BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1340561**
LENNAR CORPORATION **dba LENNAR HOMES OF CALIFORNIA** **15131 ALTON PARKWAY, SUITE 345** **IRVINE, CA 92618** **Employer**	**DECISION**

Statement of the Case

Lennar Corporation (Employer) is a general contractor developing residential properties. Beginning August 21, 2018, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Paul 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 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 California Code of Regulations, title 8.[1] The citations allege that Employer failed to (1) post the project permit at the job site, (2) establish, maintain and implement an effective heat illness prevention plan containing all the necessary sections, (3) provide effective heat illness prevention plan training to employees, and (4) properly cover and mark an opening in the floor. Citation 2, Item 1, was issued in accordance with the multi-employer regulations found in section 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 penalties in Citation 1, Items 2 and 3, and Citation 2, Item 1. Employer also asserted a series of affirmative defenses.[2]

This matter was heard by Kerry Lewis, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (Appeals Board), in Sacramento County, California, 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.

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

[2] Except as otherwise noted in the Decision, Employer did not present evidence in support of its affirmative defenses, and said defenses are therefore deemed waived. (*RNR Construction, Inc.*, Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017).)

Issues

1. Did Employer fail to post the project permit at the job site at all times?

2. Did Employer's Heat Illness Prevention Plan contain all provisions required by the safety order?

3. Did Employer provide its employees with heat illness prevention training on the procedures for provision of water and shade, emergency procedures, and acclimatization methods if they were reasonably anticipated to be exposed to the risk of heat illness?

4. Was the floor opening guarded to prevent accidental displacement and properly marked with legible letters not less than one inch high, stating: "Opening--Do Not Remove"?

5. Did the Division correctly cite Employer as both a controlling and correcting employer?

6. Did Employer establish that it acted with due diligence regarding correction of hazards for which it was cited?

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

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

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

10. Are the proposed penalties reasonable?

Findings of Fact[3]

1. Employer is a general contractor building multi-family residential condominiums at a large job site known as Foster Square.

[3] Findings of Fact 8, 13, 14, and 18 were stipulations of the parties.

2. Employer was unable to produce its project permit when Paul Guiriba (Guiriba), Associate Safety Engineer, requested it during his inspection of the job site on August 21, 2018.

3. Employer's Heat Illness Prevention Plan (HIPP) does not contain a definition of heat wave or have any specific acclimatization procedures to ensure that its employees are closely observed during a heat wave.

4. Because Employer's HIPP did not contain all necessary provisions on acclimatization, it could not have trained employees on the concept, importance, and methods of acclimatization.

5. Foster Square was a multi-employer job site.

6. Employer was responsible for safety and health conditions on the job site with authority for ensuring hazardous conditions were corrected.

7. Several months prior to Guiriba's inspection, a concrete subcontractor, Conco, created a floor opening on the second level of the building. The opening measured approximately 2 feet by 3 feet 7 inches in dimension. Conco placed a plywood cover over the floor opening.

8. The framing contractor, RJP Framing, Inc. (RJP), framed around the cover with two-by-four wood base plates, which are the bottom portion of a wall to be constructed later.

9. RJP also framed around the cover with two-by-four vertical uprights spaced ten to 14 inches apart on each side.

10. The base plates surrounding the plywood cover prevented the cover from being accidentally displaced.

11. The plywood covering was marked with faded spray paint that said "Cuidado." No other markings were visible on the covering.

12. On August 7, 2018, RJP employee Efren Ceballos Montejano (Montejano), whose job it was to clean up debris and scraps at the job site, picked up the piece of plywood covering the floor opening and fell through the opening 12 feet to the floor below.

13. As a result of his fall through the floor opening, Montejano suffered injuries that required in-patient hospitalization and treatment for a period in excess of 24 hours.

14. Employer's managers inspected the job site on a regular and frequent basis.

15. The plywood covering was plainly visible through the uprights surrounding it.

16. After the accident on August 7, 2018, no additional warning language was written on the plywood covering until Guiriba's inspection on August 21, 2018.

17. Employees who fall 12 feet through a floor opening may suffer injuries such as fractures, dislocations, impalement, and death.

18. The penalties for Citation 1, Items 1 through 3, are reasonable.

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

Analysis

1. Did Employer fail to post the project permit at the job site at all times?

The Division cited Employer for a violation of section 341.4, which provides:

> Any employer issued a permit pursuant to this Article shall post a copy or copies of the permit at or near each place of employment. If such posting is impracticable at the site of an excavation, the permit shall be made available at such site at all times, or, in the case of a mobile unit, the permit shall be made available at all times at the employer's head office in the district.

