BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of: **LENNAR CORPORATION** 1531 Alton Parkway, Suite 345 Irvine, CA 92618 **Employer**	Inspection No. **1340561** **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Appeals Board or Board), acting pursuant to authority vested in it by the California Labor Code, issues the following Decision After Reconsideration in the above-entitled matter.

JURISDICTION

Employer is a general contractor that develops residential properties. Beginning August 21, 2018, the Division of Occupational Safety and Health (Division), through Associate Safety Engineer Paul Guiriba (Guiriba), conducted an inspection of a residential construction project located at 1058 Foster Square Lane in Foster City, California (Foster Square or job site) in response to a report of an injury that occurred at the job site on August 7, 2018.

On November 14, 2018, the Division issued two citations to Employer alleging four violations of safety orders contained within title 8.[1] Citation 1, Item 1 asserted a Regulatory violation of section 341.4, alleging that Employer failed to post a copy of the project permit at the job site. Citation 1, Item 2 asserted a General violation of section 3395, subdivision (i), alleging that Employer's Heat Illness Prevention Program (HIPP) did not have all necessary elements related to the provision of water, access to shade, emergency response, and acclimatization. Citation 1, Item 3 asserted a General violation of section 3395, subdivision (h), alleging that Employer failed to provide its employees all required training regarding the contents of Employer's HIPP. Citation 2, Item 1, issued under the multi-employer worksite regulation, alleged a Serious, Accident-Related violation of section 1632, subdivision (b)(3), which requires that covers over openings be able to withstand 400 pounds or twice the weight of the employees, that they be secured in place, and marked "Opening—Do not Remove." Employer was cited as both the controlling and correcting employer. (§ 336.10.)

Employer filed timely appeals of the citations, contesting the reasonableness of the penalty in Citation 1, Item 1, and contesting the existence of the violation and the reasonableness of the

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

penalties in Citation 1, Items 2 and 3, and Citation 2, Item 1. Employer also asserted affirmative defenses.[2]

This matter was heard by Kerry Lewis, Administrative Law Judge (ALJ) for the Appeals Board on January 12 and 28, 2022. David Selden, of Messner Reeves, LLP, represented Employer. Xavier Sanchez, Staff Counsel, represented the Division. The matter was submitted for decision on April 10, 2022.

The ALJ issued a Decision on May 4, 2022, which affirmed Citation 1, Items 1, 2 and 3, and Citation 2, Item 1. The ALJ also affirmed the Serious Accident-Related classification for Citation 2. In affirming Citation 2, the ALJ held that Employer was the controlling Employer, not the correcting employer.[3] The ALJ also held that Employer failed to establish the due diligence defense.

Employer filed a timely Petition for Reconsideration (Petition). Employer challenges the ALJ's affirmance of Citation 1, Items 2 and 3. Employer also challenges Citation 2, but not its Serious, Accident-Related classification. Issues not raised in the petition are deemed waived. (Lab. Code, § 6618.) Finally, Employer contends it established the due diligence defense to Citation 2.

ISSUES

1) Did Employer's HIPP contain all the elements required by the safety order regarding emergency response and acclimatization?

2) Did Employer provide its employees with all required heat illness prevention training on the procedures for emergency response and acclimatization?

3) Was the floor opening at Employer's worksite secured to prevent accidental displacement and properly marked?

4) If the floor opening was not properly secured and/or marked, did Employer establish the due diligence defense as a controlling employer?

FINDINGS OF FACT

1) Employer is a general contractor building residences at a large multi-employer job site known as Foster Square.

2) Employer's personnel inspect the job site on a regular and frequent basis.

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[2] As stated in the ALJ's Decision, to the extent that Employer did not present evidence in support of its affirmative defenses, said defenses are deemed waived. (*RNR Construction*, *Inc*., Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017).)

[3] Because no party raises the point, this decision does not review the ALJ's determination that Employer was not the correcting employer.

3) Employer's employees intermittently worked outdoors, particularly during site and safety inspections.

4) Employer has a written HIPP.

5) Employer's HIPP does not contain a definition for the term "heat wave" or have any acclimatization procedures to ensure that its employees are closely observed during a heat wave.

