09-4036, Decision After Reconsideration (May 28, 2014).)

As part of his inspection, Decker requested Employer's safety inspection records for the two years prior to Heredia's accident. Decker testified that he did not receive any records of inspections conducted at the job site. Employer's IIPP provides, in relevant part:

> Ontario Refrigeration will maintain records of actions taken to implement and maintain this IIPP. The records will be maintained for 5 years. … Records of

> scheduled and unscheduled periodic inspections as well as other records including methods used to identify and evaluate workplace conditions and work practices shall also be retained.

(Ex. 10, Sec. IX.)

Employer did not produce any records or testimony that it did, in fact, conduct safety inspections of the job site in accordance with its IIPP, which requires supervisors to perform such inspections monthly.[3] Instead, Employer asserted that the employees are trained to look for hazards when they go to a job site. This explanation does not bring Employer into compliance with its inspection program set forth in its IIPP. Accordingly, Employer failed to implement its IIPP and a violation of section 3203, subdivision (a)(4), is established.

Instance 1 also alleges that Employer violated section 3203, subdivision (a)(4), by failing to "effectively identify and evaluate work place hazards, including but not limited to employees being exposed to falls through unguarded skylights." Although Instance 1 was already established as a violation, because the Division chose to include this allegation in the same AVD, it will be discussed briefly.

The specific categories that the Division asserts required Employer to identify the skylights as hazards are subdivisions (a)(4)(B) and (a)(4)(C). These subdivisions refer to newly discovered conditions or processes. Employer had been working on this roof with these skylights for approximately four years. There was nothing new involved in the work Employer's employees were performing at the job site. "Section 3203(a)(4), which specifically addresses new safety programs, new work processes, or new or previously unrecognized hazards, is, without more evidence, not applicable to this set of facts." (*Shimmick-Obayashi,* Cal/OSHA App. 08-5023, Decision After Reconsideration (Dec. 30, 2013) [§3203, subd. (a)(4), inapplicable to trigger inspection requirement because scaffold had been used by injured employee for six months at time of accident; not a new work procedure].)

In sum, the assertion that Employer was required by section 3203, subdivision (a)(4)(B) and (C), to conduct inspections because the work processes and hazards were new is rejected. However, as part of its IIPP, Employer has mandated monthly safety inspections by supervisory personnel and retention of records of those inspections for five years. The Division established by a preponderance of the evidence that Employer did not implement its IIPP with regard to inspections. Instance 1 of Citation 1 is affirmed as a violation.

[3] Ex. G contains inspection reports for various locations after Heredia's accident, but the record is devoid of any evidence of inspections conducted at the job site where the accident occurred.

Instance 2: Written procedures to identify and evaluate new hazards pursuant to subdivision (a)(4)(B)

Section 3203, subdivision (a)(4), requires a written program that includes "procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices." In contrast to Instance 1, which involved implementation of Employer's program, this Instance pertains to the contents of the written program itself.

The Division did not provide testimony regarding why Employer's written IIPP was insufficient to satisfy the requirements set forth in section 3203, subdivision (a)(4). The Alleged Violation Description (AVD) for Instance 2 specifically references written procedures to identify hazards "whenever new substances, processes, procedures, or equipment are introduced to the workplace." However, Employer's IIPP contains a section entitled "Hazard Identification, Evaluation & Correction." (Ex. 5.) The section contains instructions to employees, including supervisors, regarding inspecting work areas for hazards and a form to complete that identifies unsafe conditions, which is then submitted to Employer's Safety Officer for further action to abate the hazards. To the extent that the Division alleges that the section was insufficient because it did not use the specific language regarding the various "new" circumstances that might result in hazards, that argument is unpersuasive. There is no requirement that an employer's IIPP has to use the exact language in the safety order and the Appeals Board has never interpreted the safety orders to require such precise language.

Notwithstanding the issue regarding implementation of the monthly safety inspections, the language set forth in Employer's IIPP is sufficient to satisfy the requirements to identify and evaluate hazards at the workplace. The Division did not establish a violation of section 3203, subdivision (a)(4)(B), as alleged in Instance 2.

Instance 3: Correction of unsafe conditions, practices and procedures pursuant to subdivision (a)(6)

Instance 3 deals with implementation of Employer's written IIPP. Specifically, Instance 3 alleges that Employer "failed to correct unsafe conditions, work practices and work procedures, including but not limited to employees being exposed to unguarded skylights."

A written plan that states "action shall be taken on reported unsafe conditions" may satisfy the requirement to establish a written plan. (*Bay Area Rapid Transit District*, Cal/OSHA App. 09-1218, Decision After Reconsideration and Order of Remand (Sep. 6, 2012).) An employer's IIPP may be satisfactory as written, but still result in a violation of section 3203, subdivision (a)(6), if the IIPP is not implemented, or through failure to correct known hazards.