In Citation 1, Item 1, the Division alleges:

> Prior to and during the course of the inspection, including, but not limited to, August 21, 2018, the employer failed to post a copy or copies of the project permit at the job site.

Employer's appeal did not contest the existence of the violation for Citation 1, Item 1. As such, the violation is established by operation of law. (§ 361.3, *Pacific Cast Products, Inc.*, Cal/OSHA App. 99-2855, Denial of Petition for Reconsideration (July 19, 2000).)

Even had Employer challenged the existence of the violation in its appeal, the Division established a violation of the safety order. Guiriba testified that Employer did not have the project permit posted during his inspection of the job site and was unable to produce it before he left. Craig MacGregor (MacGregor), Lennar's Construction Manager, searched for the permit in binders in the onsite office while Guiriba was present for the initial inspection, but did not find it. Guiriba received a copy of the project permit from Employer about a week after the initial inspection date.

MacGregor did not testify at the hearing in this matter. Employer offered a declaration from him that states the project permit was placed in Employer's Injury and Illness Prevention Program (IIPP) binder when Employer's onsite office was relocated, that it was re-posted once the move was complete, and Guiriba did not ask questions related to the posting requirement during his inspection. Russell Golden, Director of Construction, testified that he did not recall a discussion about the project permit when Guiriba was present at the job site.

Employer's evidence is insufficient to rebut Guiriba's credible testimony. The Division objected to MacGregor's declaration as hearsay. The Appeals Board's evidence rules provide that "[h]earsay 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." (§ 376.2.) If anything, MacGregor's declaration confirms that the project permit was not posted. Additionally, while MacGregor asserts that Guiriba did not make an inquiry about the project permit, his written statement that the permit was located in a binder substantiates Guiriba's testimony that an attempt was made to locate the permit by searching for it in a binder.

Guiriba's testimony that the permit was not posted, which was subject to cross examination, is credited. Accordingly, Citation 1, Item 1, is affirmed.

2. Did Employer's Heat Illness Prevention Plan contain all provisions required by the safety orders?

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

> 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).

In Citation 1, Item 2, the Division 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).

"Although it 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." (*Hill Crane Service, Inc*., Cal/OSHA App. 1135350, Decision After Reconsideration (Sep. 24, 2021), citing *L&S Framing*, Cal/OSHA App. 1173183, Decision After Reconsideration (Apr. 2, 2021).)

Here, Employer had an established HIPP in effect at the time of inspection. During the hearing, the Division presented Employer's HIPP, which is a multi-page document with an effective date of April 20, 2015, provided to Guiriba at the time of his inspection. (Ex. 8.) Joint Exhibit 1 was also accepted into evidence, which contains a version of Employer's HIPP with an effective date of January 10, 2017. The versions are substantially the same and there is no significant difference in the provisions of either version.

a. Procedures for the provision of water and access to shade

Section 3395, subdivision (c), provides, in relevant part:

(c) Provision of water. Employees shall have access to potable drinking water … including but not limited to the requirements that it be fresh, pure, suitably cool, and provided to employees free of charge. The water shall be located as close as practicable to the areas where employees are working. Where

drinking water is not plumbed or otherwise continuously supplied, it shall be provided in sufficient quantity at the beginning of the work shift to provide one quart per employee per hour for drinking for the entire shift. …

Section 3395, subdivision (d), provides:

(d) Access to shade.

(1) Shade shall be present when the temperature exceeds 80 degrees Fahrenheit. When the outdoor temperature in the work area exceeds 80 degrees Fahrenheit, the employer shall have and maintain one or more areas with shade at all times while employees are present that are either open to the air or provided with ventilation or cooling. The amount of shade present shall be at least enough to accommodate the number of employees on recovery or rest periods, so that they can sit in a normal posture fully in the shade without having to be in physical contact with each other. The shade shall be located as close as practicable to the areas where employees are working. Subject to the same specifications, the amount of shade present during meal periods shall be at least enough to accommodate the number of employees on the meal period who remain onsite.

(2) Shade shall be available when the temperature does not exceed 80 degrees Fahrenheit. When the outdoor temperature in the work area does not exceed 80 degrees Fahrenheit employers shall either provide shade as per subsection (d)(1) or provide timely access to shade upon an employee's request.

(3) Employees shall be allowed and encouraged to take a preventative cool-down rest in the shade when they feel the need to do so to protect themselves from overheating. Such access to shade shall be permitted at all times. An individual employee who takes a preventative cool-down rest (A) shall be monitored and asked if he or she is experiencing symptoms of heat illness; (B) shall be encouraged to remain in the shade; and (C) shall not be ordered back to work until any signs or symptoms of heat illness have abated, but in no event less than 5 minutes in addition to the time needed to access the shade.