6) Employer's HIPP does not contain a procedure for contacting emergency medical services and, if necessary, transporting employees to a place where they can be reached by an emergency medical provider.

7) On August 7, 2018, Efren Ceballos-Montejano (Montejano), an employee of subcontractor RJP Framing fell through a floor opening on the second floor of one of the residences that was under construction.

8) The opening measured two feet by three feet, seven inches.

9) The opening had been created several months before by Conco, a concrete subcontractor.

10) At the time of the accident, the opening was contained within a compartment surrounded by both vertical and horizontal framing elements.

11) Vertical framing uprights, consisting of two-by-four pieces of wood, surrounded the opening, spaced 10 to 14 inches apart.

12) Two-by-four pieces of wood were also laid horizontally on the ground surrounding the opening, referred to as "bottom plates," which constitute the bottom portion of a wall to be constructed later.

13) The total space of the framing compartment was two feet, nine inches by three feet, 11 inches.

14) Prior to the accident, the opening had been covered by a piece of plywood, which was slightly larger than the opening. Conco had placed the cover over the opening several months earlier.

15) The accident occurred when Montejano entered the compartment containing the opening by stepping through the framing uprights, lifted the piece of plywood, and fell through the opening to the first floor.

16) The cover had been marked with the word "Cuidado," scrawled in barely legible spray paint. There was no writing on the cover stating, "Opening--Do Not Remove."

17) Montejano suffered serious physical harm in the fall.

18) Beginning August 21, 2018, the Division, through Guiriba, conducted an inspection of the job site.

19) When Guiriba commenced his inspection, the cover over the plywood did not have any markings stating, "Opening--Do Not Remove."

DECISION AFTER RECONSIDERATION

1) Did Employer's HIPP contain all the elements required by the safety order regarding emergency response and acclimatization?

During his inspection, Guiriba determined, and the evidence confirms, that Employer had employees that intermittently worked outdoors, particularly during site and safety inspections. The parties stipulated that Employer's management personnel inspected the worksite on a regular and frequent basis. Because Employer had employees who worked outdoors, and who were exposed to outdoor conditions, Employer was required to comply with the heat illness prevention standard set forth in section 3395, which applies to "all outdoor places of employment." (§ 3395, subd. (a).)

Employer had an HIPP applicable to its employees. The Division introduced a version of the HIPP dated April 20, 2015, which Guiriba testified he received during his on-site inspection. (Exhibit 8.) The parties also introduced a later version of the HIPP dated January 10, 2017. (Exhibit J-1.) Although Employer contends this latter document was in effect at the time of the inspection, there are no material differences between them, and the analysis is the same for either.

In Citation 1, Item 2, the Division cited Employer for a violation of section 3395, subdivision (i), which states:

> Heat Illness Prevention Plan. The employer shall establish, implement, and maintain, an effective heat illness prevention plan. The plan shall be in writing in both English and the language understood by the majority of the employees and shall be made available at the worksite to employees and to representatives of the Division upon request. The Heat Illness Prevention Plan may be included as part of the employer's Illness and Injury Prevention Program required by section 3203, and shall, at a minimum, contain:
> (1) Procedures for the provision of water and access to shade.
> (2) The high heat procedures referred to in subsection (e).
> (3) Emergency Response Procedures in accordance with subsection (f).
> (4) Acclimatization methods and procedures in accordance with subsection (g).

The Division's citation alleges:

> Prior to and during the course of the inspection, including but not limited to, on August 21, 2018, the employer failed to establish, implement, and maintain an effective written Heat Illness

> Prevention Plan that contained all of the required elements, including:
> (1) Procedures for the provision of water and access to shade.
> (3) Emergency Response Procedures in accordance with subsection (f).
> (4) Acclimatization methods and procedures in accordance with subsection (g).

