BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of: **REPUBLIC ELECTRIC WEST, INC.** **dba NEVADA REPUBLIC ELECTRIC WEST, INC.** **3820 HAPPY LANE** **SACRAMENTO, CA 95827** **Employer**	Inspection No. **1355061** **DECISION**

Statement of the Case

Republic Electric West, Inc. (Employer) is an electrical contractor. Beginning October 22, 2018, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Larry Davenport (Davenport), conducted an inspection of a residential construction project located at 1351 Amalfi Court in San Ramon, California (the job site) in response to an accident.

On March 5, 2019, the Division issued three citations to Employer alleging five violations of California Code of Regulations, title 8.[1] The citations allege that Employer: (1) failed to ensure that its employees complied with safe and healthy work practices; (2) failed to ensure that employees exposed to a fall of over 7-1/2 feet wore an approved personal fall protection system; (3) failed to select the appropriate ladder to access attic space at the job site; (4) failed to ensure that an employee used a ladder that extended at least 36 inches above the attic landing surface; and (5) failed to ensure that an employee working on a step ladder did not step or stand on the topcap of the ladder.

Employer filed a timely appeal of the citations, contesting the existence of the violations in Citation 1, Items 1 through 3, and contesting the existence of the violations, the classifications, and the reasonableness of the penalties in Citations 2 and 3. Employer also asserted a series of affirmative defenses.[2]

[1] Unless otherwise specified, all references are to sections of California Code of Regulations, title 8.
[2] Except where discussed in this Decision, Employer did not present evidence in support of its affirmative defenses, and said defenses are therefore deemed waived. (*RNR Construction, Inc.*, Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017).)

This matter was heard by Kerry Lewis, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (the Appeals Board), from Sacramento County, California. The parties and witnesses appeared remotely via the Zoom video platform on May 17 through 19, 2022, and September 6 and 8, 2023. Manuel Melgoza and Matthew McMillan, attorneys with Donnell, Melgoza and Scates, LLP, represented Employer. Deborah Bialosky, Staff Counsel, represented the Division. The matter was submitted for decision on January 31, 2024.

Issues

1. Did Employer ensure that employees complied with the safe and healthy work practices contained in its Injury and Illness Prevention Program?

2. Did Employer fail to ensure that employees exposed to a fall in excess of 7-1/2 feet through an opening wore an approved personal fall protection system?

3. Did Employer ensure that its employee selected the appropriate ladder for accessing attic space at the job site?

4. Did Employer fail to ensure that its employee used a portable ladder safely when accessing the attic space at the job site?

5. Did Employer fail to ensure that an employee did not stand on the topcap of a ladder to access the attic space at the job site?

6. Did Employer establish that it was not responsible for the violations in Citation 1, Items 2 and 3, and Citations 2 and 3, based on the Independent Employee Action Defense?

7. Did the Division establish a rebuttable presumption that Citations 2 and 3 were properly classified as Serious?

8. Did Employer rebut the presumption that the classification of the violations in Citations 2 and 3 were Serious by demonstrating that it did not know, and could not, with the exercise of reasonable diligence, have known of the existence of the violations?

9. Are the proposed penalties for Citations 2 and 3 reasonable?

Findings of Fact

1. Employer conducted weekly safety trainings, including regular training on proper ladder use.

2. Employer's residential fall protection plan included ladder safety rules.

3. In a residential new-build construction project, Employer's employees were performing electrical work for a furnace on a platform in an attic.

4. The attic platform was accessed through an opening above the laundry room.

5. The attic platform was 10 feet above the laundry room floor below.

6. In order to perform the furnace electrical work, Employer's employees needed to get on the platform because most of the work could not be completed from the ladder.

7. Prior to October 22, 2018, Employer's foreman, Alex Mora (Mora), had climbed into attics in various houses approximately 35 times to check on the work his crews had completed.

8. Celestino Cervantes (Cervantes) climbed on approximately 10 attic platforms to perform the furnace work at the job site prior to his accident.

9. Employer's employees were not provided with personal fall arrest, personal fall restraint or positioning systems while working on attic platforms.

10. There was no one providing immediate, competent supervision while crew members worked in the attics at the job site.

11. On October 22, 2018, Cervantes selected a 6-foot A-frame ladder to access the attic platform 10 feet above the laundry room floor.

12. The ladder Cervantes chose to use for the attic furnace work did not extend 36 inches or more above the attic platform.

13. Cervantes did not secure the top of the ladder to a rigid support and did not have a grasping device to assist with mounting and dismounting the ladder.

14. The 6-foot A-frame ladder was not the appropriate ladder for the task being performed by Cervantes on October 22, 2018.[3]

15. Cervantes stood on the top two rungs of the 6-foot A-frame ladder to access the attic platform.

16. Cervantes fell to the laundry room floor from the top of the ladder, suffering fractures in his spine that required surgery and hospitalization for more than two days.

17. Cervantes had been using ladders to perform electrical work for Employer for at least nine years as of October 22, 2018.

18. Employer had an Injury and Illness Prevention Program, provided written safety information to its employees during training meetings, provided training in Spanish and English, and kept records of its training meetings.

19. Multiple times throughout the workday, Mora visited the houses where his crews were working.

20. Despite Employer having a policy of written sanctions and claims that he would issue written warnings to an employee violating Employer's ladder safety rules, Mora did not issue a written warning to Cervantes after his ladder accident.

21. Employer had specific ladder safety rules which included not standing on the topcap of the ladder and ensuring that the top of the ladder extends 36 inches above the landing.

22. Cervantes knew that he was using a ladder that was inappropriate for the task being performed and that he was using it in a manner that was in violation of Employer's ladder safety rules.

23. Employer had ladders of various lengths available for Cervantes to use. At the time Cervantes selected the inappropriate ladder for his task, multiple other appropriate ladders were available both at the job site and on Mora's truck.

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[3] Finding of Fact No. 14 is a stipulation by the parties during the hearing.

