BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1267767**
FRAMING BY SUPERIOR, INC. **dba FRAMING BY SUPERIOR** **265 N. JOY STREET, SUITE 100** **CORONA, CA 92879** **Employer**	**DECISION**

Statement of the Case

Framing by Superior, Inc. (Employer), is a residential developer. Beginning October 3, 2017, the Division of Occupational Safety and Health (the Division), through Compliance Officer Jason Brissey, conducted an inspection at 28310 Glenn Ranch Road in Lake Forest, California (the site) in response to an injury**.**

On March 23, 2018, the Division issued four citations to Employer alleging violations of California Code of Regulations, title 8.[1] Citation 1, Item 1, alleges that Employer failed to provide effective heat illness prevention training. Citation 1, Item 2, alleges that Employer's Heat Illness Prevention Plan (HIPP) does not contain the required provisions regarding access to shade in compliance with the safety order. Citation 2, Item 1, alleges that Employer failed to effectively implement and maintain its written Injury and Illness Prevention Program (IIPP) by: failing to identify and evaluate workplace hazards; failing to correct unsafe work conditions and/or work practices; and failing to provide effective training and instruction on workplace hazards. Citation 3, Item 1, alleges that Employer failed to use a bracket scaffold in accordance with the manufacturer's recommendations. Citation 4, Item 1, alleges Employer failed to install railings on all bracket scaffolds exposing employees to falls of more than 7.5 feet.

Employer filed timely appeals of the citations, contesting the existence of the violations and asserting numerous affirmative defenses for all citations.[2] Additionally, Employer contested the classifications, and the reasonableness of the proposed penalties for Citations 2, 3, and 4.

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

This matter was heard by Rheeah Yoo Avelar, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, in West Covina, California, on October 8, 2019, December 11, 2019, and December 12, 2019. Manuel Melgoza, of Donnell, Melgoza, and Scates, LLP, represented Employer. Jerry Magana, District Manager, represented the Division. The matter was submitted for decision on March 21, 2020.

Issues

1. Did Employer fail to provide training regarding heat illness prevention?

2. Did Employer's procedures to provide shade comply with the minimum temperature requirements and employee accommodations standards set forth in the safety order?

3. Did Employer fail to effectively implement and maintain its IIPP?

4. Did Employer fail to use a bracket scaffold in accordance with the manufacturer's recommendations?

5. Did Employer fail to install railings on all bracket scaffolds?

6. Did the Division establish the rebuttable presumption that Citation 2 and Citation 4 were properly classified as Serious?

7. Did Employer rebut the presumption that Citation 2 and Citation 4 were properly classified as Serious by demonstrating that it did not know and could not, with the exercise of reasonable diligence, have known of the existence of the violations?

8. Are the proposed penalties for Citation 2 and Citation 4 reasonable?

Findings of Fact

1. Employer's HIPP in effect at the time of the inspection contains sections pertaining to the provision of shade structures when the temperature meets or exceeds 80 degrees Fahrenheit, and the provision of a sufficient number of shade structures to accommodate all of the employees who may be on a rest period.

2. Gabriel Jaramillo (Jaramillo), the injured employee, fell about 18 feet from a scaffold.

3. Jaramillo was a new employee, having worked between one to four weeks prior to the injury.

4. Employer did not provide Jaramillo heat illness prevention training or scaffold training.

5. Employer's foreman at the work site, Hector Ivan Valdez Linares, inspected the scaffolding daily and did not observe any signs of damage or extensive use.

6. All scaffolds at the work site were bracket scaffolds installed approximately 18 feet above ground level.

7. Employer permitted employees to work on a scaffold with access to an area of the scaffold that was visibly missing a mid-rail.

8. Falling 18 feet from a scaffold can result in death or serious physical harm.

9. Penalties were not calculated in accordance with the Division's policies and procedures.

Analysis

1. Did Employer fail to provide training regarding heat illness prevention?

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

> 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 be reasonably be anticipated to result in exposure to the risk of heat illness.

In Citation 1, Item 1, the Division alleges:

> Prior to and during the course of the inspection, the Employer failed to ensure that effective training in the topics included under this subsection were provided to each supervisory and non-supervisory employee before employees began work which could reasonably be anticipated to result in exposure to the risk of heat illness.

The Division has the burden of proving a violation by a preponderance of the evidence. (*ACCO Engineered Systems*, Cal/OSHA App. 1195414, Decision After Reconsideration (Oct. 1, 2019).) "Preponderance of the evidence" is usually defined in terms of probability of truth, or of evidence that when weighted with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence. (*Timberworks Construction, Inc.*, Cal/OSHA App. 1097751, Decision After Reconsideration (Mar. 12, 2019).)