In sum, the Division argues that Employer's HIPP did not contain all required procedures related to water and shade, emergency response, and acclimatization. The Division has the burden to demonstrate that defects in Employer's written HIPP amounted to a failure to establish, implement, or maintain an effective program. (*Hill Crane Service*, *Inc*., Cal/OSHA App. 1135350, Decision After Reconsideration (Sept. 24, 2021).) "Although [Employer's HIPP] need not conform to the exact format or language of the regulation, an employer's HIPP must contain, at a minimum, all elements and sub-elements specified in the regulation." (*Ibid*. [other citations omitted].) The Division need only show one missing component to establish a violation. (*Ibid*.)

Here, the ALJ found that Employer's HIPP contained all necessary provisions related to water and shade, but found that the HIPP failed to contain all required emergency response and acclimatization procedures. Employer's Petition argues that the ALJ erred in so finding. We address each point below.

<u>Emergency Response Procedures:</u>

Section 3395, subdivision (i)(3), requires that Employer's HIPP contain emergency response procedures "in accordance with subdivision (f)." Subdivision (f), in turn, states:

> (f) Emergency Response Procedures. The Employer shall implement effective emergency response procedures including:
> […]
> (2) Responding to signs and symptoms of possible heat illness, including but not limited to first aid measures and how emergency medical services will be provided.
> (A) If a supervisor observes, or any employee reports, any signs or symptoms of heat illness in any employee, the supervisor shall take immediate action commensurate with the severity of the illness.
> (B) If the signs or symptoms are indicators of severe heat illness (such as, but not limited to, decreased level of consciousness, staggering, vomiting, disorientation, irrational behavior or convulsions), the employer must implement emergency response procedures.
> (C) An employee exhibiting signs or symptoms of heat illness shall be monitored and shall not be left alone or sent home without being offered onsite first aid and/or being provided with emergency medical services in accordance with the employer's procedures.
> (3) Contacting emergency medical services and, if necessary, transporting employees to a place where they can be reached by an emergency medical provider.

> (4) Ensuring that, in the event of an emergency, clear and precise directions to the work site can and will be provided as needed to emergency responders.

When section 3395, subdivisions (i)(3) and (f)(3) are read in conjunction, they require that an Employer's HIPP contain a procedure for "[c]ontacting emergency medical services and, if necessary, transporting employees to a place where they can be reached by an emergency medical provider." Here, the ALJ's Decision found the HIPP deficient because it did not contain such a provision. (Decision, p. 9.) After careful review of both Exhibits 8 and J-1, we find the ALJ's analysis is correct; there is no such provision in the HIPP regarding transportation of employees. Since such a procedure is required and does not exist, Employer's HIPP is deficient. Again, the Division need only show a single missing element in the HIPP to establish a violation. (*Hill Crane Service*, *Inc*., *supra*, Cal/OSHA App. 1135350.)

<u>Acclimatization Procedures:</u>

Next, section 3395, subdivision (i)(4), requires that Employer's HIPP contain acclimatization procedures "in accordance with subdivision (g)." Subdivision (g), in turn, states:

> (g) Acclimatization.
> (1) All employees shall be closely observed by a supervisor or designee during a heat wave. For purposes of this section only, "heat wave" means any day in which the predicted high temperature for the day will be at least 80 degrees Fahrenheit and at least ten degrees Fahrenheit higher than the average high daily temperature in the preceding five days.
> (2) An employee who has been newly assigned to a high heat area shall be closely observed by a supervisor or designee for the first 14 days of the employee's employment.

When section 3395, subdivisions (i)(4) and (g)(1) are read in conjunction, they require that an Employer's HIPP contain procedures for closely observing employees during a "heat wave," as that term is defined, *supra*. The ALJ found that Employer's HIPP was deficient because Employer's acclimatization procedures do not address "heat waves," as that term is defined. (Decision, p. 10.) We agree. Again, there is no such provision and, therefore, a violation exists. "The Board has held, where a citation alleges multiple instances of an employer's violation of a single safety order, a single proven instance is sufficient to sustain the citation." (*Hill Crane Service*, *Inc*., *supra*, Cal/OSHA App. 1135350 [other citations omitted].)

Ultimately, for the reasons stated herein, the Division established, and the ALJ's Decision correctly found, that Employer's HIPP is deficient because it failed to contain required emergency response and acclimatization procedures. Therefore, Citation 1, Item 2, is affirmed.