(4) If an employee exhibits signs or reports symptoms of heat illness while taking a preventative cool-down rest or during a preventative cool-down rest period, the employer shall provide appropriate first aid or emergency response according to subsection (f) of this section.

A close review of Employer's HIPP reveals that it contains instructions regarding procedures for the provision of water and shade. Item 2 under "Procedures" in the section of Employer's IIPP entitled "Heat Illness Prevention—California Only," provides that "an adequate supply of clean and cool drinking water is available and located as practicable to where Company Associates are working. Every worker needs to drink at least 4 cups of water per hour." Additionally, Item 3 under "Procedures" provides the requirements for adequate shade and rest breaks for cooling down and drinking water. (See Ex. 8 and J-1.)

Guiriba testified that the only provision missing from Employer's shade procedures is the requirement that an employee taking a cool down rest period must be provided with first aid or medical treatment if they report symptoms of heat illness. However, Employer's HIPP does contain such a provision in the "Procedures" section under Item 4: "Any Company associate taking a 'preventative cool down rest' must be monitored for symptoms of Heat Illness. Associates must remain in the shade until symptoms are gone and provided necessary first aid." (See Ex. 8 and J-1.)

Accordingly, Employer's HIPP was not deficient in its shade and water provisions.

b. Emergency response procedures

Section 3395, subdivision (f), provides, in relevant part:

> (f) Emergency Response Procedures. The Employer shall implement effective emergency response procedures including:
>
> (1) Ensuring that effective communication by voice, observation, or electronic means is maintained so that employees at the work site can contact a supervisor or emergency medical services when necessary. …
>
> (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.

The Division asserted that the Employer's HIPP did not contain provisions regarding the employer's duty to transport an employee to a place where they can be reached by emergency medical personnel, that a supervisor will take action when a supervisor observes or receives a report of an employee having heat illness symptoms, and not leaving an employee alone or sending an employee home without having offered onsite first aid or being provided with emergency medical procedures. (§ 3395, subd. (f)(2)(A) & (C), (3).)

Employer's HIPP requires prompt medical attention be given and identifies symptoms of heat illness. (Ex. 8 and J-1.) The HIPP also includes a Heat Stress Handout that provides information on treating specific heat illness symptoms. (*Id*.) However, nowhere in Employer's HIPP does it instruct an employee or supervisor that they should transport employees to a location where they can be reached by emergency medical services if necessary under the circumstances.

Accordingly, Employer's HIPP lacks the minimum requirements for emergency response procedures set forth in section 3395, subsection (f).

c. Acclimatization methods and procedures

Section 3395, subdivision (g), provides:

(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.

Here, Employer's acclimatization section requires workers to adjust to working in heat if returning to work after a prolonged absence or recent illness, recently moving from a cool to hot climate, or working during the beginning stages of a heat wave. (Ex. 8 and J-1.) However, the section on acclimatization does not contain any guidance for close observation of the employees in the three categories set forth. Rather, it provides for a progressive increase in work time during these conditions.

As to close observation of employees during a heat wave, in the section that pertains to high-heat procedures when the temperature exceeds 95 degrees, there are provisions requiring that workers be "observed for alertness and signs or symptoms of heat illness" and that workers new to a job site should be "under close supervision for the first 14 days unless they have been doing similar work outdoors for 10 of the past 30 days for 4 or more hours per day." (*Id*.) While Employer's HIPP provides for close supervision of new employees during high heat periods, when temperatures exceed 95 degrees, it does not contain a definition of heat wave, which is defined as "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." (§ 3395, subd. (g).) Thus, Employer's acclimatization procedures are insufficient as there is no requirement that employees be closely observed at a lower temperature threshold if it meets the definition of "heat wave" under section 3395, subdivision (g).

Employer argued that its HIPP is sufficient considering that the only employees it had on the job site held supervisory positions and do not regularly perform labor outdoors, but instead, most work in air-conditioned onsite offices. However, the HIPP for which Employer was cited is not site-specific and was not applicable only to the few employees at the Foster Square project. Rather, the HIPP is applicable to all employees in California. Further, Employer did not dispute that its Foster Square employees worked outdoors performing walkthroughs and inspections of the job site on a regular basis.

"The Division need only show one missing component, of the many required by the safety order, in order to establish a violation. [Citations.]" (*Hill Crane Service, Inc*., *supra*, Cal/OSHA App. 1135350.) The Division established that Employer's HIPP is deficient with regard to emergency response and acclimatization procedures. Therefore, Citation 1, Item 2, is affirmed.

3. Did Employer provide its employees with heat illness prevention training on the procedures for provision of water and shade, emergency procedures, and acclimatization methods if they were reasonably anticipated to be exposed to the risk of heat illness?