Where the Division presents evidence which, if believed, is of such a nature as to support a finding if unchallenged, then the burden of producing evidence shifts to Employer to present convincing evidence to avoid an adverse finding as to Employer. (*RNR Construction, Inc*., *supra*, Cal/OSHA App. 1092600.) "When the evidence is in conflict regarding a material fact, an ALJ may resolve the conflict by rejecting evidence proffered by one party when stronger evidence is available to that party, but the party chose to offer the weaker evidence instead. [Citations.]" (*R & L Brosamer, Inc*., Cal/OSHA App. 03-4832, Decision After Reconsideration (Oct. 5, 2011), fn. 6; *C.C. Myers, Inc.*, Cal/OSHA App. 94-1862, Decision After Reconsideration (Nov. 25, 1998). [Risk manager's unsupported testimony viewed as weak because it was within the employer's power to produce the more compelling evidence of training records and trainee testimony.])

The safety order requires employers to provide employees heat illness prevention training. The Division asserted that Employer did not train Jaramillo on heat illness prevention. Employer provided no testimony or documentary evidence to refute the Division's assertions. Employer produced a training record related to heat illness prevention conducted on a day Jaramillo was at work, but there is no evidence that Jaramillo received the training.

Therefore, the Division established a violation of section 3395, subdivision (h)(1). Accordingly, Citation 1, Item 1, is affirmed.

2. Did Employer's procedures to provide shade comply with the minimum temperature requirements and employee accommodations standards set forth in the safety order?

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

> (i) 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.

Citation 1, Item 2, references section 3395, subdivision (d)(1), which 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.

In Citation 1, Item 2, the Division alleges:

Prior to and during the course of the inspection, the Employer failed to establish, implement, and maintain an effective written Heat Illness Prevention Plan for employees in that:

Instance 1: The HIPP procedures for access to shade was not in compliance with the 80 degree trigger temperature referred to in subsection (d).

Instance 2: The HIPP procedures for access to shade was not in compliance with providing shade to all employees who might be on rest periods referred to in subsection (d).

Instance 1: Failure to provide shade when the temperature exceeded 80 degrees.

On October 6, 2017, Employer initially provided the Division a written HIPP that contained an 85 degree minimum threshold for providing access to shade. Employer's Director of Safety, Cindy Bevis (Bevis), credibly testified that she later realized that she provided an out of date version of Employer's HIPP. In January of 2018, Employer sent the Division its updated written

HIPP that was in effect at the time of the inspection.[3] The updated HIPP required that shade structures will be opened and placed as close as practicable to the workers when the temperature equals or exceeds 80 degrees Fahrenheit. The Division thus failed to demonstrate that the first instance is a violation of the safety regulation.

Instance 2: Failure to provide sufficient access to shade for all employees who might be on rest periods.

The safety order requires that employers provide sufficient access to shade to accommodate all employees who may be on rest periods. Employer's written HIPP that was in effect at the time contains shade procedures requiring that enough shade structures will be available at the site to accommodate the number of employees on recovery or rest periods. Employer's HIPP is compliant with the requirement that enough shade structures be available to accommodate the number of employees on rest periods. The Division thus failed to demonstrate that the second instance is a violation of the safety regulation.

For the reasons above, the Division failed to establish a violation of section 3395, subdivision (i)(1). Accordingly, Employer's appeal of Citation 1, Item 2, is granted.

3. Did Employer fail to effectively implement and maintain its IIPP?

Section 1509, subdivision (a), provides:

> (a) Every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program in accordance with section 3203 of the General Industry Safety Orders.

The Division's citation refers to section 3203, subdivisions (a)(4), (a)(6), and (a)(7), which require the IIPP to:

> (4) Include procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices. Inspections shall be made to identify and evaluate hazards:
>
> (A) When the Program is first established;

[3] During the hearing, the Division argued that the updated HIPP and other training records were not provided by Employer during discovery and objected to the admission of Exhibits H and J. However, Employer provided sufficient proof that the documents had been provided to the Division prior to the hearing date. Accordingly, Exhibits H and J are admitted into the record.

Exception: Those employers having in place on July 1, 1991, a written Injury and Illness Prevention Program complying with previously existing section 3203.

(B) Whenever new substances, processes, procedures, or equipment are introduced to the workplace that represent a new occupational safety and health hazard; and

(C) Whenever the employer is made aware of a new or previously unrecognized hazard.

[….]

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

(A) When observed or discovered; and,

(B) When an imminent hazard exists which cannot be immediately abated without endangering employee(s) and/or property, remove all exposed personnel from the area except those necessary to correct the existing condition. Employees necessary to correct the hazardous condition shall be provided the necessary safeguards.

(7) Provide training and instruction:

(A) When the program is first established;

Exception: Employers having in place on July 1, 1991, a written Injury and Illness Prevention Program complying with the previously existing Accident Prevention Program in Section 3203.

(B) To all new employees;

(C) To all employees given new job assignments for which training has not previously been received;

(D) Whenever new substances, processes, procedures or equipment are introduced to the workplace and represent a new hazard;

(E) Whenever the employer is made aware of a new or previously unrecognized hazard; and,

(F) For supervisors to familiarize themselves with the safety and health hazards to which employees under their immediate direction and control may be exposed.

