BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1405107**
S. C. ANDERSON, INC. **11109 RIVER RUN BLVD., STE. 200** **BAKERSFIELD, CA 93311** **Employer**	**DECISION**

Statement of the Case

S.C. Anderson, Inc. (Employer) is a general contracting company that also performs construction management services for owner builders. Beginning June 3, 2019, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Daniel Pulido (Pulido), conducted an accident investigation at Employer's worksite located at 7301 Old River Road, in Bakersfield, California (the site).

On November 25, 2019, the Division issued one citation to Employer for an alleged violation of a section of the California Code of Regulations, title 8.[1] Citation 1, classified as Serious Accident-Related, alleges that Employer failed to ensure that roof openings were appropriately covered to prevent subcontractor employees from falling through an opening.

Employer filed a timely appeal contesting the existence the alleged violation, the classification, and the reasonableness of the proposed penalty. Employer also raised numerous affirmative defenses.

This matter was heard by Howard Isaac Chernin, Administrative Law Judge (ALJ), for the California Occupational Safety and Health Appeals Board (Appeals Board) in Los Angeles, California, on July 27, 2021, January 26 and 27, 2022, and February 16, 2022. ALJ Chernin conducted the video hearing with all participants appearing remotely via the Zoom video platform. Staff Counsel Kathryn Woods represented the Division, and attorney Manuel Melgoza of Donnell Melgoza and Scates represented Employer.

The matter was submitted on January 1, 2023.

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

Issues

1. Was Employer a controlling employer at the worksite?
2. Did Employer fail to guard a roof opening?
3. Did the Division establish that Citation 1 was properly classified as Serious?
4. Did Employer rebut the presumption that the violation alleged in Citation 1 was Serious?
5. Did the Division establish that Citation 1 was properly characterized as Accident-Related?
6. Did Employer establish any of its affirmative defenses?
7. Is the proposed penalty for Citation 1 reasonable?

Findings of Fact

1. The Kern High School District (the District) hired Employer to serve as the construction manager for the construction of a building called the Career Technical Education Center (CTEC) and an Aquatics Center at Independence High School, located at the site.

2. Employer's contract with the District required Employer to provide "business administration and management services to ensure the timely and satisfactory completion of the Project."

3. Employer's contractual obligations included assigning responsibilities for safety precautions and verifying that the requirements and assignment of responsibilities were included in the final contracts with the various contractors. In addition, Employer was required to advise each of the contractors that they must have an operative safety program.

4. Employer's actual practices at the site included taking responsibility for safety of the various contractors and trades present.

5. Employer conducted and documented weekly site inspections that included safety-related elements, and instructed contractors to correct unsafe conditions.

6. Employer held meetings with various contractors where safety was discussed.

7. Following the accident, Employer conducted an investigation, which included interviewing subcontractor employees, identifying the root cause of the accident, and recommending and recording the post-accident corrective actions taken.

8. Israel Comparan (Comparan), an employee of a subcontractor named Garcia Roofing, was working on the roof of the CTEC building that was under construction at the site.

9. Comparan fell through a roof opening on the CTEC building and landed on the concrete 31 feet below.

10. The roof opening that Comparan fell through was not covered or guarded in a manner that would prevent a person, equipment, or material from falling through it, and lacked a written warning.

11. As a result of the accident, Comparan required hospitalization for more than 24 hours.

12. Falling 31 feet onto concrete is likely to cause serious physical harm or death.

13. Comparan's injuries occurred because the roof opening he fell through was not adequately guarded or securely covered.

14. The Division proposed a reasonable penalty for Citation 1.

Analysis

1. Was Employer a controlling employer at the worksite?

California Code of Regulations, title 8, section 336.10, is the multi-employer worksite regulation promulgated by the Director of the Department of Industrial Relations. (*McCarthy Building Companies, Inc*. (*McCarthy*), Cal/OSHA App. 11-1706, Decision After Reconsideration (January 11, 2016); *Airco Mechanical, Inc.*, Cal/OSHA App. 99-3140, Decision After Reconsideration (Apr. 25, 2002).) Section 336.10 defines the categories of employers that may be cited when the Division has evidence of employee exposure to a hazard in violation of any requirement enforceable by the Division. (*McCarthy, supra, Cal/OSHA App. 11-1706; see also,* Lab. Code § 6400.)