Section 3395, subdivision (h)(1), provides:

(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:

(A) The environmental and personal risk factors for heat illness, as well as the added burden of heat load on the body caused by exertion, clothing, and personal protective equipment.

(B) The employer's procedures for complying with the requirements of this standard, including, but not limited to, the employer's responsibility to provide water, shade, cool-down rests, and access to first aid as well as the employees' right to exercise their rights under this standard without retaliation.

(C) The importance of frequent consumption of small quantities of water, up to 4 cups per hour, when the work environment is hot and employees are likely to be sweating more than usual in the performance of their duties.

(D) The concept, importance, and methods of acclimatization pursuant to the employer's procedures under subsection (i)(4).

(E) The different types of heat illness, the common signs and symptoms of heat illness, and appropriate first aid and/or emergency responses to the different types of heat illness, and in addition, that heat illness may progress quickly from mild symptoms and signs to serious and life threatening illness.

(F) The importance to employees of immediately reporting to the employer, directly or through the employee's supervisor, symptoms or signs of heat illness in themselves, or in co-workers.

(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.

(I) The employer's procedures for 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. These procedures shall include designating a person to be available to ensure that emergency procedures are invoked when appropriate.

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.

Here, the Division argues that, because Employer's HIPP did not contain all the elements specified in section 3395, subdivision (i), it could not have trained employees on those missing elements. Section 3395, subdivision (f), requires employers to train its employees about contacting emergency medical services, which includes instructing them that, if the circumstances warrant, an employee with signs of heat illness must be transported to a location where emergency medical services can reach them.

Section 3395, subdivision (h)(1)(D), requires employers to train on its acclimatization procedures. Employer's HIPP outlines the requirement to train employees and includes a list of topics for training. With regard to emergency procedures, the training list provides only, "How to contact emergency services and effectively report work location." (Ex. 8 and J-1.) Thus, Employer's HIPP does not include the training topic of transporting an employee to somewhere accessible by emergency medical services, and the required topic is nowhere in Employer's HIPP procedures.

Additionally, the HIPP does not provide procedures for close observation of employees at any time other than during the first 14 days of high-heat conditions. In the acclimatization section of Employer's HIPP, there is no requirement that workers must be closely observed to acclimate themselves when returning to work after prolonged absence, recently moving from a cool climate, or during a heat wave, as that term is defined in section 3395, subdivision (g)(1). The Division asserted that Employer could not have trained its employees on procedures that did not exist.

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. Accordingly, Citation 1, Item 3, is affirmed.

4. Was the floor opening guarded to prevent accidental displacement and properly marked with legible letters not less than one inch high, stating: "Opening--Do Not Remove"?

In Citation 2, the Division cited Employer for a violation of section 1632, subdivision (b), which requires:

> (b) …
>
> (3) 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.

a. Existence of Violation

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."

Here, it is undisputed that the floor opening was subject to the requirements of section 1632, subdivision (b)(3). The floor opening was approximately 2 feet by 3 feet 7 inches in dimension. As such, the floor opening was required to be (1) secured in place to prevent accidental removal or displacement and (2) marked with legible letters stating "Opening—Do Not Remove."

(1) Secured in Place to Prevent Accidental Removal or Displacement

At the time of the accident, the floor opening was covered by plywood. The cover was not nailed or otherwise fastened to the floor, but there was framing around the floor opening. The floor opening was surrounded by base plates, two-by-fours fastened to the floor on each side. There were also uprights installed around the opening. Upright two-by-fours were placed 14 inches apart on two sides and 10 inches apart on the other two sides. On one side with 14-inch spacing between the uprights, a two-by-four was secured diagonally across the uprights and, on the other side with 14-inch spacing, there were two two-by-fours secured parallel to the floor across the uprights.

The Division asserted that Employer violated the safety order because the injured employee was able to lift the cover, resulting in his fall through the uncovered opening. During the inspection, Guiriba stepped into the framed area where the opening was located and was able to lift the cover as well. As such, the Division argued that the cover was not secured to the surface beneath it.

However, Employer argued that the cover was secured from accidental removal or displacement because the surrounding base plates prevented the cover from being unintentionally knocked or forced out of position by an employee during the course of his duties. Employer submitted a video demonstrating that the cover could not be easily dislodged and purposeful action was needed in order to remove it. (Ex. YY.)

Although it was not nailed or otherwise secured to the surface below it, the cover was indeed secured from *accidental* removal or displacement. The movement that resulted in the removal of the cover, and the only possible hazardous displacement that could have occurred, was the result of the intentional act of stepping into the space and manually lifting the cover from its position.