Analysis

1. Did Employer ensure that employees complied with the safe and healthy work practices contained in its Injury and Illness Prevention Program?

Section 1509, subdivision (a), provides that "[e]very employer shall establish, implement and maintain an effective Injury and Illness Prevention Program in accordance with section 3203 of the General Industry Safety Orders." Section 3203 requires employers to have a written Injury and Illness Prevention Program (IIPP) that meets minimum requirements set forth in the regulation and that the IIPP must be established, implemented, and maintained effectively. In Citation 1, Item 1, the Division references section 3203, subdivision (a)(2), which 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:
>
> […]
>
> (2) Include a system for ensuring that employees comply with safe and healthy work practices. Substantial compliance with this provision includes recognition of employees who follow safe and healthful work practices, training and retraining programs, disciplinary actions, or any other such means that ensures employee compliance with safe and healthful work practices.

The Alleged Violation Description (AVD) in Citation 1, Item 1, states:

> Prior to and during the course of the investigation, including but not limited to, on October 22, 2018, the employer failed to implement and maintain an effective Injury [and] Illness Prevention Program to ensure that employees comply with their safe and healthy work practices in the following instances:
>
> 1. Failed to ensure that employees complied with the fall protection program which would ensure a fall protection system be utilized when working above 6 feet.
> 2. Failed to ensure that employees complied with their residential fall protection program.
> 3. Failed to ensure that employees complied with the ladder safety section of their Injury [and] Illness Prevention Program.

"Substantial compliance" with section 3203, subdivision (a)(2), can be accomplished by any of four methods: recognition of employees for good safety habits; safety training and re-training programs for employees; disciplinary actions for employees who violate safety rules; or, "any other such means that ensures employee compliance."

> In order to show a violation of section 3203, subdivision (a)(2), the Division must demonstrate that the Employer did not comply with any of the listed methods. To rebut the Division's showing, the Employer may demonstrate compliance by establishing that it implemented any one of the four listed methods. [Citations omitted.] The Board has previously found that compliance with "at least one of the four listed methods" was sufficient to rebut the Division's showing. [Citation omitted.]

(*DPR Construction, Inc., et al. dba DPR Construction,* Cal/OSHA App. 1206788, Decision After Reconsideration (Feb. 19, 2021).)

The evidence presented during the hearing established that Employer provided its employees with safety training every Monday and that weekly training regularly included written and verbal information regarding the proper use of ladders. As such, the Division did not establish that Employer failed to substantially comply with section 3203, subdivision (a)(2), as it relates to Instance 3.

The remaining two instances in Citation 1, Item 1, relate to Employer's fall protection program. Employer's safety program provides that fall protection is required when employees are working at elevations above six feet in height, and that fall protection may be accomplished by (1) a "conventional" fall protection system such as guardrails, harnesses, or safety nets, or (2) an alternative method for residential construction. (Ex. 16, p. 25.) The safety program further provides that the residential fall protection program involves various ladder safety practices such as three points of contact, extending the top of the ladder at least three feet above the landing, and other ladder safety rules. (Ex. 16, p. 26.)

First, it is unclear why the Division alleged the fall protection violations as two separate instances when the residential fall protection program referenced in Instance 2 is the implementation of the fall protection referenced in Instance 1. As set forth with reference to Instance 3, the Division failed to establish that Employer's safety program did not substantially comply with section 3203, subdivision (a)(2). Employer regularly provided safety training regarding ladder safety, which was the implementation of its fall protection program as related to the instances alleged in Citation 1, Item 1.

The evidence demonstrated that Employer had a system to ensure that its employees comply with safe work practices by providing evidence of substantial compliance with the safety order. Accordingly, Citation 1, Item 1, is dismissed.

2. Did Employer fail to ensure that employees exposed to a fall in excess of 7-1/2 feet through an opening wore an approved personal fall protection system?

Section 1670, subdivision (a), provides:

> Approved personal fall arrest, personal fall restraint or positioning systems shall be worn by those employees whose work exposes them to falling in excess of 7 1/2 feet from the perimeter of a structure, unprotected sides and edges, leading edges, through shaftways and openings, sloped roof surfaces steeper than 7:12, or other sloped surfaces steeper than 40 degrees not otherwise adequately protected under the provisions of these Orders. Note: (1) Requirements relating to fall protection for employees working at elevated locations on poles, towers and other structures are provided in Section 2940.6(b) and (c) of the High Voltage Electrical Safety Orders. (2) Requirements relating to fall protection for employees working on poles, towers, or similar structures are provided in Section 8615(g) of the Telecommunications Safety Orders. (3) Requirements relating to fall protection for employees working in roofing operations are provided in Section 1730 of the Construction Safety Orders.

In Citation 1, Item 2, the Division alleges:

> Prior to and during the course of the investigation, including but not limited to, on October 22, 2018, the employer failed to ensure that an approved personal fall protection system be worn [*sic*] by those employees whose work exposes them to a fall of over 7 1/2 feet when working on a platform with unprotected sides in the attic space of a residential homes [*sic*].

The Division has the burden of proving a violation by a preponderance of the evidence. (*Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).) In order to establish a violation of section 1670, subdivision (a), the Division must prove that (1) employees were working on a platform with an opening, (2) employees were exposed to a fall of over 7-1/2 feet, and (3) the employees were not wearing a personal fall arrest, personal fall restraint, or positioning system.

a. Applicability of the safety order

Employer argued that section 1670, subdivision (a), is inapplicable to the circumstances in the attic space of the residential home at issue in this matter. Section 1670 applies to work areas where employees are exposed to fall hazards at the "perimeter of a structure, unprotected sides and edges, leading edges, through shaftways and openings, sloped roof surfaces steeper than 7:12, or other sloped surfaces steeper than 40 degrees… ." (§ 1670, subd. (a).) Employer asserted that the working area of the attic was more accurately described in section 1669, which includes "thrustouts or similar locations, such as trusses, beams, purlins, or plates of 4-inch nominal width, or greater… ." The threshold height for requiring fall protection for locations in section 1669 is 15 feet, so Employer asserts that it was in compliance with this safety order because the attic working level was 10 feet from the floor below.