In Citation 2, Item 1, the Division alleges:

Prior to and during the course of the inspection, including but not limited to, on October 3, 2017, the Employer failed to effectively implement their [*sic*] written Injury and Illness Prevention Program in that:

1. The Employer failed to identify and evaluate workplace hazards by performing inspections to identify unsafe conditions and work practices for employees in accordance with the written procedures of their written Injury and Illness Prevention Program, which is essential to their overall program.

2. The Employer failed to correct unsafe work conditions and/or work practices for exposed employees which were identified from, including but not limited to, bracket scaffold inspections, in accordance with the written procedures of their Injury and Illness Prevention Program, which is essential to their overall program.

3. The Employer failed to provide effective training and instruction on workplace hazards for which they may be exposed in accordance with the written procedures of their Injury and Illness Prevention Program, which is essential to their overall program.

Instance 1: Failure to perform inspections to identify hazards in accordance with IIPP

Pursuant to section 3203, subdivision (a), employers are required to establish, implement and maintain an effective IIPP. Employer must have procedures in place for identifying and evaluating workplace hazards, and these procedures are to include "scheduled periodic inspections." (*Brunton Enterprises, Inc.*, Cal/OSHA App. 08-3445, Decision After Reconsideration (Oct. 11, 2013).)

Merely having a written IIPP is insufficient to establish implementation. (*Los Angeles County Department of Public Works*, Cal/OSHA App. 96-2470, Decision After Reconsideration

(Apr. 5, 2002).) Although an employer may have a comprehensive IIPP, the Division may still demonstrate a violation by showing that the employer failed to implement one or more elements. (*HSS Construction*, Cal/OSHA App.12-0492, Decision After Reconsideration (Feb. 26, 2015).)

To establish an IIPP violation, the Division must prove that flaws in Employer's written IIPP amounted to a failure to "establish" or "implement" or "maintain" an "effective" program. A single, isolated failure to "implement" a detail within an otherwise effective program does not necessarily establish a violation for failing to maintain an effective program where that failure is the sole imperfection. (See *GTE California*, Cal/OSHA App. 91-107, Decision After Reconsideration (Dec. 16, 1991); *David Fischer, dba Fischer Transport, A Sole Proprietorship*, Cal/OSHA App. 90-762, Decision After Reconsideration (Oct. 16, 1991).)

However, an IIPP is not effectively maintained if there is even one deficiency, if that deficiency is shown to be essential to the overall program. (*Keith Phillips Painting*, Cal/OSHA App. 92-777, Decision After Reconsideration (Jan. 17, 1995).) Procedures to ensure compliance with safety and healthy work practices and procedures for correcting unsafe or unhealthy conditions, including imminent hazards, are essential to the overall program. (*GTE California, supra*, Cal/OSHA App. 91-107*; David Fischer, dba Fischer Transport, A Sole Proprietorship, supra*, Cal/OSHA App. 90-762.) Whether an employer has implemented its IIPP is a question of fact. (*National Distribution Center, LP*, et al., Cal/OSHA App. 12-0391, Decision After Reconsideration (Oct. 5, 2016).)

To establish a violation, the Division must show that Employer did not perform inspections to identify unsafe conditions in accordance with the procedures in its IIPP.

Employer's Code of Safe Practices provides, "2. All equipment, materials, and, job sites should be regularly inspected for safety." (Exhibit 12.)

Employer's written procedures for hazard identification require, in relevant part:

> Periodic inspections are performed according to the following schedule:
> […]
>
> 3. Daily inspections for required construction tasks/ operations.
> […]
>
> 5. When new substances, processes, procedures or equipment, which present potential new hazards, are introduced into our workplace/jobsite.

9. Whenever workplace/jobsite conditions warrant an inspection.

Periodic inspections consists of identification and evaluation of workplace hazards utilizing applicable sections of the Hazard Assessment checklist/Inspection Forms […] and other effective methods to identify and evaluate workplace hazards.

(Exhibit 9.)

Valdez credibly testified he performed daily inspections. Valdez testified he started and ended each day with a walk through to assess the conditions of the work site, checking for safety before employees begin work and after they finish. Additionally, he testified that he constantly walked through the work site to ensure that employees used tools and safety equipment properly.

Valdez's inspections included visual inspections of the scaffolding. He testified that he inspected them prior to installation and after dismantling. Valdez testified that scaffolding is installed and set up two or three days ahead of use for inspection because once the scaffolding is installed, it cannot be inspected underneath. He testified that each segment of scaffolding needs inspection as it is set up, so installation does not always finish in one day. Valdez testified that he performed daily walk-throughs on assembled scaffolds to ensure railings were in place and planks were overlapping.

Valdez testified that he filled out inspection forms on a daily basis, placed them in a folder, and returned them to Employer weekly in an envelope. Employer did not provide any copies of completed forms. However, Employer did provide completed Whalen-Jack Scaffold Bracket Inspection forms ranging from September 5, 2017, through October 2, 2017. All of the scaffold inspection forms show Valdez's signature and date of signature.

When asked if he ever failed to fill out any inspection forms, Valdez testified, "I don't recall. Sometimes when you arrive early and you're in a hurry, you have 20 workers and you have to spread them around so that they can work." His statement may explain why some daily inspection forms do not appear to be filled out contemporaneously with the inspection in that some dates are repeated.