(2) Marked with legible letters stating "Opening—Do Not Remove"

The floor opening cover was marked with the word "Cuidado." Cuidado is a Spanish word meaning beware, caution or be careful.[4] Employer argues this marking was more effective than a marking in English reading "Opening--Do Not Remove" because most of the employees on the job site were Spanish-speaking. This argument is unpersuasive. The safety order contains mandatory language and, if Employer felt that it would be helpful to include the message in

[4] Although there was no interpreter at the hearing, the parties were generally in agreement about the meaning of the Spanish word. Employer's opening statement asserted that "cuidado" means "caution" or "watch out." During the hearing, Guiriba testified that it means "careful." Finally, the Division's post-hearing brief cites to *The New Revised Velázquez Spanish and English Dict*. (1985) p. 212, cols. 1-2, for the definition of "cuidado" as "care," "mind," or "beware."

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.

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. As demonstrated in a photograph on page 3 of Employer's Incident Report, the writing was faded and difficult to discern as more than a discoloration of the plywood. (Ex. F.) 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.

When a safety order has more than one distinct requirement, a violation of the safety order occurs if an employer violates any one of the requirements. (*California Erectors Bay Area Inc.*, Cal/OSHA App. 93-503, Decision After Reconsideration (July 31, 1998).) Therefore, the Division established a violation of section 1632, subdivision (b)(3), because the cover was not marked with the language required by the safety order in legible letters.

b. Employee Exposure to the Hazard

In addition to demonstrating the existence of a hazard, the Division has the burden of proving that there was employee exposure to the hazard.

> The Division may demonstrate employee exposure by showing that an employee was actually exposed to the zone of danger or hazard created by the violative condition. [Citation.] Actual exposure is established when the evidence preponderates to a finding that employees actually have been or are in the zone of danger created by the violative condition. [Citations.]

(*RNR Construction, Inc.*, *supra*, Cal/OSHA. App. 1092600.)

Employer presented evidence that Montejano was not expected to be working on the second floor where the incident occurred. According to Ruben Medel (Medel), RJP's Foreman, the cleanup of the second floor had been completed the day before the accident and he did not know why Montejano was on the floor at the time of the accident.

However, an employer's knowledge or expectation of the work being performed is not a component of the exposure analysis. Montejano was actually exposed to the hazard created by the improperly marked cover when he lifted it and fell through the floor opening.

Accordingly, because an employee was exposed to an improperly covered floor opening, the Division established a violation of section 1632, subdivision (b)(3).

5. Did the Division correctly cite Employer as both a controlling and correcting employer?

The Division cited Employer as both the correcting and controlling employer for Citation 2. Section 336.10 provides the following:

> On multi-employer worksites, both construction and non-construction, citations may be issued only to the following categories of employers when the Division has evidence that an employee was exposed to a hazard in violation of any requirement enforceable by the Division:
>
> (a) The employer whose employees were exposed to the hazard (the exposing employer);
> (b) The employer who actually created the hazard (the creating employer);
> (c) The employer who was responsible, by contract or through actual practice, for safety and health conditions on the worksite; i.e., the employer who had the authority for ensuring that the hazardous condition is corrected (the controlling employer); or
> (d) The employer who had the responsibility for actually correcting the hazard (the correcting employer).
>
> Note: The employers listed in subsections (b) through (d) may be cited regardless of whether their own employees were exposed to the hazard.

The Division argued that Employer is a correcting employer as defined in section 336.10 because MacGregor had the authority to require correction of workplace hazards, to stop work if necessary, and terminate the subcontractor. While Employer had such authority as discussed below, the Division's argument that this authority makes Employer a correcting employer is flawed.

A correcting employer must have actual responsibility for correcting the specific hazard in question. (*Hearn Construction Inc.*, Cal/OSHA App. 02-3533, Decision After Reconsideration (Sept. 19, 2008).) The fact that Employer had a duty and the authority to ensure that hazards were corrected, does not mean, in this case, that Employer also had the responsibility of performing the actual corrections. As to the specific hazard, Medel testified that it was first the responsibility of the concrete subcontractor to cover the floor opening and, once framing began,

it was the responsibility of the framing subcontractor. The Division presented insufficient evidence to establish otherwise. Accordingly, Employer was not a correcting employer.

Employer did not dispute it was the controlling employer, as that term is defined in section 336.10. Employer was responsible for safety and health conditions on the worksite with authority for ensuring hazardous conditions were corrected. As such, Employer was citable as a controlling employer pursuant to section 336.10, subdivision (c).