2) Did Employer provide its employees with all required heat illness prevention training on the procedures for emergency response and acclimatization?

Section 3395, subdivision (h), requires that Employer provide effective training on a list of topics. That subdivision states:

> (h) Training.
> (1) Employee training. Effective training in the following topics shall be provided to each supervisory and non-supervisory employee before the employee begins work that should reasonably be anticipated to result in exposure to the risk of heat illness:
> […]
> (D) The concept, importance, and methods of acclimatization pursuant to the employer's procedures under subsection (i)(4).
> […]
> (G) The employer's procedures for responding to signs or symptoms of possible heat illness, including how emergency medical services will be provided should they become necessary.
> (H) The employer's procedures for contacting emergency medical services, and if necessary, for transporting employees to a point where they can be reached by an emergency medical service provider.

In Citation 1, Item 3, the Division alleges:

> Prior to and during the course of the inspection, including, but not limited to August 21, 2018, the employer failed to provide effective training on the topics set forth in subsection (h)(1) to each supervisory and non-supervisory employee before the employee begins work that should reasonably be anticipated to result in exposure to the risk of heat illness.

The Division argues, and the ALJ's Decision found, that because Employer's HIPP did not contain all the elements specified in section 3395, subdivision (i), it did not, and could not, provide training on those elements, as required by subdivision (h). We agree.

Section 3395, subdivisions (f)(3) and (i)(3), when read in conjunction, require an Employer's HIPP to contain procedures for "contacting emergency medical services and, if necessary, transporting employees to a place where they can be reached by an emergency medical provider." Next, section 3395, subdivision (h)(1)(H), requires employees to be trained on "the employer's procedures for contacting emergency medical services, and if necessary, for transporting employees to a point where they can be reached by an emergency medical service provider." Here, because Employer had no such procedure in its HIPP regarding transporting employees to a location where they can be reached by a medical service provider, it follows that Employer did not provide training on the procedure.

Section 3395, subdivisions (i)(4) and (g)(1), when read in conjunction, require that an Employer's HIPP contain procedures for closely observing employees during a "heat wave," as that term is defined. Next, section 3395, subdivision (h)(1)(D), requires training on acclimatization "pursuant to Employer's procedures[.]" However, as already noted, Employer's HIPP did not contain a requirement that employees be observed during a "heat wave" as that term is defined. Again, Employer could not have provided training on a "procedure" that does not exist.

Additionally, as the ALJ noted, "Employer presented no evidence that refuted the Division's assertions. No testimony or documentary evidence established that Employer's heat

illness prevention training did, in fact, contain the topics that are missing from its HIPP." (Decision, p. 12.) Therefore, Citation 1, Item 3, is affirmed.

3) Was the floor opening at Employer's worksite secured to prevent accidental displacement and properly marked?

Citation 2 alleges a violation of section 1632, subdivision (b)(3), which requires that temporary openings be protected as follows:

> Covers shall be capable of safely supporting the greater of 400 pounds or twice the weight of the employees, equipment and materials that may be imposed on any one square foot area of the cover at any time. Covers shall be secured in place to prevent accidental removal or displacement, and shall bear a pressure sensitized, painted, or stenciled sign with legible letters not less than one inch high, stating: "Opening-Do Not Remove." Markings of chalk or keel shall not be used.

In Citation 2, the Division alleges:

> Prior to and during the course of the inspection, including, but not limited to, August 7, 2018, Lennar Corporation dba Lennar Homes of California, who is the controlling and correcting employer, failed to ensure that covers were secured in place to prevent accidental removal or displacement, and bear a pressure sensitized, painted, or stenciled sign with legible letters not less than one inch high, stating: Opening-Do Not Remove. As a result, an employee of RJP Framing suffered serious injuries when he fell approximately 12 feet through a floor opening after lifting an unsecured and unmarked plywood cover.