(*Contra Costa Electric, Inc*., Cal/OSHA App. 09-3271 Decision After Reconsideration (May 13, 2014).)

> Section 3203, subdivision (a)(6), requires employers have written procedures for correcting unsafe or unhealthy conditions and it requires the employer to actually implement those procedures by taking appropriate action to correct hazards. [Citations.] Implementation of an IIPP is a question of fact. [Citation.] Proof of implementation requires evidence of actual responses to known or reported hazards. [Citation.] Further, the corrective action taken by the employer must be sufficient in magnitude and scope to address the particular hazard. [Citation.]

(*Papich Construction Company, Inc.*, Cal/OSHA App. 1236440, Decision After Reconsideration (Mar. 26, 2021), citing to *National Distribution Center, LP, Tri-State Staffing*, Cal/OSHA App. 12-0391, Decision After Reconsideration (Oct. 5, 2015).)

Section 3203, subdivision (a)(6), is a performance standard, which "creates a goal or requirement while leaving it to employers to design appropriate means of compliance under various working conditions." (*MCM Construction, Inc.*, Cal/OSHA App. 13-3851, Decision After Reconsideration (Feb. 22, 2016).)

Employer's written IIPP contains instructions regarding correction of identified hazards that include designating individuals responsible for abating physical hazards or correcting unsafe employee behaviors, prioritizing the most severe physical hazards and unsafe behaviors, and documenting the abatement actions for validation by Employer's Safety Officer. Employer submitted documentation of numerous safety audits where hazards were identified and corrective action was required before employees could continue working at the particular location at issue. Several of the audits identified skylights as a hazard when the employees were required to work in close proximity to them. One of the audits by Employer's safety consultant states that a "sunroof" had been identified in the work area but indicated that it was not a hazard because "it was approximately 15 feet away from the nearest work area." (Ex. G, p. 14 of 61.) Numerous other safety inspection reports reflect identification and suggested abatement of hazards, including skylights in proximity to work areas.

The crux of the issue with regard to Instance 3 is that Employer did not correct what the Division deemed to be a hazard: unguarded skylights at the job site. However, Employer did not identify the skylights as a hazard due to its belief that there was no employee exposure to the skylights. Gray testified that if Employer determines that a skylight is within six feet of a unit, Employer informs the customer that the fall hazard must be mitigated before employees will perform work on the unit. "But in the case of AEM, there were no skylights there that we had to

get within six feet of. So there was no need for us to go back to the customer and ask them to mitigate those hazardous conditions." (Transcript p. 234, lns. 11-15.)

Gray also testified that Employer has a "six-feet rule" which is Employer's training for employees that they are not permitted to go within six feet of a skylight or roof edge without fall protection. Decker's notes of an interview with Employer's Service Manager, Sergio De La Torre (De La Torre), further reference Employer's rule regarding staying at least six feet away from skylights. (Ex. 17.)

The Appeals Board has previously addressed a situation where the Division believed that there was a hazard that the employer had not corrected and found that section 3203, subdivisions (a)(4) and (a)(6), were not violated:

> According to testimony, no employee or outside safety expert identified the Employer's safety chain policy as inadequate. Employer believed that it had identified the hazard, and created a policy that effectively mitigated the hazard to drivers. While the Division may dispute this, Employer's conclusion was not unreasonable, given these unusual circumstances and the efforts Employer had put forth to improve its program and solicit expert advice. No section 3203, subsection (a)(4)(C) violation is found.
>
> […]
>
> Employer made no error in its implementation of its own IIPP, but created and interpreted a rule that it believed to be sufficient to correct the hazards […]. The Division has failed to demonstrate a violation of this subsection.

(*Coast Waste Management, Inc*., Cal/OSHA App. 11-2385, Decision After Reconsideration (Oct. 7, 2016).)

The preponderance of the evidence supports a finding that Employer's IIPP contains sufficient written instructions regarding correcting hazards and that Employer did take steps to mitigate hazards that had been identified. Employer has a rule about working near skylights and determined that the hazard was sufficiently mitigated at the job site where the accident happened. As with *Coast Waste Management, supra,* Cal/OSHA App. 11-2385, although the Division disagrees that this mitigation of the potential hazard was sufficient, there was no demonstration of a failure to correct identified hazards.