6. Did Employer establish that it acted with due diligence regarding correction of hazards for which it was cited?

The Appeals Board has recognized the due diligence defense for controlling employers. (*Harris Construction Company, Inc.*, Cal/OSHA App. 03-3914, Decision After Reconsideration (Feb. 26, 2015).) Where the controlling employer establishes that it exercised due diligence, it is relieved from liability of a violation of the safety order. (*Id*.)[5]

The totality of the circumstances must be considered when determining whether a controlling employer acted with due diligence. (*McCarthy Building Companies, Inc.*, Cal/OSHA App. 11-1706, Decision After Reconsideration (Jan. 11, 2016) (*McCarthy*).) In *McCarthy*, the Appeals Board identified several factors relevant to the determination of due diligence: whether the controlling employer researched the safety history of the subcontractor; whether the hazard was latent and unforeseeable; whether the controlling employer conducted periodic inspections of appropriate frequency; whether the controlling employer implemented an effective system for promptly correcting hazards; and, whether the controlling employer enforces the other employer's compliance with safety and health requirements with an effective, graduated system of enforcement and follow-up inspections. (See also, *Hanover RS Construction, LLC.*, Cal/OSHA App. 1205077, Decision After Reconsideration (May 26, 2021).)

The Appeals Board noted that "the dispositive circumstances and factors can be expected to vary from case to case." (*McCarthy*, *supra*, Cal/OSHA App. 11-1706.) The foregoing factors are not to be applied mechanically. (*Id*.) "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." (*Id.*)

[5] In its post-hearing brief, the Division asserted that Employer had waived its right to assert the "due diligence defense" because the defense had not been asserted in its original appeal. However, a review of the administrative file reveals that Employer did, in fact, submit a statement setting forth various defenses with its appeal forms and it did raise the due diligence defense in that document.

a. Familiarity with Subcontractor's Safety History

Bret Wallach (Wallach), Employer's Director of Operations and Safety Officer Bay Area Division, testified that that Employer reviews it subcontractors' IIPPs and that Employer believed RJP to be a safety-conscious company. Wallach testified that the companies worked together on their safety programs. The parties stipulated that RJP's workers are trained, RJP conducts weekly safety trainings, and that RJP has a comprehensive written safety program.

c. Periodic Inspections of Appropriate Frequency

The parties stipulated that Employer's onsite construction managers inspected the Foster Square job site on a regular and frequent basis. Wallach testified that the construction manager, MacGregor, performed site walks inspecting for safety issues. MacGregor completed a Community (Construction) Safety Inspection Homebuilding Division form on a weekly basis (Inspection Form). (Ex. A.) The Inspection Form listed the various areas to be monitored for safety issues, including personal protective equipment, fall protection, scaffolds, ladders, tools, electrical, excavations, housekeeping, and safety signage. (*Id*.)

d. Effective System for Promptly Correcting Hazards

Wallach testified that construction managers are expected to correct observed safety hazards, which includes immediate correction. If immediate correction is not possible, the work is stopped, the subcontractor is notified, and work cannot continue until the unsafe condition is corrected. A review of the Inspection Forms revealed that MacGregor noted when safety hazards were observed and the corrective action taken. (Ex. A.) Wallach testified that Employer also uses a third party compliance company that performs safety inspections twice a month.

However, 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. It was not until Guiriba instructed Medel to properly mark the cover, which Medel then changed from "Cuidado" to "Do Not Remove-Hole." While this language is not identical to the language included in the safety order because it uses the word "hole" instead of "opening," it is clear to convey the message and is sufficiently protective of any employees exposed to the hazard.

e. Enforcement of Compliance with Safety and Health Requirements

As described above, Employer had a system in place for identifying and correcting hazards on the job site. The Master Trade Partner Agreement (Agreement) between Employer

and RJP required that RJP "take all reasonable and necessary safety precautions" and "comply with all safety requirements, laws, regulations, rules or ordinances of any authority (governmental or otherwise) responsible for the safety of persons or property." (Ex. D.) The Agreement further required RJP and its employees to comply with Lennar's Code of Safe Practices. Wallach testified that Employer also required its subcontractors to have their own IIPP and safety program in place.

The parties stipulated that Employer disciplines, counsels, issues warnings, and can assess fines or even remove a subcontractor or its employees from a project if they are working unsafely. Pursuant to the Agreement, in the event of a safety violation, Employer had the authority to stop RJP's work, require immediate remedy, assess fines of up to $200 for each safety violation, or it could terminate the contract.

Wallach testified that every incident was reviewed for necessary action by Employer, which included following up with the subcontractor and the issuance of a verbal or written warning and/or fines. Wallach further testified that progressive discipline was used when there were serious or repeat offenses. Wallach testified that Employer verifies that any necessary corrections are immediately completed or follows up with the subcontractor.

d. Whether the hazard was latent and unforeseeable

Employer argues that the improperly-covered floor opening was a latent hazard because it was located in a small area that was fully framed and it was not foreseeable that an employee would step through the framed uprights to lift the cover.