Under section 336.10, employers that may be cited include (1) the employer whose employees were exposed to the hazard (the exposing employer); (2) the employer that actually created the hazard (the creating employer); (3) the employer who was responsible, by contract or through actual practice, for safety and health conditions on the worksite, which is the employer who had the authority for ensuring the hazardous condition is corrected (the controlling employer); and (4) the employer who has the responsibility for actually correcting the hazard (the correcting employer). (*McCarthy, supra, Cal/OSHA App. 11-1706.*) Controlling, correcting, and creating employers may be cited regardless of whether their own employees were exposed to the hazard. (Section 336.10; Lab. Code §6400, subd. (b).)

An employer's statutory duty to furnish a safe and healthful place of employment is non-delegable. (*Guardsmark,* Cal/OSHA App. 10-2675, Denial of Petition for Reconsideration (Sept. 22, 2011); *Labor Ready, Inc*., Cal/OSHA App. 99-3350, Decision After Reconsideration (May 11, 2001).) Employers may not shift responsibility for safety at a multi-employer worksite to another employer. (See *DeSilva Gates Construction,* Cal/OSHA App. 01-2742, Decision After Reconsideration (Dec. 10, 2004).) Thus, "an employer will not be rewarded for remaining ignorant of the circumstances present at a job site or for its inaction." (*Harris Construction Company, Inc*., Cal/OSHA App. 03-3914, Decision After Reconsideration (Mar. 30, 2007), partially overruled on other grounds by *United Assn. Local Union 246, AFL-CIO v. Occupational Safety and Health Appeals Bd.* 199 Cal. App. 4th 273 (2011).)

a. *Health and Safety Responsibility: Contract*

On January 3, 2018, the District executed a "Construction Management Contract" (the contract) with Employer. (Exhibit AY.) A contract describes the relationship between the parties and establishes rights and duties as between them. "The fundamental canon of contract interpretation remains to give effect to the mutual intention of the parties as it existed at the time of contracting." (*Ahern v. Asset Management Consultants, Inc*., 74 Cal. App. 5th 675, 694.) Thus, parties' mutual intention must be ascertained based on the language contained within the contract.

Paragraph (B) of the contract's recitals states:

> In consideration for the payment made by Owner, Construction Manager shall perform the duties and responsibilities indicated in this contract and generally provide business administration and management services to ensure the timely and satisfactory completion of the Project.

The attached "Terms & Conditions of Agreement Between Owner & Construction Manager" ("Terms & Conditions") further provides that the construction manager will "furnish business administration and management services" related to pre-construction and construction activity. The pre-construction duties assigned to Employer under the contract include cost-estimation, scheduling, constructability review, bid packaging, and tracking the progress of the construction.

Several recitals in the Terms & Conditions cover Employer's responsibilities regarding safety and health under the contract. Section 1.1.3 of the Terms & Conditions for instance, states that Employer, as part of its pre-construction phase duties, shall "assign responsibilities for safety precautions… [and] verify that the requirements and assignment of responsibilities are

included in the proposed Contract Documents for the Project." In addition, section 1.2.4 states that, during the construction phase, Employer shall "advise each of the Contractors that they must have an O.S.H.A. Health and Safety Program in effect as required by statutes and the Contract Documents."