Instance 4: Employee training pursuant to subdivision (a)(7)

Training is the touchstone of any effective IIPP. (*Cranston Steel Structures*, Cal/OSHA App. 98-3268, Decision After Reconsideration (Mar. 26, 2002), citing §3203, subd. (a)(7).) A violation exists if an employer's IIPP, regardless of how it is implemented, is not in writing. (*Tomlinson Construction, Inc.*, Cal/OSHA App. 95-2268, Decision After Reconsideration (Feb. 18, 1998).) The Appeals Board has consistently held that a violation of section 3203, subdivision (a), is established even if specific sub-elements are missing from an existing written program. (*Murphy Industrial Coatings, Inc.*, Cal/OSHA App. 96-4017, Decision After Reconsideration (Nov. 9, 2000).)

In Instance 4, the Division alleges a section 3203, subsection (a)(7), failure to have written procedures regarding training related to a new assignment, new substances, processes or procedures constituting a new hazard, or a previously unrecognized hazard. Of note, Instance 4 does not allege a failure to train employees. Rather, it is the written provisions of the IIPP that the Division found lacking.

A review of the "Training" section of Employer's IIPP, admitted as Exhibit 10, reveals that there are few, if any, instructions for employees that address when training is required. The section covers instructions regarding how to conduct a safety meeting and the topics to discuss during safety meetings. Gray's testimony makes it clear that Employer has a robust onboarding training program when employees are initially hired. However, the written provisions of the IIPP do not contain the required elements of section 3203, subdivision (a)(7).

Instance 5: Supervisor training pursuant to subdivision (a)(7)(F)

As with Instance 4, Instance 5 pertains to written procedures in Employer's IIPP regarding training. Instance 5 is specific to procedures setting forth training for supervisors. As discussed in Instance 4, the "Training" section of Employer's IIPP is limited to instructions for how to conduct safety meetings and topics to be discussed in the meetings. As such, Employer's written IIPP does not satisfy the requirement set forth in section 3203, subdivision (a)(7)(F), that the written program must contain procedures for providing training and instruction to supervisors to familiarize themselves with the hazards to which their employees may be exposed.

The Division has established violations of the safety order in instances 1, 4, and 5. A citation may be upheld on the basis of a single instance. (*Golden State Boring & Pipe Jacking, Inc.*, Cal/OSHA App. 1308948, Decision After Reconsideration (July 24, 2020).) Accordingly, Citation 2 is affirmed.

3. Did the Division establish that Employer failed to protect employees from unguarded skylights at the job site?

Section 3212, subdivision (e), provides, in relevant part:

(e) Any employee approaching within 6 feet of any skylight shall be protected from falling through the skylight or skylight opening by any one of the following methods:

(1) Skylight screens installed above the skylight. The design, construction, and installation of skylight screens shall meet the strength requirements equivalent to that of covers specified in subsection (b) above. They shall also be of such design, construction and mounting that under design loads or impacts, they will not deflect downward sufficiently to break the glass below them. The construction shall be of grillwork, with openings not more than 4 inches by 4 inches or of slatwork with openings not more than 2 inches wide with length unrestricted, or of other material of equal strength and similar configuration.

(2) Skylight screens installed below the skylight. Existing screens (i.e. burglar bars) shall meet the following requirements if they will be relied upon for fall protection:

[…]

(3) Guardrails meeting the requirements of Section 3209.

(4) The use of a personal fall protection system meeting the requirements of Section 1670 of the Construction Safety Orders.

(5) Covers, including the skylight itself, meeting the requirements of subsection (b) installed over the skylights, or skylight openings. Where the skylight itself serves as a cover, the skylight shall be required to meet only the strength requirements of subsection (b). Further, for skylights serving as covers, the employer shall obtain documentation from the manufacturer that the skylight will meet the strength requirements of subsection (b) for the dates that work will be performed in the vicinity of the skylight. Such documentation shall be obtained prior to the start of work and shall be made available upon request.

(6) Skylight nets.

In Citation 3, the Division alleges:

Prior to and during the course of the inspection, the employer failed to ensure that employees that approached within 6 feet of unguarded skylights were protected from falling. As a result, on or about June 26, 2018, an employee sustained fatal

injuries after stepping through a skylight and falling approximately 25 feet to the receptionist desk and tile floor below.

There was no evidence or allegation that the violation alleged in Citation 3 applied to any skylights other than the one involved in Heredia's accident. There was no evidence that the employees had ever approached, or would have any need to approach, within six feet of any of the other skylights on the roof. Decker testified that Citation 3 involved only the skylight through which Heredia fell. Accordingly, the issue to be analyzed with regard to Citation 3 is whether Employer was required, and failed, to guard the skylight involved in Heredia's accident.

a. Exposure

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*., Cal/OSHA App. 00-2976, Decision After Reconsideration (Apr. 24, 2003).)