Employer claimed that "[the employees] were working from and around beams and trusses that had little to no material between them." (Employer's Post-Hearing Brief, p. 5.) However, the attic area where the furnace was located had plywood installed, creating a platform on which the furnace was situated. (See Ex. 38MOD and Ex. 21MOD2.) The photographs of the attic area show the four sides of the framed opening and the plywood surface on which the furnace is located. Because there was a plywood platform, the attic location was not the type of working area described by the beams, trusses, thrustouts, and other surfaces identified in section 1669.

Section 1504, subdivision (a), defines "opening" as, "An opening in any floor or platform, 12 inches or more in the least horizontal dimension. It includes: stairway floor openings, ladderway floor openings, hatchways and chute floor openings." The opening in the ceiling of the laundry room was more than 12 inches wide and was the access point to the attic.

Because there was a platform with an opening at the access point to the attic, the applicable safety order is section 1670, subdivision (a).

b. Employees exposed to a fall of at least 7-1/2 feet

The Division must establish that the height of the working platform was at least 7-1/2 feet from the level below and that there was employee exposure to a fall from that height.

The platform on which the furnace was located in the attic area was approximately 10 feet from the floor in the laundry room below. The Division presented photographs and testimony from Davenport and Mora to support this fact. (Ex. 38.) Mora testified that all of the houses under construction in the housing project had a furnace in the attic and that the distance

from floor to ceiling was the same in each house. (Hearing Recording (Hrg. Rec.), May 17, 2022, 37:45.)

David Bloom (Bloom), Employer's area supervisor, testified that the employees worked from the attic platform in the various houses in order to perform tasks such as "installing electrical devices, boxes, wires, hooking up furnaces, lighting." (Hrg. Rec., Sept. 6, 2023, 2:14:30.) Mora testified that, prior to the time of the accident, he had gone into attics at the various houses in the development approximately 35 times to check his crews' work wiring the furnace. (Hrg. Rec, May 17, 2022, 40:10.) Cervantes testified that he needed to get up in the attic in order to hook up the furnace, as the work could not be completed by standing on the ladder. (Hrg. Rec., May 17, 2022, 3:29:49.) Cervantes estimated that he had been in an attic at various houses at the job site approximately 10 times prior to his accident. (Hrg. Rec, May 17, 2022, 3:57:00.)

The Division established that Employer's employees were exposed to a fall of at least 7-1/2 feet when they were wiring furnaces in the houses at the job site.

c. Through an opening

The safety order requires fall protection when there is a fall of at least 7-1/2 feet from various locations. The Division's AVD references an "unprotected side," but section 1504 defines "unprotected sides or edges" as "Any side or edge (*except at entrances to points of access*) of a walking/working surface, e.g., floor, roof, ramp, or runway where there is no wall or standard guardrail or protection provided." (Emphasis added.)

The part of the attic where the furnace was located, and the area where Employer's employees worked in the attic, was right next to the access point from the laundry room into the attic. As such, the location that was the basis for the Division's citation was not an "unprotected side" of the platform. Rather, it was an opening, which is also identified in section 1670, subdivision (a), as an area that requires fall protection when workers are exposed to a fall of at least 7-1/2 feet. (§1670, subd. (a) ["through shaftways and openings"].) The testimony established that Employer's employees were working in the attic where they were exposed to a fall of at least 7-1/2 feet through an opening.

d. Personal fall arrest, fall restraint or positioning system

There was no dispute that the employees who worked in the attic at the job site were not provided with any sort of personal fall protection system. The witnesses testified that they did not wear a harness or other fall protection system, and Employer did not assert that they should

have been wearing a personal fall protection system. Instead, Employer argued that a personal fall protection system was not required pursuant to the safety order.

The Division established that employees were working without fall protection at an unprotected access point opening and were exposed to a fall of at least 7-1/2 feet.

e. Greater hazard

Employer's post-hearing brief argues that complying with the fall protection requirements set forth in the safety orders would create a greater hazard than allowing employees to work in the attic for approximately 15 to 30 minutes without fall protection. Specifically, Employer argues that the installation of a fall protection system in the attic would take longer than the brief amount of time that the employees were working unprotected in the attic, creating a hazard that would not otherwise have been present but for the installation of the fall protection. (Employer's Post-Hearing Brief, pp. 5-6.)

The Appeals Board has addressed this argument before:

> Employer's contention that the fall protection systems required by section 1670, subdivision (a), are unworkable and/or ineffective is beyond the power the Appeals Board to adjudicate. Its function is confined to interpreting and applying the safety orders adopted by the [Occupational Safety and Health] Standards Board. It may not go beyond that function and ignore or revise the requirements of an order. If an Employer believes an order unwise or unworkable, its recourse is with the Standards Board – the agency which conducted the regulatory hearing, heard from the experts, and fashioned the terms of the order, and the agency vested with power to grant variances from it.

(*Superior Construction, Inc.*, Cal/OSHA App. 96-2267, Decision After Reconsideration (Dec. 21, 2000).)

As such, with regard to Employer's argument about the "greater hazard" of installing fall protection in the attic, Employer's recourse is with the Standards Board, not the Appeals Board.

Accordingly, the Division established a violation of section 1670, subdivision (a). Citation 1, Item 2, is affirmed.

3. **Did Employer ensure that its employee selected the appropriate ladder for accessing attic space at the job site?**

Section 1675, subdivision (b), requires that "[a]ll portable ladders used in construction shall comply with the provisions of Section 3276 of the General Industry Safety Orders."