When asked how Employer would know Valdez was doing his job, Valdez replied that Bevis came twice per week, and a representative from an outside safety company came once per week, to perform spot checks.

Employer's IIPP requires periodic inspections to occur daily, whenever new equipment is introduced, and whenever needed. Valdez's testimony and the weight of the evidence supports a

finding that Employer performed inspections in accordance with its IIPP. The Division thus failed to establish that Employer violated section 3203, subdivision (a)(4).

Instance 2: Failure to correct unsafe work conditions

Section 3203, subdivision (a)(6), requires employers to establish, implement and maintain procedures to identify and correct hazards. A written plan that states, "action shall be taken on reported unsafe conditions," may satisfy the requirement to have a written plan. Section 3203, subdivision (a)(6), "is a performance standard, and creates a goal or requirement while leaving employers to design appropriate means of compliance under various working conditions." (*MCM Construction Inc.*, Cal/OSHA App. 13-3851, Decision After Reconsideration (Feb. 22, 2016).) "The issue is generally not that the IIPP is flawed, but that the employer has neglected to implement that IIPP, as it has failed to correct a hazard at the workplace." (*Id.*, citing *Contra Costa Electric, Inc*., Cal/OSHA App. 09-3271, Decision After Reconsideration (May 13, 2014).) "Employers are given wide latitude in how they choose to correct hazards, and presumably, creation of a new written procedure may not always be necessary." (*MCM Construction, Inc.*, *supra,* Cal/OSHA App. 13-3851.) Proof of implementation requires evidence of actual responses to known or reported hazards. Conversely, proof of failures to respond to known or reported hazards establishes a violation of the safety regulation through a failure to implement a plan. It is the employer's burden to show that it has actually responded to known or reported hazards. (*Bay Area Rapid Transit District*, Cal/OSHA App. 09-1218, Decision After Reconsideration and Order of Remand (Sep. 6, 2012) [reversed on other grounds].)

A broken weld was discovered in a bracket scaffold after Jaramillo fell. However, there is no evidence showing that the faulty weld was in existence, or discoverable through Valdez's inspections and Employer's spot checks, prior to installation or after assembly. The Division presented no evidence showing that any unsafe work conditions existed at the work site. Accordingly, the Division cannot establish that Employer failed to correct unsafe work conditions.

Without evidence from the Division that unsafe work conditions existed, a violation of section 3203, subdivision (a)(6), cannot be established.

Instance 3: Failure to provide effective training on hazards

The purpose of section 3203, subdivision (a)(7), is to provide employees with the knowledge and ability to recognize, understand and avoid the hazards they may be exposed to by a new work assignment through training and instruction. (*Siskiyou Forest Products*, Cal/OSHA App. 01-1418, Decision After Reconsideration (Mar. 17, 2003).) The Appeals Board considers training as the touchstone of any effective IIPP. (*National Distribution Center, LP, et al*, *supra,* Cal/OSHA App. 12-0391, Decision After Reconsideration (Oct. 5. 2015).) The Division may

prove a violation of section 3203, subdivision (a)(7), by showing that the implementation of the training required by this section is inadequate. It is not enough for employers to simply provide employees training, the training must also be of sufficient quality to make employees "proficient or qualified" on the subject of the training. (*Ibid.*, discussing the definition of "training.")

Employer submitted several training records of its employees. The records show Jaramillo received a safety orientation and fall protection training, but do not indicate he received any training related to scaffold work and heat illness. Employer's scaffold training records do not indicate that Jaramillo attended the training, although he was employed by Employer at the time the training was conducted. Finally, as discussed previously, Employer's records of heat illness training conducted on a day Jaramillo was at work do not show that he received training.

Employer's records show that heat illness prevention and scaffold trainings were conducted on days while Jaramillo was at work. These records do not show that Jaramillo received these two trainings that clearly would have been relevant to his job hazards. For these reasons, the Division established that Employer violated section 3203, subdivision (a)(7).

The Division alleged three instances of violations of section 1509, but "only a single instance is required to uphold a violation." (*West Coast Arborists, Inc.*, Cal/OSHA App. 1180192, Denial of Petition for Reconsideration (Apr. 26, 2019).) The Division did not establish a violation of the first instance alleging a failure to perform inspections for unsafe conditions or work practices because the weight of the evidence showed that Employer conducted periodic inspections. The Division did not establish a violation of the second instance alleging a failure to correct unsafe work conditions, because it did not provide evidence of any unsafe conditions in existence. However, the Division did establish a failure to provide effective training and instruction on workplace hazards because the evidence demonstrated an employee who was exposed to scaffolds and heat did not receive scaffold training or heat illness prevention training. Thus, Citation 2, Item 1, is affirmed.

4. Did Employer fail to use a bracket scaffold in accordance with the manufacturer's recommendations?

Section 1637, subdivision (b)(4), provides:

(b) Scaffold Design and Construction.

(4) Manufactured scaffolds shall be used in accordance with the manufacturer's recommendations.