The Division may demonstrate employee exposure 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*., *supra*, Cal/OSHA App. 00-2976.) 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. (*Dynamic Construction Services, Inc.*, Cal/OSHA App. 14-1471, Decision After Reconsideration (Dec. 1, 2016).)

The violative condition in Citation 3 was an employee approaching within six feet of a skylight without one of several options for fall protection or guarding of the skylight. Thus, the zone of danger is set forth specifically within the regulation itself: six feet from the skylight. In the instant matter, Heredia fell through the skylight, which establishes that there was actual exposure to the zone of danger.

b. Violation

If an employee is approaching within six feet of a skylight, section 3212, subdivision (e), requires that the skylight must have a screen, net, cover, guardrails, or the employee must be wearing appropriate fall protection. Heredia approached within six feet of an unguarded skylight and was not using fall protection. Accordingly, a violation of the safety order was established.

4. Did Employer establish that the injured employee's actions were an unforeseeable extreme departure from his job duties?

The Unforeseeable Extreme Departure defense applies in cases where employees engage in an extreme departure from the scope of their work duties. (*Andersen Tile Company*, Cal/OSHA App. 94-3076, Decision After Reconsideration (Feb. 16, 2000).) The Appeals Board has held that the defense does not apply when an employee happened to do his assigned work at a different time. (*Blue Diamond Growers*, Cal/OSHA App. 1040471, Decision After Reconsideration (Sep. 24, 2018).)

For there to be extreme departure, an employee must engage in work that was not within, nor in reasonable understanding, of his position's duties. (*Blue Diamond Growers, supra*, Cal/OSHA App. 1040471, citing *California Prison Authority*, Cal/OSHA App. 07-2171, Decision After Reconsideration (Jun. 3, 2010) [vacating the citation because the employee's job did not encompass cleaning a duct and the employer could not have anticipated such an act].)

For an employer to successfully establish this defense, it must prove the following elements: 1) employee engaged in an extreme departure from the scope of a reasonable understanding of assigned work duties; 2) employee knew his/her work duties did not encompass the specific activity; and 3) employer did not and could not have known through the exercise of reasonable diligence and supervision the employee would so act. Employers may rarely assert this defense in a successful manner. (*Blue Diamond Growers, supra*, Cal/OSHA App. 1040471).)

a. Element One: Departure from Scope of Assigned Duties

To satisfy the first element, employers must demonstrate that employees engaged in a task that was not within their actual work duties and it was not within any reasonable understanding of those duties. Employers' burden is high because they must prove an employee's act was not only an actual departure of his duties, but it was also not within a reasonable understanding of those duties. Both aspects are necessary to prove an employee extremely departed from his general work duties.

There was no indication that Heredia was involved in any work-related task at all, much less one that was assigned to him. Heredia was dispatched to the job site to assist Celiceo with a leak on a condensing coil in a single air conditioning unit (AC7). The full extent of Heredia and Celiceo's assignment at the job site was to repair the leak on AC7. After removing the coil and repairing the leak, Celiceo and Heredia exited the roof to take their lunch break. Heredia and Celiceo discussed what each would be doing during their break: Celiceo was going to a nearby restaurant for a sandwich and Heredia was going to eat his lunch in his van. There was no

evidence, or even speculation by the Division, that Heredia decided to perform some type of unscheduled work on an air conditioning unit closer to the skylight (AC1).

For the foregoing reasons, Heredia was engaged in activities outside of the scope of his assigned duties. He was not working at the time that he fell through the skylight and was not on the roof pursuant to instructions or expectations of Employer. Employer satisfied the first element.

b. Employee Knew the Activity Was Not Part of Work His Duties

Employer conducts regular safety meetings, including a meeting where the topic was fall protection on June 18, 2018, approximately one week before Heredia's accident. Heredia attended the June 18, 2018, meeting.

De La Torre, Employer's Service Manager, informed Decker that Employer's policy provides that employees are not permitted to approach within six feet of a skylight. Additionally, Employer provided Heredia with a fall protection harness, which he kept in his work truck.

Further, Heredia and Celiceo were on a designated work break. They had ceased their repair tasks, descended from the roof, and discussed their plans for the lunch period. Heredia was at the job site to assist Celiceo, but Celiceo had gone to lunch when Heredia went back up to the roof. There was no indication that Heredia was performing any work duties, so there is no reasonable supposition that he believed the activity he was performing was part of his assigned work duties.

c. Lack of Employer Knowledge That Employee Would Take This Action

In order to establish the final element of the defense, Employer must prove it did not know, and could not have known through the exercise of reasonable diligence and supervision, that the employee would act outside the scope of his work duties. As set forth above, Heredia was on a lunch break and there was no expectation that he would go up on the roof, much less walk all the way to the far corner from the roof access point and walk near a skylight. Heredia and Celiceo were not assigned any tasks that involved AC1, the air conditioning unit closest to the skylight. There was no evidence that Heredia was performing any work at the time that he fell through the skylight and AC1 was not in need of service.