Citation 1, Item 3, references section 3276, subdivision (d)(1)(B), which provides:

> (d) Selection.
>
> (1) Ladders shall be selected and their use restricted to the purpose for which the ladder is designed. Single-rail ladders shall not be used.
>
> […]
>
> (B) Portable ladders are generally designed for one-person use to meet the requirements of the person, the task, and the environment. When selecting a ladder for use, consideration shall be given to the ladder length or height required, the working load, the duty rating, worker position to the task to be performed, and the frequency of use to which the ladder will be subjected.

In Citation 1, Item 3, the Division alleges:

> Prior to and during the course of the investigation, including but not limited to, on October 22, 2018, the employer failed to ensure that when employees select a ladder, they take into consideration the ladder length or height required, and worker position when trying to access the attic space in residential homes.

For purposes of Citation 1, Item 3, in order to establish a violation of section 1675, subdivision (b), with reference to section 3276, subdivision (d)(1)(B), the Division must prove that an employee selected a ladder without taking into account the ladder length needed for the height of the task being performed and the position the employee would be in when performing the task.

As set forth above, the task being performed at the time of Cervantes' accident was accessing a platform in the attic in order to connect a furnace. The platform was 10 feet from the floor in the laundry room below. Cervantes chose a 6-foot A-frame ladder to get into the attic. The parties stipulated that Cervantes chose the wrong ladder for the task. Even Cervantes acknowledged during his hearing testimony that he was using the wrong ladder for the task.

(Hrg. Rec., May 17, 2022, 3:54:34.) Cervantes did not take into consideration the ladder length or height required for the task he was performing.

The Division established a violation of section 1675, subdivision (b), with reference to section 3276, subdivision (d)(1)(B). Citation 1, Item 3, is affirmed.

4. Did Employer fail to ensure that its employee used a portable ladder safely when accessing the attic space at the job site?

Citation 2 alleges a violation of section 1675, subdivision (b), regarding portable ladder use. Citation 2 references section 3276, subdivision (e)(11):

> (e) Care, Use, Inspection and Maintenance of Ladders
>
> […]
>
> (11) Access to Landings. When portable ladders are used for access to an upper landing surface, the side rails shall extend not less than 36 inches above the upper landing surface to which the ladder is used to gain access; or when such an extension is not possible, then the ladder shall be secured at its top to a rigid support that will not deflect, and a grasping device, such as a grab-rail, shall be provided to assist employees in mounting and dismounting the ladder. In no case shall the extension be such that ladder deflection under a load would, by itself, cause the ladder to slip off its support.

In Citation 2, the Division alleges:

> Prior to and during the course of the investigation, including but not limited to, on October 22, 2018, the employer failed to ensure that employees used portable ladders safely by securing its top to a rigid support with a grasping device, or side rails that extended not less than 36 inches above the upper landing surface to assist in mounting and dismounting the ladder for safe access to the attic space. As a result, on or about October 18, 2018, an employee was seriously injured when he fell approximately six feet to [the] ground when he attempted to access a landing that was 10 feet high using a 6 foot ladder.

In order to establish that Employer violated section 1675, subdivision (b), with reference to section 3276, subdivision (e)(11), the Division must establish that (1) an employee used a portable ladder in an attempt to access an upper landing surface; (2) the side rails of the ladder

did not extend 36 inches or more above the upper landing surface; and, if the rails did not extend high enough, that (3) the ladder was not secured at the top to a rigid support with a grasping device provided to assist employees in mounting and dismounting the ladder.

As set forth above, there was no dispute that the landing surface that Cervantes was attempting to access was 10 feet from the laundry room floor below. Cervantes testified that the ladder he chose to access the landing was a 6-foot A-frame ladder. As such, there is no question that the side rails of the 6-foot A-frame ladder could not even reach the landing, much less extend 36 inches or more above it. Additionally, the top of the ladder was not secured to a rigid support with a grasping device provided to assist him with mounting and dismounting the ladder.

Accordingly, the Division established a violation of section 1675, subdivision (b), with reference to section 3276, subdivision (e)(11). Citation 2 is affirmed.

5. Did Employer fail to ensure that an employee did not stand on the topcap of a ladder to access the attic space at the job site?

Citation 3 alleges a violation of section 1675, subdivision (b), regarding portable ladder use. Citation 3 references section 3276, subdivision (e)(15)(E):

> (e) Care, Use, Inspection and Maintenance of Ladders
>
> […]
>
> (15) Climbing and Working on Ladders.
>
> […]
>
> (E) Employees shall not sit, kneel, step or stand on the pail shelf, topcap or the step below the topcap of a step ladder.

In Citation 3, the Division alleges:

> Prior to and during the course of the investigation, including but not limited to, on October 22, 2018, the employer failed to ensure that employees working on portable step ladders located at 1351 Amalfi Court, San Ramon, CA 94582, did not step or stand on the tocap [*sic*] or the step below the tocap [*sic*] when trying [to] access a platform in the attic space. As a result, on or about October 18, 2018, an employee was seriously injured when he stood on the topcap of a ladder and fell approximately 6 feet to the ground.

In order to establish a violation of 1675, subdivision (b), with reference to section 3276, subdivision (e)(15)(E), the Division must prove that (1) an employee was using a step ladder, and (2) the employee sat, kneeled, or stood on the pail shelf, topcap, or the step below the topcap of the ladder.

Cervantes testified that he was using a 6-foot A-frame stepladder to access the attic platform when he fell. Employer's Accident Investigation, completed by Employer's Safety Manager, Scott Stewardson (Stewardson), states that Cervantes climbed the ladder "all the way to the top rung and attempted to hoist/jump into the attic space." (Ex. 15.) Employer objected to the admission of Exhibit 15, asserting that it was hearsay.

Section 376.2, the evidence rules for Appeals Board proceedings, provides, in relevant part:

> Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection to hearsay evidence is timely if made before submission of the case or raised in a petition for reconsideration.

Evidence Code section 1222 states that:

> Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if: (a) The statement was made by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement; and (b) The evidence is offered either after admission of evidence sufficient to sustain a finding of such authorization or, in the court' discretion, as to the order of proof, subject to the admission of such evidence.