In Citation 3, Item 1, the Division alleges:

> Prior to and during the course of the inspection, including, but not limited to, on October 3, 2017 the Employer failed to use a bracket scaffold in accordance with the manufacturer's recommendations at the job site located near 28310 Glenn Ranch Road in Lake Forest, CA in that scaffolding showing signs of damage or extensive use was not discarded or replaced.

The manufacturer's recommendation for the Whalen-Jack scaffolding provides, in relevant part:

> ALL WHALEN-JACK EQUIPMENT MUST BE INSPECTED BEFORE AND AFTER EVERY USE. SCAFFOLD SHOWING ANY SIGNS OF DAMAGE OR EXTENSIVE USE MUST BE DISCARDED AND REPLACED. CONSULT JOBSITE FOREMAN IF THERE IS ANY QUESTION REGARDING INTEGRITY OF SCAFFOLD.

(Exhibit 17.)

In order to prove a violation, the Division must first show that scaffolding showed signs of damage or extensive use, and then show that Employer failed to discard or replace it according to the manufacturer's recommendations.

Valdez informed Brissey that, after Jaramillo's fall, Employer discovered a piece of the bracket scaffold where a weld failed and broke. However, the Division did not establish when the particular weld on the scaffold was damaged.

As discussed previously, Valdez testified that he visually inspected the worksite every day. He testified that he inspected scaffolding prior to installation. Valdez testified that if he were to find unsafe scaffolding prior to installation, he tagged it, or withdrew it to his office so it was not put to use. Additionally, Valdez testified that, after scaffolding was installed, he climbed up every day to make sure that the handrails and wood were all in place. He further testified that if he discovered damaged scaffolding after dismantling, the damaged parts were separated and placed in a padlocked area. He explained the damaged parts were eventually sent back to the office and not placed in storage boxes with other parts.

The Division did not establish that any part of the scaffolding equipment was showing damage, visually or otherwise, prior to installation or at any time, which would have required Employer to discard or replace it. Thus, Employer's appeal of Citation 3, Item 1, is granted.

5. Did Employer fail to install railings on all bracket scaffolds?

In Citation 4, Item 1, the Division alleged a violation of section 1645, subdivision (d)(3),which provides:

> (d) Bracket Scaffolds. The use of bracket scaffolds shall be permitted only when through-bolted to walls, with at least 5/8-inch diameter bolts; welded to steel tanks; secured with a metal stud attachment device; or, hooked over a well-secured and adequately strong supporting member.
>
> NOTE: This Order does not prohibit the use of bracket scaffolds that are an integral part of movable form panels or similar construction. (See Plates B-20 and B-21, Appendix.)
>
> All form scaffolds shall be designed and erected with a minimum safety factor of 4, computed on the basis of the maximum rated load; i.e., the total of all loads including the working load, the weight of the scaffold, and such other loads as may be reasonably anticipated.
> […]
>
> (3) Railings shall be installed on bracket scaffolds for all heights 7 1/2 feet or more above the ground.
>
> NOTE: For railing requirements, see Section 1620.

In Citation 4, Item 1, the Division alleges:

> Prior to and during the course of the inspection, including, but not limited to, on October 3, 2017, the Employer failed to install railings in accordance with section 1620 on all bracket scaffolds exposing employees to falls more than 7 ½ feet from the ground, at the job site located near 28310 Glenn Ranch Rd. in Lake Forest.

In order to establish a violation of section 1645, subdivision (d)(3), the Division must demonstrate that Employer's scaffolds were bracket scaffolds, installed at 7.5 feet or higher above ground, and missing railings. Specifically, the Division asserted that Employer did not satisfy the requirement that scaffold guardrails must include mid-rails in accordance with section 1620.

There was no dispute that the scaffolds used at Employer's work site were bracket scaffolds and that they were installed at approximately 18 feet above ground. As such, the Division established the first two components of the violation.

The Division presented several photographs of scaffolds mounted on the roofline of buildings under construction at the worksite. The photographs show that wooden planks for walking on the scaffolding are in place. They also show that some top rails, mid-rails, and bottom rails are not in place at various points along the scaffolding. The mid-rails, in particular, are missing in several corners where the scaffolding turns to wrap around the sides of buildings.

The buildings in the photographs are at various stages of completion. For example, some have roof sheeting and while others only have roof framing. It is not clear if the scaffolds in the photographs are similarly at different stages in the process of assembly, or if Employer deemed the entire installation to be complete. Nonetheless, one photograph shows two workers standing and working on a scaffold, indicating that Employer considered the scaffold in the photograph to be fully assembled, inspected, and fit for use.