The Division has the burden of proving all elements of a violation by a preponderance of evidence. (*National Distribution Center*, *LP*, *Tri-State Staffing*, Cal/OSHA App. 12-0391, Decision After Reconsideration (Oct. 5, 2015).) As part of its burden, the Division also bears the burden of proving employee exposure to the violative condition. (*Ibid.*)

To prove a violation of section 1632, subdivision (b)(3), the Division must first establish, as a threshold matter, that an opening exists. Section 1504 defines an opening as "[a]n opening in any floor, 12 inches or more in the least horizontal dimension. It includes: stairway floor openings, ladderway floor openings, hatchways and chute floor openings."

There is no dispute that an opening existed and that it was covered. Citation 2 arose from an accident on August 7, 2018, at Building 13. Montejano, an employee of subcontractor RJP Framing, fell through a floor opening on the second floor. The opening measured two feet by three feet, seven inches. Prior to the accident, the opening had been covered by a piece of plywood that was slightly larger than the opening. The opening, and the plywood, existed inside a compartment surrounded by vertical framing uprights, and at least one diagonal piece of framing. The total space

of the compartment was two feet, nine inches by three feet, 11 inches. At the base of the framing, two-by-four pieces of wood were laid horizontally on all sides, referred to as "bottom plates." The accident occurred when Montejano, while in the process of cleaning debris on the second floor, entered the compartment containing the opening by stepping through the framing uprights,[4] lifted the piece of plywood, and fell to the first floor, suffering serious physical harm.

After concluding that an opening exists and that it was covered, the safety order requires that the cover meet, at least, three requirements: (1) it must be capable of safely supporting the greater of 400 pounds or twice the weight of the employees; (2) it must be secured in place to prevent accidental removal or displacement; and (3) it must be marked with legible letters, not less than one inch high, stating "Opening—Do Not Remove." A violation may be upheld if an uncovered opening exists. Alternatively, where the opening is covered, a violation may be upheld if the cover fails to meet any of the aforementioned three requirements. "When a safety standard includes two or more distinct requirements, a violation of the safety standard occurs if an employer violates any one of the requirements." (*Fedex Freight, Inc.,* Cal/OSHA App. 317247211, Decision After Reconsideration (Dec. 14, 2016), citing *California Erectors Bay Area Inc*., Cal/OSHA App. 93-503, Decision After Reconsideration (July 31, 1998).)

Here, no party disputes that the cover could withstand sufficient weight. Next, the ALJ found the cover had been secured from accidental removal or displacement by the surrounding framing, but found that the cover did not have the writing required by the safety order. We concur with the ALJ's latter conclusion, and therefore need not reach the former.[5]

The safety order requires that the cover be marked with legible letters, not less than one inch high, stating "Opening—Do Not Remove." (§ 1632, subd. (b)(3).) During the Division's investigation, Guiriba inspected the accident site and he, like Montejano, was able to fit through the framing uprights and enter the location of the opening. Upon entering the area of the opening, Guiriba stepped onto a small portion of floor uncovered by plywood, lifted the plywood cover, saw the opening, and set the cover down. Guiriba stated he could not discern any legible writing on the plywood, only some blurry paint. A photo in Employer's Incident Report demonstrates that the word "Cuidado," which translates to English as "be careful,"[6] is scrawled in barely legible spray paint on the cover. (Exhibit F.) Ultimately, the record evidence supports the ALJ's conclusion that the marking on the plywood failed to comply with the requirements of the safety order. We affirm that conclusion.

Employer's petition argues the word "Cuidado" constituted a better alternative to the requirements of the safety order because most of its workers were Spanish-speaking. (Petition, p. 12.) However, as the ALJ correctly noted,

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[4] The vertical uprights surrounding the compartment had sufficient space between them to permit Montejano to access the compartment, approximately 14 inches on one side and 10 inches on the other.

[5] Because we find a violation of the safety order on the basis of the insufficient markings (as discussed herein), we need not address the ALJ's conclusion that the opening had been properly secured by the framing. (See *Fedex Freight, Inc.*, *supra*, Cal/OSHA App. 317247211.)

[6] Cambridge Spanish-English Dictionary (Online) <https://dictionary.cambridge.org/dictionary/spanish-english/cuidado> (accessed Aug. 2, 2023.)