Additionally, Evidence Code section 1221 provides an exception to the hearsay rule for adoptive admissions, as follows:

> Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth.

Stewardson is Employer's Safety Manager. He completed the Accident Investigation and signed it on behalf of Employer. The statements included therein, including the statement that Cervantes climbed to the top rung to try to hoist himself into the attic, were offered against

Employer to establish the circumstances surrounding the accident. The statements in the Accident Investigation were made by a person authorized to make the statements. Additionally, the statements were adopted by Employer by their inclusion in the Accident Investigation without indication that Employer disagreed with the truth of the matter. That is, if Employer did not believe that Cervantes had climbed to the top rung of the ladder, the statement in the Accident Investigation could have been made with qualifying language instead of as a statement of fact. Accordingly, the statements contained in the Accident Investigation are admissible over hearsay objection as authorized admissions or adoptive admissions. Therefore, pursuant to section 376.2, the statement in Exhibit 15 is not limited in its use to supplementing or explaining other evidence and is found to be a sufficient basis for finding that Cervantes stood on the topcap of a step ladder.

The Division met its burden of proof regarding the elements of a violation of section 1675, subdivision (b), referencing section 3276, subdivision (e)(15)(E). Cervantes was standing on the topcap of a step ladder. Accordingly, the Division established the violation in Citation 3.

6. Did Employer establish that it was not responsible for the violations in Citation 1, Items 2 and 3, and Citations 2 and 3, based on the Independent Employee Action Defense?

Employer asserted that it is not responsible for the violations alleged in Citation 1, Items 2 and 3, and Citations 2 and 3, based on the Independent Employee Action Defense (IEAD). In order to successfully assert the affirmative defense of IEAD, an employer must establish each of the following elements:

(1) The employee was experienced in the job being performed;
(2) The employer has a well-devised safety program which includes training employees in matters of safety respective to their particular job assignments;
(3) The employer effectively enforces the safety program;
(4) The employer has a policy of sanctions against employees who violate the safety program; and
(5) The employee caused a safety infraction which he or she knew was contra to the employer's safety requirements.

(*Fedex Freight, Inc*., Cal/OSHA App. 12-0144, Decision After Reconsideration (Dec. 14, 2016); *Mercury Service, Inc*., Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980).)

a. Was Cervantes experienced in the job being performed?

This requirement 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).)

Cervantes testified that he had worked for Employer as an electrician for nine years at the time of his accident. Based on the testimony that Employer's electricians regularly use ladders for the various tasks they perform at each job, and that Cervantes had accessed the attic at least 10 times on this one particular job, there is a reasonable basis to conclude that Cervantes was experienced in the use of ladders to perform tasks such as accessing an attic. As such, Employer satisfied the first element of the IEAD.

b. Did 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. (See *Mercury Service, Inc*., *supra,* Cal/OSHA App. 77-1133.)

Employer's written IIPP was produced to the Division during the inspection as part of Employer's responses to a document request. The written IIPP includes all the topics required by section 3203, subdivision (a). The Division did not establish that Employer had any deficiencies in its safety program.

There was extensive testimony about the weekly safety meetings conducted by Employer and the training that occurred during those meetings. Employer had written materials for the safety topics, provided interpreters for Spanish-speaking employees, and Employer keeps a record of who attends each safety meeting. Mora testified that ladder safety training is a regular topic that is reviewed at the weekly meetings.

However, as set forth in the discussion of Citation 1, Item 2, Employer failed to provide and require fall protection for its employees exposed to a fall through an opening from an elevation of at least 7-1/2 feet. Thus, Employer's safety program was lacking because it was not in compliance with the fall protection safety orders.

Accordingly, Employer did not establish the second element of the IEAD.

c. Did Employer effectively enforce its safety program?

"While an employer may have a well-defined safety program on paper, an employer must also demonstrate that it effectively enforces that safety program to meet the IEAD. 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).)

Employer conducts weekly safety meetings to emphasize various topics included in its safety program. Additionally, Mora testified that he spends his workdays traveling around the various job sites that he oversees, and he walks through the homes looking for safety issues and checking the crews' work. Mora testified that he regularly emphasizes the importance of working safely when he meets with his crews.

However, as discussed in the first element, Employer's safety program was not in compliance with the safety orders regarding fall protection at heights over 7-1/2 feet. Thus, Employer did not establish that it enforced a well-devised safety program.

d. Did Employer have a policy of sanctions against employees who violate 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.*, Cal/OSHA App. 317253953, Decision After Reconsideration (May 15, 2017).) 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).)

Employer's safety program required progressive discipline that started with a written warning, followed by suspension and then demotion or termination. Employer produced several notices of safety infractions that had been issued to employees for various safety violations. However, of the 21 notices Employer offered into evidence, only four are dated prior to the ladder incident at issue herein. Six of the notices are not dated at all. The overall persuasiveness of the safety infraction notices is greatly diminished by the lack of documented warnings during the period prior to the Cervantes accident relative to the warnings after the accident.

Additionally. Mora testified that he would give an employee a written warning if he observed a violation of the ladder safety rules. (Hrg. Rec., May 17, 2022, 2:32:16.) However, he also testified that he had only given Cervantes a verbal warning rather than a written notice of

safety infraction. (*Id.*) This is despite Employer's policy requiring a written warning as the first level of discipline for safety violations.

Therefore, Employer failed to establish the fourth element of the IEAD.

e. Did Cervantes commit a safety infraction that he knew was contra to Employer's safety requirements?

"The final element requires the employer to demonstrate that the employee causing the infraction knew he was acting contra to the employer's safety requirements." (*Synergy Tree Trimming, Inc*., *supra,* Cal/OSHA App. 317253953.) When the record lacks evidence that the employee actually knew of the safety requirement that was violated, the fifth element fails. (*Paso Robles Tank, Inc*., Cal/OSHA App. 08-4711, Denial of Petition for Reconsideration (Nov. 2, 2009). [Appeals Board found that the injured employee did not know he was taking an action in violation of the safety program, given his testimony that he had taken that same action on numerous occasions.])