Exposure

The Division bears the burden of proving employee exposure to a violative condition addressed by a safety order by a preponderance of the evidence. (*Benicia Foundry & Iron Works*, Inc., Cal/OSHA App. 00-2976, Decision After Reconsideration (Apr. 24, 2003).) The Appeals Board has articulated several tests for determining employee exposure. In *Dynamic Construction Services, Inc.*, Cal/OSHA Insp. 1005890, Decision After Reconsideration (Dec. 1, 2016), the Appeals Board stated:

> The Division may establish exposure in one of two ways. First, the Division may demonstrate employee exposure by showing that an employee was actually exposed to the zone of danger or hazard created by a violative condition. (*Benicia Foundry & Iron Works, Inc*., Cal/OSHA App. 00-2976, Decision After Reconsideration (April 24, 2003).) 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. [Citation.]
>
> Alternatively, "the Division may establish the element of employee exposure to the violative condition without proof of actual exposure by showing employee access to the zone of danger based on evidence of reasonable predictability that employees while in the course of assigned work duties, pursuing personal activities during work, and normal means of ingress and egress would have access to the zone of danger." [Citation.] Stated another way, employee exposure may be established by showing the area of the hazard was "accessible" to employees such that it is reasonably predictable by operational necessity or otherwise, including inadvertence, that employees have been, are, or will be in the zone of danger. [Citations.] Under this "access" exposure analysis, the Division may establish

> exposure by showing that it was reasonably predictable that during the course of their normally work duties employees "might be" in the zone of danger. [Citation.] "The zone of danger is that area surrounding the violative condition that presents the danger to employees that the standard is intended to prevent." [Citation.] The scope of the zone of danger is relative to the wording of the standard and the nature of the hazard at issue. [Citation.]

In determining whether exposure exists, the Appeals Board fully considers all of the evidence placed in the record by the parties. (*Home Depot USA, Inc. dba Home Depot #6683*, Cal/OSHA App. 1014901, Decision After Reconsideration (Jul. 24, 2017).)

i. Actual Exposure

Brissey testified that the danger zone is generally measured at six feet from an edge where a fall could occur. However, Brissey also testified that no such delineation or terminology applies to scaffolding. A review of safety orders related to falls from unprotected edges reveals that, section 1671.2, subdivision (a)(2), found in Article 24: Fall Protection, requires that control lines be erected not less than six feet from an unprotected edge. Thus, the danger zone in the context of this citation is deemed to be not less than six feet from where any railings are missing.

Bevis testified that the two workers in the photograph were Employer's employees. The photograph shows they are working next to each other on a scaffold where no mid-rail is installed at a corner. Valdez testified that the workers were about ten feet away from the corner. Valdez testified that wooden pieces, called tails, were placed two feet apart and he counted five tails from the corner to the employee closest to the corner.

The Division did not provide any evidence that either of these employees were ever actually at or within six feet of the corner and thus actually exposed to the fall hazard presented by the missing mid-rail. Therefore, the Division did not establish actual exposure.

ii. Access to the Zone of Danger

As cited above, the Appeals Board has held the Division may establish exposure by showing that it was reasonably predictable that during the course of normal work duties, or inadvertently, employees might be in the zone of danger.

Bevis testified that the employees in the photograph move along the scaffolding. She further testified that the employees would not be working in the area on the other side of the corner, thereby not needing to cross the area where the mid-rail was missing. The design of the scaffolding assembly, however, does not restrict employees to a limited area.

The scaffolding appears to be set up to allow employees access all along the perimeter of the roofline, allowing movement throughout the scaffolding. There is no barricade preventing employees from deliberately or inadvertently crossing the unprotected corner and travelling to other locations. With direct and unimpaired access to the fall hazard at the corner, it seems reasonably predictable that employees might be in the zone of danger.

The weight of the evidence leans toward a finding that Employer exposed its employees to fall hazards that the guardrails mandated in safety orders are designed to prevent. Therefore, the Division established a violation of section 1645, subdivision (d)(3). Accordingly, Citation 4, Item 1, is affirmed

6. Did the Division establish the rebuttable presumption that Citation 2 and Citation 4 were properly classified as Serious?

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

(a) There shall be a rebuttable presumption that a "serious violation" exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation. The 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.
[...]

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

(e) "Serious physical harm," as used in this part, means any injury or illness, specific or cumulative, occurring in the place of employment or in connection with any employment, that results in any of the following:

(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.

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).)

Brissey 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. (See §6432, subd. (g).)

Citation 2

Employer failed to provide scaffold safety training to Jaramillo, who was subsequently exposed to the hazards of working on scaffolding, and suffered a serious injury requiring several days of hospitalization. Brissey testified that Employer's failure to provide training as required by the safety regulation and Employer's own IIPP prior to being exposed to hazards can result in serious injury or death. Not only was there a realistic possibility of serious physical harm or death as a result of the hazard, but it was an actuality in the instant matter.

Citation 4

Employer failed to install mid-rails on its bracket scaffolds which were installed at approximately 18 feet above ground, exposing its employees to fall hazards. Brissey competently testified that a fall from a height of 7.5 feet above ground would realistically result in serious injury or death.

For the foregoing reasons, the Division established a rebuttable presumption that Citation 2 and Citation 4 were properly classified as Serious.

7. Did Employer rebut the presumption that Citation 2 and Citation 4 were properly classified as Serious by demonstrating that it did not know, and could not, with the exercise of reasonable diligence, have known of the existence of the violations?