> This argument is unpersuasive. The safety order contains mandatory language and, if Employer felt that it would be helpful to include the message in Spanish as well, that was its option. However, including only a Spanish word that does not convey the message required by the safety order is insufficient.
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> Not only were the required words not used to warn the employees against removal of the cover, but the word 'Cuidado' was scrawled in spray paint that was barely legible. . . . Based on the fact that the injured employee removed the cover, it is reasonable to infer that he either could not see the word of caution or it did not provide him with sufficient warning not to remove the cover because it was covering an opening.

(Decision, pp. 15.) We agree. "Cuidado" neither denotes nor implies the "Opening—Do Not Remove" message required by section 1632, subdivision (b)(3).

Next, the record also demonstrates that Montejano was exposed to the violative condition. Exposure may be demonstrated in two different ways: by showing "actual exposure" to the zone of danger, or by demonstrating reasonably predictable access to the zone of danger. (*Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (April 24, 2003); *Dynamic Construction Services, Inc*., Cal/OSHA App. 14-1471, Decision After Reconsideration (Dec. 1, 2016) (*Dynamic Construction*).) "Actual exposure" may be found when the Division demonstrates an employee was actually exposed to a hazard created by the violation, i.e., the employee has been or is within a zone of danger created by the violative condition. (*Dynamic Construction*, *supra*, Cal/OSHA App. 14-1471.) Here, the ALJ properly concluded that "Montejano was actually exposed to the hazard created by the improperly marked cover when he lifted it and fell through the floor opening." (Decision, p. 15.)

Accordingly, Citation 2 is affirmed.

4) If the floor opening was not properly secured and/or marked, did Employer establish the due diligence defense as a controlling employer?

We next consider whether Employer established the due diligence affirmative defense. The Board recognizes a due diligence affirmative defense available to controlling employers in California cited under the multi-employer worksite regulation. (*McCarthy Building Companies, Inc,* Cal/OSHA App. 11-1706, Decision After Reconsideration (Jan 11, 2016) (*McCarthy*).) Where the controlling employer exercises "due diligence" it may be relieved from liability for violation of a safety order. (*Ibid*.) The due diligence defense recognizes that the "[t]he general contractor is not normally required to inspect for hazards as frequently or to have the same level of expertise and knowledge of applicable standards as the subcontractor it hired." (*Harris Construction Company*, Cal/OSHA App. 03-3914, Decision After Reconsideration (Feb. 26, 2015).)

In determining whether the controlling employer exercised due diligence, the totality of circumstances will be considered. (*McCarthy*, *supra*, Cal/OSHA App. 11-1706.) Multiple factors are relevant to the determination of due diligence, including: (a) whether the controlling employer

conducted periodic inspections of appropriate frequency; (b) whether the controlling employer implemented an effective system for promptly correcting hazards; (c) whether the controlling employer enforced the other employer's compliance with safety and health requirements with an effective, graduated system of enforcement and follow-up inspections; (d) whether the controlling employer researched the safety history of the subcontractor; and (e) whether the hazard was latent and unforeseeable.[7] (*Ibid*; see also *Hanover RS Construction*, *LLC*., Cal/OSHA App. 1205077, Decision After Reconsideration (May 26, 2011) (*Hanover*).) We consider these elements here.

Here, some *McCarthy* factors favor application of the due diligence defense. As correctly discussed within the ALJ's Decision, the evidence, including stipulations, demonstrates that Employer had familiarity with the subcontractor's safety practices and background, conducted regular and frequent inspections, generally enforced compliance with safety and health requirements, had a system of employee education and training, and had a comprehensive IIPP. (Decision, pp. 17-20.) On the other hand, other factors militate against the defense. The evidence demonstrates that the hazard in this case, i.e., the improperly marked cover, was neither latent nor unforeseeable. (Decision, pp. 19-20.) Further, although Employer generally enforced compliance with safety and health requirements, Employer did not promptly correct this particular hazard upon discovery. (*Id*. at p. 18.)