Cervantes testified during the hearing that he knew he had selected the wrong ladder to access the attic. He asserted that he knew that he was violating Employer's safety rules and was "careless" to select the 6-foot ladder for the task. (Hrg. Rec., May 17, 2022, 3:54:34.) Cervantes testified that it was easier to use the 6-foot ladder than to get a longer ladder and he felt confident that he could use the 6-foot ladder for the task. (Hrg. Rec., May 17, 2022, 4:31:07.)

Cervantes repeatedly stated that he should have selected an 8-foot A-frame ladder instead of the 6-foot ladder he used. However, during cross-examination, Cervantes testified that, after setting up the 8-foot ladder, if he had realized he could not reach the attic without standing on the top two steps, that would also have been a violation of Employer's safety policy. (Hrg. Rec., May 17, 2022, 4:55:35.)

Thus, based on testimony by Cervantes, Employer established the fifth element of the IEAD.

A single missing element defeats the IEAD. *(Home Depot USA, Inc*., Cal/OSHA App. 10-3284, Decision After Reconsideration (Dec. 24, 2012).) Employer failed to establish the second, third, and fourth elements and, therefore, has not met its burden of proof with regard to the affirmative defense of the IEAD.

7. **Did the Division establish a rebuttable presumption that Citations 2 and 3 were properly classified as Serious?**

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

(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 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.

[…]

(g) A division safety engineer or industrial hygienist who can demonstrate, at the time of the hearing, that his or her division-mandated training is current shall be deemed competent to offer testimony to establish each element of a serious violation, and may offer evidence on the custom and practice of injury and illness prevention in the workplace that is relevant to the issue of whether the violation is a serious violation.

Associate Safety Engineer Davenport testified that his Division-mandated training is current. Therefore, under Labor Code section 6432, subdivision (g), Davenport is deemed competent to offer testimony to establish each element of the Serious violation and to offer evidence on the custom and practice of injury and illness prevention in the workplace that is relevant to the issue of whether the violation is a Serious violation.

The actual hazard created by the violations asserted in Citations 2 and 3 is that an employee using a ladder unsafely may fall from height and suffer injury. Both citations relate to safety practices that are designed to ensure that ladders do not fall with employees on them and that employees do not fall off ladders.

Labor Code section 6432, subdivision (e), provides that "serious physical harm," means any injury or illness occurring in the place of employment or in connection with any employment

that results in, among other things, inpatient hospitalization, permanent disfigurement, or loss of a body part.

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).) Davenport testified that a fall of the nature involved in the instant matter creates a realistic possibility that the employee will suffer major fractures, head injuries, and possibly even death. Indeed, Cervantes suffered fractures and was hospitalized for more than two days. When Stewardson made Employer's report to the Division following the injury, he reported that Cervantes had gone into surgery for fractured bones in his back. (Ex. O.) As such, not only was there a realistic possibility of serious physical harm, but the fall resulted in actual serious physical harm.

Accordingly, the Division established a rebuttable presumption that Citations 2 and 3 were properly classified as Serious.

8. Did Employer rebut the presumption that the classification of the violations in Citations 2 and 3 were Serious by demonstrating that it did not know, and could not, with the exercise of reasonable diligence, have known of the existence of the violations?

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)[4][; and]

---

[4] Labor Code section 6432, subdivision (b)(1), 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."

(2) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered.

Employer's safety training and written safety program set forth Employer's rules for using ladders. Those rules include a prohibition on standing on the top two rungs of a ladder and the requirement that an employee choose a ladder that extends at least 36 inches above the landing. Cervantes violated both of these rules, leading to his accident.

Mora and Bloom testified that Cervantes had access to ladders other than the 6-foot A-frame ladder that he chose to use for his task in the attic. If the appropriate ladder was not located at the house where Cervantes was working, there was one within a short walking distance or Cervantes could have called Mora, who had a variety of ladders on his truck and could bring them to him within minutes. (Hrg. Rec., May 17, 2022, 1:33:45.) Instead of making the effort to obtain the correct ladder, Cervantes opted to use a ladder that was undeniably too short to access a platform that was 10 feet above the level below without standing on the topcap of the ladder.

There was a significant amount of testimony about the ladders that Employer had available for Cervantes to use at the job site. Bloom specifically testified that Employer has extension ladders that extend 13 or 16 feet. There was also a great deal of testimony regarding a "Little Giant," which Bloom testified extends beyond 12 feet when it is extended from the A-frame position into an extension ladder. Davenport claimed that the Little Giant does not extend beyond 12 feet. The Division attempted to assert that the Little Giant's maximum extension length of 12 feet was insufficient to extend 36 inches beyond the attic platform landing, thus arguing that Cervantes did not have access to the appropriate ladder for the task. Bloom's testimony is credited based on his years of experience in the construction industry and familiarity with the various types of ladders that he deals with daily. Thus, the Division's argument is unpersuasive not only based on Bloom's credible testimony about the Little Giant's actual extension length, but also because there was sufficient testimony that Employer maintained longer extension ladders in addition to the Little Giant.

Employer trained its employees extensively regarding ladder safety, Cervantes was an experienced employee who had attended numerous trainings regarding proper ladder safety, and Cervantes could have obtained any number of ladders that were more appropriate for the work he was performing. Therefore, Employer established that it took all steps a reasonable and responsible employer should have taken to anticipate the violation.

Accordingly, Employer successfully rebutted the presumption that Citations 2 and 3 were 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 violations.

Citations 2 and 3 are reclassified as General violations, as they are "determined not to be of a serious nature, but [have] a relationship to occupational safety and health of employees." (§334, subd. (b).)

9. Are the proposed penalties for Citations 2 and 3 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).) Employer asserted that the penalties for Citations 2 and 3 were not reasonable.[5]

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

The Appeals Board has held that when the Division does not provide evidence to support its proposed penalty, it is appropriate that an employer be given the maximum credits and adjustments provided under the penalty-setting regulations such that the minimum penalty provided under the regulations for the violation is assessed. (*RII Plastering, Inc*, *supra*, Cal/OSHA App. 00-4250.)