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

(c) If the division establishes a presumption pursuant to subdivision (a) that a violation is serious, the employer may rebut the presumption and establish that a violation is not serious 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. The employer may accomplish this by demonstrating both of the following:

(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).

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

The Appeals Board has long held that hazardous conditions in plain view constitute serious violations since the employer could detect them by exercising reasonable diligence. (*Home Depot USA, Inc.*, Cal/OSHA App. 15-2298, Decision After Reconsideration (May 16, 2017) citing *Fibreboard Box & Millwork Corp.*, Cal/OSHA App. 90-492, Decision After Reconsideration (Jun. 21, 1991).)

Citation 2

Under section 1509 and Employer's own IIPP, Employer is responsible for ensuring that new employees and employees with new assignments or equipment receive training and instruction on work hazards to which they may be exposed. Employer did not ensure that Jaramillo received heat illness prevention training or scaffold training even though he was at work on the days Employer conducted these trainings. Employer also did not take effective action to eliminate Jaramillo's exposure to heat hazards or to scaffold hazards, as the evidence shows he was working outside on a scaffold at the time of his injury.

Thus, Employer did not meet its burden to show that it took all the steps a reasonable and responsible employer in like circumstances should be expected to take to prevent the violation, or take effective action to eliminate employee exposure to hazards created by the violation as soon as the violation was discovered.

Citation 4

Employer was responsible for all of the scaffold installation at the worksite. Employer also performed daily inspections of scaffolds and weekly spot checks of the work site. The guardrails that are missing are in plain view from the ground.

Employer permitted employees to work on a scaffold clearly missing a mid-rail. Employer failed to show that it took effective action to eliminate employee exposure to the fall hazard created by the violation. Thus, Employer did not meet its burden to show that it took all the steps a reasonable and responsible employer in like circumstances should be expected to take to prevent the violation, or take effective action to eliminate employee exposure to hazards created by the violation as soon as the violation was discovered.

For the foregoing reasons, Employer failed to rebut the presumption that Citation 2 and Citation 4 were properly classified as Serious. Accordingly, the Serious classifications are sustained.

8. Are the proposed penalties for Citation 2 and Citation 4 reasonable?

Penalties calculated in accordance with the penalty setting regulations set forth in sections 333 through 336 are presumptively reasonable and will not be reduced absent evidence that the amount of the proposed civil penalty was miscalculated, the regulations were improperly applied, or that the totality of the circumstances warrant a reduction. (*Stockton Tri Industries, Inc*., Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).)

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

The Appeals Board has held that if the Division fails to establish all of the facts supporting the implementation of the penalty calculation, the employer is to be given maximum credit. (*C.A. Rasmussen, Inc.*, Cal/OSHA App. 08-0219, Decision After Reconsideration (Jul. 19, 2012).)

An initial penalty of $18,000 is assessed for all Serious violations. (§336, subd. (c).) The penalty may be further adjusted based on Extent and Likelihood and the result is the Gravity-based Penalty. Where Extent or Likelihood is rated as High, the base penalty is increased by 25 percent, where it is rated as Medium the base penalty is not adjusted, and where it is rated as Low the base penalty is decreased by 25 percent. (§336, subd. (c).)

Extent is based on the degree to which a safety order is violated. It is related to the ratio of the number of violations of a certain safety order to the number of possibilities for a violation at the work site. It is an indication of how widespread the violation is. Extent is rated Low when an isolated violation of the standard occurs, Medium when occasional violation of the standard occurs, and High when numerous violations of the standard occur.

Likelihood is the probability that injury, illness, or disease will occur as a result of the violation. Thus, Likelihood is based on (i) the number of employees exposed to the hazard created by the violation, and (ii) the extent to which the violation has in the past resulted in injury, illness, or disease to the employees of the firm as shown by experience, available statistics, or records. Depending on the above, Likelihood is rated as Low, Moderate, or High.

Section 336 also provides adjustment factors for Good Faith, Size, and History.

The Good Faith of an employer is based upon the quality and extent of the safety program the employer has in effect and operating. (§335, subd. (c).) It includes the employer's awareness of CAL/OSHA, and any indications of the employer's desire to comply with the California Occupational Safety and Health Act. Section 336, subdivision (d)(2), allows for no reduction, or a reduction of 15 percent or 30 percent depending on the level of an employer's Good Faith.

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.

Section 335, subdivision (d), and section 336, subdivision (d)(3), provide that if an employer has not had a negative history of violations in the past three years, based upon specified criteria, the employer warrants a 10 percent reduction of the penalty for History.

Citation 2

Extent in the context of Citation 2 is the scope of Employer's failure to train. Brissey testified that Extent was Medium because three of the seven elements in section 3203, subdivision (a), were at issue, thus no adjustment was given. It is determined, however, that Employer only violated one of the seven elements of section 3203, subdivision (a), which relates to training. The

evidence demonstrated that the violation affected only one employee. For these reasons, the Medium rating is modified to a Low rating and 25 percent of the Base Penalty is subtracted.