In resolving whether to apply the defense, when some factors favor and others disfavor the defense, "[t]he Board does not consider or apply the foregoing factors mechanically." (*Hanover*, *supra*, Cal/OSHA App. 1205077; *McCarthy*, *supra*, Cal/OSHA App. 11-1706.) "Rather, the respective weight assigned to each factor, or combination thereof, will properly depend on the circumstances of each case, including the type and severity of the hazard presented." (*Ibid*.)

Here, the ALJ found that the patent nature of the hazard, and the failure to promptly correct the hazard, were sufficient to defeat the due diligence defense. We agree.

In previous cases considering violations of the same safety order, in which the Board upheld the due diligence defense, such as *McCarthy* and *Hanover*, the Board found it significant that the hazard was latent. In *McCarthy,* the Board found it significant that an unmarked cover was behind a 21-inch curb, preventing the hazardous condition from being readily observable. (*McCarthy*, *supra*, Cal/OSHA App. 11-1706.) The Board also found it significant that the cover "had previously been secured and marked, and that the marking had been obliterated, likely due to relatively-recent work by a separate subcontractor." (*Ibid*.) Likewise, in *Hanover*, the Board found the general contractor did not have reasonable opportunity to observe the hazard due to its brief duration and the time between the replacement of the cover and the employee displacing it. (*Hanover*, *supra*, Cal/OSHA App. 1205077.) The general contractor also had no expectation that the subcontractor would leave a cover unsecured; there was no evidence of any prior unsecured cover at that site. (*Ibid*.)

Here, in contrast to both *Hanover* and *McCarthy*, the ALJ correctly observed that the hazard was neither latent nor unforeseeable. The ALJ's Decision stated,

[7] The Board also considers factors set forth by the State of Washington in WISHA Regional Directive 27.00. (*McCarthy*, *supra*, Cal/OSHA App. 11-1706.)

> The cover in this case was in plain view. The framing did not prevent the cover from being observable upon inspection. There was a line of sight to the cover between the two-by-fours as they were spaced 10 or 14 inches apart. The base plates surrounding the cover also did not prevent it from being observable as the base plates were only two inches high and the cover was flush with the base plates. While it may not have been readily apparent as to whether the cover was fastened, it was plain to see that the cover was not properly marked.
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> […]
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> In the instant matter, the parties stipulated that the floor opening had been created by a concrete contractor several months prior to the accident. The concrete contractor placed the cover over the floor opening and RJP framed around it shortly thereafter. There was no indication that there was any change in the positioning, marking, or framing around the cover between the time it was originally framed and the date of the accident. As such, both *McCarthy* and *Hanover's* determinations of a latent hazard are distinguishable from the instant matter because the regular inspections conducted by Employer's managers in the instant matter could have, and should have, observed the deficient marking on the cover over the course of several months.

(Decision, pp. 19-20.)

We concur with the ALJ's determination that the hazard was not latent or unforeseeable. The evidence demonstrates that the opening was created by Conco, the concrete contractor, who also initially placed the cover over the opening. The opening existed for several months prior to the accident. RJP framed around the opening and the cover. Employer was aware, or should have been aware, of the opening, the cover, and the fact that it was improperly marked. Employer had the blueprints, was present when the opening was created, was present when RJP framed around it, conducted regular inspections, and should have been aware of the deficient writing, but did not direct anyone to properly mark the cover for several months. We cannot find that Employer engaged in due diligence when it left such a patent hazard unaddressed for months. This deficiency alone is sufficient to defeat the defense.

Next, although the evidence demonstrates that Employer did have procedures in place to promptly correct observed safety hazards, those procedures were not followed here. As the ALJ noted, "Employer did not take action to ensure that the hazard created by the improperly marked floor opening cover was corrected promptly. Guiriba did not conduct his initial inspection of the job site until two weeks after the accident and the cover was in the same condition it had been it at the time of the accident." (Decision, p. 18.) We concur.

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We conclude that Employer failed to establish the due diligence defense as to the violation of section 1632, subdivision (b).

DECISION

For the reasons stated above, the Decision of the ALJ is affirmed.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

/s/ Ed Lowry, Chair
/s/ Judith S. Freyman, Board Member
/s/ Marvin P. Kropke, Board Member

FILED ON: 09/26/2023