Citation 2

Severity

The Severity of the violation for Citation 2 was rated as High because they were classified as Serious. Additionally, Citation 2 had no other adjustments to the Base Penalty because it was Accident-Related. (See § 336, subd. (c)(2) and (d)(7).) However, because the citations were reclassified from Serious to General, the Base Penalty from which all other adjustments are made must be reduced in accordance with section 336.

[5] Employer did not appeal the reasonableness of the penalties for the items in Citation 1.

Section 336, subdivision (b), provides that a Base Penalty will be set initially based on the Severity of the violation. Section 335, subdivision (a), provides in part:

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

To determine the proper Severity, it is necessary to evaluate the type and amount of medical treatment required for an injury most likely to be sustained as a result of an employee falling from a ladder due to using a ladder that does not extend 36 inches above the landing platform or is not secured at the top. Although the Division provided testimony that there is a realistic possibility of serious physical harm or death, that standard does not establish the "most likely" result from the violation. Accordingly, Employer is entitled to the minimum penalty with regard to Severity. A General violation with a Low Severity has a Base Penalty of $1,000. (§ 336, subd. (b).)

Extent

Section 335, subdivision (a)(2), defines Extent:

> […]
>
> ii. When the safety order violated does not pertain to employee illness or disease, Extent shall be based upon the degree to which a safety order is violated. It is related to the ratio of the number of violations of a certain order to the number of possibilities for a violation on the premises or site. It is an indication of how widespread the violation is. Depending on the foregoing, Extent is rated as:
>
> LOW-- When an isolated violation of the standard occurs, or less than 15% of the units are in violation.
>
> MEDIUM-- When occasional violation of the standard occurs or 15-50% of the units are in violation.
>
> HIGH-- When numerous violations of the standard occur, or more than 50% of the units are in violation.

For Citation 2, Davenport testified:

> Medium was given through the investigation, the number of times the injured employee stating that this is something that he did regularly as far as the violation, which would have -- which I have given between at least 15 and 50 percent of the time him accessing the attics that he had done it and based on the testimony of the supervisor, stating that he had done it before because of the nature of the work that's being done. So, I gave them between -- to the extent, medium, because of that percentage.

(Hrg. Rec., May 18, 2022, 56:45.)

The testimony from Cervantes during the hearing established that he had not used the 6-foot A-frame to access the attic prior to the day of the accident, and certainly not "regularly," as asserted by Davenport. Accordingly, the basis for the rating of Medium for Extent is unsupported by the record. The Division's basis for the Medium rating was hearsay statements allegedly made during interviews by Cervantes and Mora regarding the use of the incorrect ladder to access the attic and there was no non-hearsay evidence establishing the allegations.

Accordingly, Employer is afforded maximum credit for Extent for Citation 2. (*RII Plastering, Inc*, *supra*, Cal/OSHA App. 00-4250.) Extent is reduced to Low, which results in a 25 percent reduction of the Base Penalty. (§ 336, subd. (c)(1).)

Likelihood

Section 335, subdivision (a)(3), defines the adjustment for Likelihood:

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

For Citation 2, Davenport testified:

> It was based off of the likelihood – or to the extent of times it was done and the likelihood of an injury occurring during those times that the violation occurred. The likelihood was medium because of the percentage of times that we estimated they may have had that violation from the testimony stating that that's what he did all the time.

(Hrg. Rec., May 18, 2022, 58:14.)

As with the evidence provided for Extent, the Division's basis for a Medium rating for Likelihood is unsupported by evidence. Davenport's reference to "the testimony stating that that's what he did all the time" pertains to Davenport's interview with Cervantes, not the actual testimony given during the hearing. (Hrg. Rec., May 18, 2022, 58:14.) Davenport provided further testimony that his Likelihood rating was also based on the fact that one employee, out of the three employees in the house, was using the wrong ladder.

None of the testimony provided by Davenport regarding Likelihood is sufficient to support a Medium rating. Accordingly, Employer is afforded maximum credit for Likelihood for Citation 2. (*RII Plastering, Inc*, *supra*, Cal/OSHA App. 00-4250.) As such, the Low Likelihood results in a 25 percent reduction of the Base Penalty. (§ 336, subd. (c)(1).)

Thus, for Citation 2, the Gravity-based Penalty resulting from applying the reductions for Extent and Likelihood is $500 ($1,000, less 50 percent).

Section 336 also provides for adjustment of the Gravity-based Penalty pursuant to the factors for Good Faith, Size, and History.

Good Faith

Section 335, subdivision (c), provides:

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

Citation 2 was originally issued as a Serious Accident-Related violation. Pursuant to section 336, subdivision (c)(2), the Gravity-based Penalty for Accident-Related violations may only be reduced by the Size adjustment factor. The Division presented no evidence about Good Faith or History for Citation 2. However, Davenport did provide testimony about the adjustment factors for Citation 3, which the regulations contemplate would be applied for Citation 2 as well. As such, that testimony by Davenport for Good Faith is applicable here.

Davenport testified that he applied a "Fair" rating for the Good Faith adjustment factor because Employer had an IIPP in place, but its implementation was ineffective. Having found that Division did not establish a violation of section 3203, subdivision (a), there is no finding that Employer's IIPP was not effectively implemented. The Division did not provide any further support for its application of the "Fair" rating for Good Faith. Accordingly, the "Good" rating for Good Faith is hereby applied, which results in a reduction of 30 percent of the Gravity-based Penalty. (§ 336, subd. (d)(2).)

Size

Section 335, subdivision (b), defines the “Size of the Business of the Employer” as “the number of individuals employed at the time of the inspection/investigation.” If an employer has more than 100 employees, there is no downward adjustment for Size. (§ 336, subd. (d)(1).)