Employer points to *McCarthy, supra*, Cal/OSHA App. 11-1706, where the Appeals Board found that a general contractor acted with due diligence, determining that two unmarked and unsecured floor openings were latent hazards because they were "located behind a 21-inch curb that prevented the defects from being readily observable, except upon close inspection." Here, the facts surrounding the improperly covered floor opening are distinguishable. 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.

The cover in *McCarthy, supra,* Cal/OSHA App. 11-1706, was not marked at the time that it was deemed to be a latent hazard. However, the Appeals Board noted 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." (*Id*.) Here, Employer did not establish that the cover had at one time been properly marked, or that the proper markings were recently damaged, and as such, it did not have a reasonable opportunity to observe the hazard. Based on the photographs submitted by both parties, there is no indication that any markings other than "Cuidado" were ever present on the cover.

In *Hanover RS Construction LLC., supra,* Cal/OSHA App. 1205077, a general contractor was cited for a violation of 1632, subdivision (b), where a floor covering was removed by a subcontractor and momentarily placed back on the opening without being secured. In that brief moment, an employee walked on the cover, displaced it, and fell through the floor opening. (*Id*.) The Appeals Board found this hazard to be unforeseeable because the general contractor demonstrated it did not have knowledge or an expectation that the subcontractor would remove the cover. (*Id*.) 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. (*Id*.)

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.

Accordingly, the due diligence defense is insufficient to relieve Employer of liability for the violation of section 1632, subdivision (b). Citation 2, Item 1 is affirmed.

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

Although Employer's appeal did not assert that the classification of Citation 2 was incorrect, it did assert that the penalty was unreasonable. A challenge to the reasonableness of the penalty automatically places the classification of the violation at issue. (See *Hudson Plastering Co., Inc*., Cal-OSHA App. 85-1271, Decision After Reconsideration (Nov. 19, 1987).)

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

> There shall be a rebuttable presumption that a "serious violation" exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation. The demonstration of a violation by the division is not sufficient by itself to establish that the violation is serious. The actual hazard may consist of, among other things:
>
> […]
>
> (2) The existence in the place of employment of one or more unsafe or unhealthful practices that have been adopted or are in use.

"Serious physical harm" is defined as an injury or illness occurring in the place of employment that results in:

> (1) Inpatient hospitalization for purposes other than medical observation.
> (2) The loss of any member of the body.
> (3) Any serious degree of permanent disfigurement.
> (4) Impairment sufficient to cause a part of the body or the function of an organ to become permanently and significantly reduced in efficiency on or off the job, including, but not limited to, depending on the severity, second-degree or worse burns, crushing injuries including internal injuries even though skin surface may be intact, respiratory illnesses, or broken bones.

(Lab. Code §6432, subd. (e).)

The Appeals Board has defined the term "realistic possibility" to mean a prediction that is within the bounds of human reason, not pure speculation. (*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).)

Labor Code section 6432, subdivision (g), provides:

> 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.

Here, Guiriba testified that he was current on his Division-mandated training at the time of the hearing. As such, he was competent to offer testimony regarding the classification of the citation as Serious. Guiriba testified that employee exposure to improperly covered floor openings creates a realistic possibility of serious physical harm, such as fractures, dislocations, impalement, and death. The parties stipulated that Montejano's injury resulted in in-patent hospitalization and treatment for a period in excess of 24 hours. As such, there is not only a realistic possibility that the violation in Citation 2 could result in serious physical harm, but it was an actuality in this case.

Accordingly, the Division established a rebuttable presumption that Citation 2 was properly classified as Serious.

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

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

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

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

(Lab. Code §6432, subd. (c).)

Labor Code section 6432, subdivision (b), provides that the following factors may be taken into account: (A) Training for employees and supervisors relevant to preventing employee

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

The Appeals Board has recognized that the employer has the burden to establish that it did not, and could not with the exercise of reasonable diligence, know of the presence of the violation:

> To prove that Employer could not have known of the violative condition by exercising reasonable diligence, Employer must establish that the violation occurred at a time and under the circumstances which could not provide Employer with a reasonable opportunity to have detected it. [Citations.]

(*National Steel and Shipbuilding Company*, Cal/OSHA App. 10-3791, Decision After Reconsideration (Nov. 17, 2014).)

Here, as set forth above, the insufficient warning signage on the cover was plainly visible. Employer cannot claim that it was unaware of the improperly marked cover absent evidence that the violation occurred in such a short time frame that it did not have reasonable opportunity to observe the violation.