As set forth above, the scope of Celiceo and Heredia's work on the date of the accident was to repair the leak in AC7. The distance between AC7 and the skylight was 33 feet. There were no skylights any closer to AC7 and the scope of their work did not require that Celiceo and Heredia approach anywhere near a skylight.

As such, there was no reason for Employer to know, even with the exercise of reasonable diligence and supervision, that Heredia would return to the roof during his lunch break and approach within six feet of a skylight without fall protection. Additionally, had Heredia acted only within the course of his assigned duties, he would not have been exposed to the skylight hazard.

Employer established that the violation was the result of an unforeseeable extreme departure. The Appeals Board has held that establishing the defense results in a finding that a violation did not exist. (See *Blue Diamond Growers, supra,* Cal/OSHA App. 1040471.) Accordingly, Citation 3 is dismissed.

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

Labor Code section 6432, subdivision (a), provides, in relevant part:

> (a) 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 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.

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).)

Decker testified that he was current in his Division-mandated training. Therefore, under Labor Code section 6432, subdivision (g), Decker is deemed competent to offer testimony to establish each element of the Serious violation.

Decker testified that there is a realistic possibility that an employee may sustain serious physical harm due to an employer's failure to conduct regular safety inspections as required by section 3203, subdivision (a)(4).

Accordingly, the Division met its burden to establish a rebuttable presumption that the violation cited in Citation 2 was properly classified as Serious.

6. Did Employer rebut the presumption that the violation cited in Citation 2 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.

Labor Code section 6432, subdivision (b), provides that the following factors may be taken into account:

> (A) Training for employees and supervisors relevant to preventing employee exposure to the hazard or to similar hazards; (B) Procedures for discovering, controlling access to, and correcting the hazard or similar hazards; (C) Supervision of employees exposed or potentially exposed to the hazard; and (D) Procedures for communicating to employees about the employer's health and safety rules and programs.

As set forth in Labor Code section 6432, subdivision (b), the burden is on the employer to rebut the presumption that the citation was properly classified as Serious.

The violation asserted in Citation 2 is the failure to establish and implement various provisions of its written IIPP. As set forth above, the Division established a violation of section 3203 with regard to the implementation of Employer's IIPP provisions regarding inspections,

and failure to include required written provisions pertaining to training of employees and supervisors.

As each of these aspects of the establishment and implementation of an IIPP are the responsibility of an employer, rather than its employees, there can be no reasonable assertion that the violations could have occurred as a result of actions outside of the knowledge of Employer and its managerial or supervisorial representatives.

Accordingly, Employer cannot rebut the presumption that Citation 2 was properly classified as Serious.

7. 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. (*RNR Construction, Inc.*, *supra*, Cal/OSHA App. 1092600, citing *Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).)

Decker testified that the penalty for Citation 2 was calculated in accordance with the Division's policies and procedures. Employer did not present evidence that the penalty was miscalculated or that the Division had misapplied the penalty-setting regulations. Accordingly, the penalty of $22,500 is reasonable.

Conclusions

For Citation 1, the Division did not establish that Employer failed to provide its employee with heat illness prevention training. The citation is dismissed.

For Citation 2, Employer failed to establish, implement, and maintain an effective IIPP because it did not implement its own inspection procedures and the IIPP did not include written provisions for training of employees and supervisors. The citation was properly classified as Serious and the penalty is reasonable.

For Citation 3, the Division established that there was a violation of section 3212, subdivision (a), but Employer met its burden to establish that the violation was the result of an unforeseeable extreme departure from the employee's assigned duties. The citation is dismissed.

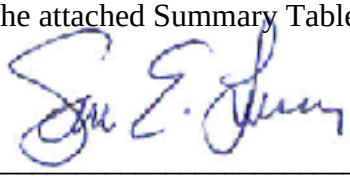
Order

It is hereby ordered that Citation 1 is dismissed and the penalty is vacated.

It is hereby ordered that Citation 2 is upheld and the penalty of $22,500 is affirmed.

It is hereby ordered that Citation 3 is dismissed and the penalty is vacated.

It is further ordered that the penalty set forth in the attached Summary Table be assessed.



Dated**:** 08/16/2021

SAM E. LUCAS
Presiding 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.**