Davenport testified that Employer had more than 100 employees. Employer did not dispute this fact. Accordingly, Employer was not entitled to a downward adjustment for Size.

History

Section 335, subdivision (d), provides:

> (d) The History of Previous Violations--is the employer’s history of compliance, determined by examining and evaluating the employer’s records in the Division’s files. Depending on such records, the History of Previous Violations is rated as:
>
> GOOD-- Within the last three years, no Serious, Repeat, or Willful violations and less than one General or Regulatory violation per 100 employees at the establishment.
>
> FAIR-- Within the last three years, no Serious, Repeat, or Willful violations and less than 20 General or Regulatory violations per 100 employees at the establishment.
>
> POOR-- Within the last three years, a Serious, Repeat, or Willful violation or more than 20 General or Regulatory violations per 100 employees at the establishment.
>
> For the purpose of this subsection, establishment and the three-year computation, shall have the same meaning as in Section 334(d) of this Article.

Davenport testified that he reviewed Employer’s citation history on the Federal Occupational Safety and Health Administration (Fed/OSHA) website and determined that Employer had been issued a Serious citation in 2014, and that citation became final in 2017 after appeal. Accordingly, Davenport asserted that Employer was not afforded a reduction for History. (§ 336, subd. (d)(3).)

However, the Fed/OSHA website and Settlement Order in the prior case reflect that the citation was reduced to a General violation through settlement in 2017. Official notice[6] was taken during the hearing, noticing the Appeals Board's Settlement Order in Inspection Number 1010447, which states that the Division reclassified the citation to General and reduced the associated penalty. Thus, the Division did not establish that Employer had a Serious citation in the three years prior to the citations at issue herein. Employer should have been afforded a reduction of 10 percent for a "Good" History.

Accordingly, for Citation 2, Employer's Gravity-based Penalty of $500 shall be further reduced by 30 percent for Good Faith and 10 percent for History, resulting in an Adjusted Penalty of $300.

Abatement Credit

Section 336, subdivision (e)(2), provides for a 50 percent reduction of the Adjusted Penalty if an employer abates an alleged violation within specified time parameters. Although abatement credit is not applicable to Accident-Related citations, the reclassification of this citation makes the credit applicable. The citation issued to Employer contains the statement "Corrected During Inspection."

Accordingly, the Adjusted Penalty of $300 is reduced to $150 for Citation 2.

Citation 3

The violation for Citation 3 was standing on the topcap of the ladder, which could result in the hazard of an employee becoming injured by falling to the surface below. As with Citation 2, the analysis of Severity results in a Low rating due to a lack of testimony establishing the injuries that would "most likely" result in a fall from a ladder. Accordingly, the Base Penalty is $1,000. (§336, subd. (b).)

Davenport testified that he determined the ratings for Extent and Likelihood using the same factors for Citation 3 that he used for Citation 2, and his testimony was unchanged for those factors. As set forth above, the testimony was insufficient to support the Medium Extent and Likelihood ratings. As such, both factors are reduced to Low, resulting in a 50 percent reduction of the Base Penalty, or $500. (§336, subd. (c)(1).)

[6] "In reaching a decision, official notice may be taken, either before or after submission of the proceeding for decision, of … orders, findings and decisions, required by law to be made by the Division, the Appeals Board or the Standards Board." (§ 376.3, subd. (a).)

The remaining adjustment factors of Good Faith, Size, and History are unchanged from Citation 2 to Citation 3. As such, the Adjusted Penalty amount for Citation 3 is $300 ($500, less 40 percent).

Employer originally received an abatement credit for Citation 3, further reducing the penalty by 50 percent. Accordingly, the Adjusted Penalty of $300 is reduced to $150 for Citation 3.

The modified penalty amounts for Citations 2 and 3, as set forth above, are found to be reasonable.

Conclusions

The evidence did not establish a violation of section 3203, subdivision (a)(2), because the Division did not establish that Employer had not substantially complied with the safety order.

The Division established a violation of section 1670, subdivision (a), because employees exposed to fall from over 7-1/2 feet were not provided with personal fall protection systems.

The Division established a violation of section 1675, subdivision (b), with reference to section 3276, subdivision (d)(1)(B), because Employer did not ensure that an employee selected the appropriate ladder for the task being performed.

The Division established a violation of section 1675, subdivision (b), with reference to section 3276, subdivision (e)(11), because Employer did not ensure that an employee used a portable ladder safely by ensuring that the side rails extended not less than 36 inches above the upper landing surface or was secured at its top. Employer rebutted the presumption that the citation was properly classified as Serious. The citation was reclassified as General and the penalty, as amended, is reasonable.

The Division established a violation of section 1675, subdivision (b), with reference to section 3276, subdivision (e)(15)(E), because Employer did not ensure that an employee did not stand on the topcap of a step ladder. Employer rebutted the presumption that the citation was properly classified as Serious. The citation was reclassified as General and the penalty, as amended, is reasonable.

Order

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

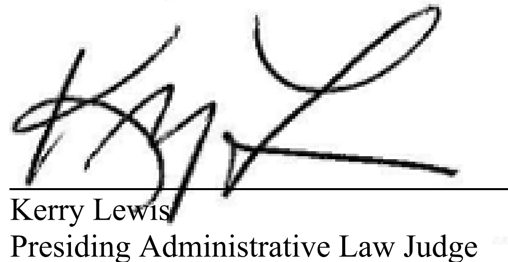
It is hereby ordered that Citation 1, Item 2, is affirmed and the associated penalty of $600 is sustained.

It is hereby ordered that Citation 1, Item 3, is affirmed and the associated penalty of $1,200 is sustained.

It is hereby ordered that Citation 2 is affirmed, the classification is amended to General, and the associated penalty is modified to $150, as indicated above.

It is hereby ordered that Citation 3 is affirmed, the classification is amended to General, and the associated penalty is modified to $150, as indicated above.

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



Dated: 02/27/2024

Kerry Lewis
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.**