Likelihood for Citation 2 is the probability that injury will occur as a result of Employer's failure to train. Brissey testified that, based on numbers Employer provided, 40 employees were exposed to the violation, so he gave Likelihood a Medium rating. The Division did not provide evidence to show the extent to which the violation has in the past resulted in injury or illness. For this reason, the Medium rating is modified to a Low rating and an additional 25 percent of the Base Penalty is subtracted.

Extent and Likelihood are both modified from Medium to Low ratings. Therefore, the resulting Gravity-based Penalty for Citation 2 is reduced by a total of 50 percent to $9,000.

Brissey did not explain why he applied a 15 percent adjustment factor for Good Faith. Without a basis for the 15 percent Good Faith adjustment, the Appeals Board must apply maximum credit. (*C.A. Rasmussen, Inc.*, *supra*, Cal/OSHA App. 08-0219.) Maximum Good Faith credit is therefore applied and the Gravity-based Penalty is reduced further by 30 percent.

Brissey testified that employer had over 100 employees. As Employer has more than 100 employees, no adjustment is warranted for Size.

Brissey testified that he did not give credit for History because Employer had a history of citations. However, Brissey did not provide further information about these prior citations. Without discussion of the examination or evaluation of Employer's records in the Division's file, Employer is entitled to the maximum credit for History. The Gravity-based Penalty is further reduced by another 10 percent.

This results in a 40 percent total adjustment to the Gravity-based Penalty, or $3,600, pursuant to section 336, subdivision (d). Accordingly, the resulting final Adjusted Penalty is $5,400.

Finally, the matter is not expedited and Division did not establish that Employer failed to abate the violation alleged in Citation 2. The Division did not substantiate why it did not apply a 50 percent abatement credit. For this reason, the full abatement credit of 50 percent must apply. The resultant penalty for Citation 2 is $2,700.

Citation 4

Extent in the context of Citation 4 is the number of guardrails missing from scaffolding. The Division established one mid-rail that was missing at the worksite. Brissey testified that he

deemed the Extent as Moderate, but he did not discuss the ratio of the number of violations to the number of possibilities for a violation at the work site. For these reasons, the Moderate rating is modified to Low and 25 percent of the Base Penalty is subtracted.

Likelihood in Citation 4 is the probability that injury will occur as a result of the missing guardrail. The evidence established that two employees were exposed. Brissey testified that he deemed Likelihood to be Moderate, but he did not discuss the extent to which the violation has in the past resulted in injury. For these reasons, the Medium rating is modified to a Low rating and an additional 25 percent of the Base Penalty is subtracted.

Extent and Likelihood are both modified from Medium to Low ratings. Therefore, the resulting Gravity-based Penalty for Citation 4 is reduced by a total of 50 percent to $9,000.

As discussed above in the penalty calculations for Citation 2, Employer is entitled to further reductions in the amount of 40 percent for Good Faith and History. Accordingly, the resulting final Adjusted Penalty is $5,400.

There was no evidence that Employer failed to abate the violation alleged in Citation 4. The Serious citation was not in the expedited process, resulting in an inference that the Division had verified that abatement had been completed. As such, Employer is entitled to an additional 50 percent reduction as an abatement credit. The resultant penalty for Citation 4 is $2,700.

Conclusions

The Division established a violation of section 3395, subdivision (h)(1). The Division presented evidence showing that Employer failed to provide at least one of its employees heat illness training before the employee began work that should be reasonably be anticipated to result in exposure to the risk of heat illness. Employer did not appeal the classification or penalty.

The Division failed to establish a violation of section 3395, subdivision (i)(1). Employer produced its HIPP that was in compliance with the safety order and in effect at the time of the inspection.

The Division established a violation of section 1509, subdivision (a). The Division presented evidence showing that Employer did not provide training on workplace hazards to employees exposed to those hazards. This violation was properly classified as Serious. The proposed penalty is not found to be reasonable and is recalculated applying maximum Extent, Likelihood, Good Faith, History, and abatement credits.

The Division failed to establish a violation of section 1637, subdivision (b)(4). The Division presented no evidence to show that Employer failed to use a bracket scaffold in accordance with the manufacturer's recommendations.

The Division established a violation of section 1645, subdivision (d)(3). The Division presented evidence showing that Employer failed to install railings on all bracket scaffolds. This violation was properly classified as Serious. The proposed penalty is not found to be reasonable and is recalculated applying maximum Extent, Likelihood, Good Faith, History, and abatement credits.

Order

It is hereby ordered that Citation 1, Item 1, is affirmed and the penalty of $635 is sustained.

It is further ordered that Citation 1, Item 2, is dismissed and the associated penalty is vacated.

It is further ordered that Citation 2, Item 1, is affirmed and the modified penalty of $2,700 is sustained.

It is further ordered that Citation 3, Item 1, is dismissed and the associated penalty is vacated.

It is further ordered that Citation 4, Item 1, is affirmed and the modified penalty of $2,700 is sustained.

Total penalties of $6,035 are affirmed and shall be assessed as set forth in the attached Summary Table.

Dated: 04/17/2020

Rheeah Yoo Avelar
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.**