Even if it could be found that Employer only learned of the violation at the time of the accident, Employer failed to take effective action to ensure the violation was corrected. Employer did not require RJP to properly mark the covering or take steps to have one of Employer's employees mark it. The violation was not corrected until after the Division's inspection, which happened two weeks after the accident.

Therefore, Employer failed to rebut the Division's classification of Citation 2 as Serious.

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

In order for a citation to be classified as Accident-Related, there must be a showing by the Division of a "causal nexus between the violation and the serious injury." (*Webcor Construction LP dba Webcor Builders*, Cal/OSHA App. 317176766, Denial of Petition for Reconsideration (Jan. 20, 2017).) The violation need not be the only cause of the accident, but the Division must make a "showing [that] the violation more likely than not was a cause of the injury." (*Id.*, citing *MCM Construction, Inc.*, Cal/OSHA App. 13-3851, Decision After Reconsideration (Feb. 22, 2016).)

At the time of the accident in 2018, Labor Code section 6302, subdivision (h), provided that a "serious injury" included, among other things, any injury or illness occurring in a place of employment or in connection with any employment which required inpatient hospitalization for a period in excess of 24 hours for other than medical observation. As set forth above, the parties stipulated that Montejano was hospitalized for more than 24 hours, during which time he received treatment for his injuries. Accordingly, his injury meets the definition of "serious injury."

The violation was that the floor opening cover did not have the required signage warning employees of the opening and not to remove the cover. It is reasonable to infer that if the covering had the required language warning not to remove it because there was a floor opening underneath, Montejano would not have mistaken the plywood cover for scrap and attempted to remove it, which led to him falling through the floor opening. As such, Montejano's serious injury was caused by the violation.

Therefore, Citation 2 is properly characterized as Accident-Related.

10. Are the proposed penalties 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. (*Sacramento County Water Agency Department of Water Resources,* Cal/OSHA App. 1237932, Decision After Reconsideration (May 21, 2020).)

Here, Employer stipulated that the Division calculated penalties in accordance with its procedures and policies for Citation 1, Items 1 through 3. As such, if applicable, the adjustment factors set forth for those citation items are presumed to be reasonable for the calculation of the penalty for Citation 2.

As to Citation 2, section 336, subdivision (c), provides that the base penalty for a Serious violation shall be assessed at $18,000. Section 336, subdivision (d)(7), provides that the penalty for a Serious violation causing death or serious injury, illness, or exposure, may only be reduced for Size.

Section 335, subdivision (b), and section 336, subdivision (d)(1), provide that no adjustment may be made for Size when an employer has over 100 employees. The Proposed Penalty Worksheet submitted as Exhibit J-3, reflects that zero percent was applied as an adjustment factor for Size in each of the citations, indicating that Employer had more than 100

employees at the time the citation was issued. Employer did not dispute this adjustment factor. Accordingly, no adjustment may be made for Size.

As discussed above, Citation 2 is properly classified as Serious and the violation resulted in a serious injury. Employer presented no evidence that the penalty proposed for Citation 2 was miscalculated, the regulations were improperly applied, or the circumstances warrant a reduction.

Based on the foregoing, the penalties in Citation 1, Items 1 through 3, and Citation 2, are found to be reasonable.

Conclusions

For Citation 1, Item 1, a Regulatory violation of section 341.4 was established because Employer did not appeal the existence of the violation. Notwithstanding that the violation was not at issue, the Division presented sufficient evidence that a project permit was not posted at the job site. The parties stipulated that the proposed penalty is reasonable.

For Citation 1, Item 2, the Division established a General violation of section 3395, subdivision (i), because Employer's HIPP did not contain all the required elements. Specifically, Employer's HIPP lacked the required provisions for acclimatization methods and procedures in accordance with section 3395, subdivision (g). The parties stipulated that the proposed penalty is reasonable.

For Citation 1, Item 3, the Division established a General violation of section 3395, subdivision (h), because Employer did not provide effective heat illness training to its employees. Specifically, because Employer's HIPP lacked the required provisions for acclimatization methods and procedures, training on the HIPP would also be lacking in that area. The parties stipulated that the proposed penalty is reasonable.

For Citation 2, the evidence supports a finding that Employer violated section 1632, subdivision (b)(3), by failing to ensure that a floor opening cover was properly marked with legible letters not less than one inch high stating "Opening—Do Not Remove." The violation was properly classified as Serious and characterized as Accident-Related. The proposed penalty is reasonable.

Order

It is hereby ordered that Citation 1, Items 1, 2, and 3, and Citation 2 are affirmed and the associated penalties are sustained.

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

Dated: 05/04/2022

Kerry Lewis
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.**