The Division argues, citing to the above language, that the contract between Employer and the school district evidences that Employer was the controlling employer at the site. However, nothing in the language delegates to Employer responsibility for health and safety conditions at the site. The contract does not require Employer to do anything more than assign responsibilities for safety precautions and advise each contractor of the requirement to have an Injury and Illness Prevention Program. Nothing in the contract suggests that Employer was required to implement a safety plan for the work encompassed by the project at the site. Accordingly, the evidence is not of sufficient caliber to establish that Employer was responsible, by contract, for safety and health at the worksite. Accordingly, the evidence does not establish that Employer was citable as a controlling employer based on the language of the contract between it and the District.

b. *Health and Safety Responsibility: Practice*

As noted above, the evidence does not support a conclusion that Employer was responsible by contract for safety and health conditions at the worksite. However, that is not where the inquiry ends. As observed by the Appeals Board:

> While … contractual language can be relevant to determining if an employer meets the definition of "controlling employer," additional analysis is required. To find otherwise would suggest that a general contractor's liability turns on the artfulness with which it drafts its contract. Such an approach both elevates form over substance and fails to further the objectives of the Act and Labor Code section 6400(b)."

(*Harris Construction Company, Inc*., *supra*, Cal/OSHA App. 03-3914.)

Thus, the putative controlling employer's "actual practices at the worksite" are considered in determining liability. (*United Assn. Local Union 246, AFL-CIO v. Occupational Safety and Health Appeals Bd.* 199 Cal. App. 4th 273 (2011).)

According to Pulido, Division employee John Rodenberg (Rodenberg) held a conference with Employer due to its role at the site as the project administrator. [2] During the conference, the

[2] The Division asked the undersigned to take official notice of the definition of "project administrator" as found in section 341, subdivision (b)(8). Employer did not object. The undersigned therefore takes official notice that a project administrator is "a person or entity that has overall onsite responsibility for the planning, quality,

parties reviewed safety-related items such as workers' compensation and Employer's Injury and Illness Prevention Program (IIPP). (Exhibit 35.) Rodenberg's notes from the conference reflect that the parties discussed openings and floor coverings. Pulido further testified that Employer's role in applying for the project permit and attending the conference with Division permit inspector Rodenberg, where items pertaining to safety at the site were discussed, demonstrates Employer's active role in overseeing safety at the site.

Pulido testified that during his investigation, Employer provided him with copies of inspection records reflecting Employer's role at the site.[3] According to Pulido, the records reflected that Employer's project superintendent Greg Owens (Owens) conducted weekly walk-around safety inspections at the site.[4] Among other things, Owens inspected for uncovered roof and floor openings. (Exhibit 16, pp. 5-6.) Owens conducted and documented a site safety inspection on the date of the accident, May 28, 2019, after the accident occurred. (Exhibit 19) In response to item 7.2 of the form ("All holes greater than 2" in diameter covered, marked, and secured"), Owens wrote "The curbs for the exhaust fans need to be covered on top of the curb and then marked appropriately. Contractor was notified and is providing material to cover the opening." Owens made a similar comment under section 7.3 of the form, pertaining to all holes larger than one foot by two feet. Pulido also testified that, during the inspection, Owens admitted to performing weekly walk-around safety inspections at the site.

Pulido testified that he also interviewed employees and managers from other contractors at the site: roofing contractor Garcia Roofing and HVAC contractor Simco. Pulido learned that contractors provided safety training to their respective employees, but did not perform periodic safety inspections at the site and did not exercise any safety authority over employees of other contractors. Employees from both contractors told Pulido that Employer would hold weekly meetings with the various foremen, during which time safety was regularly discussed. Pulido learned from both Simco president Alex Harabachian and Simco foreman Richard Thoman that they had each informed Employer that other contractors' employees were removing roof opening covers in order to move material and equipment through the openings.

During the inspection, Employer provided Pulido with a copy of its "Incident Investigation Form" that it prepared following the accident. (Exhibit D.) The document reflects that Owens and Employer's safety director Justin Anspach (Anspach) conducted the investigation. The form includes sections identifying the root cause of the accident as well as Employer's recommendations and corrective actions taken following the accident, which

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management, or completion of a project involving the erection or demolition of a structure. Examples of Project Administrators include, without limitation, general contractors, prime contractors, owner/builders, joint ventures, and construction managers."

[3] Employer objected to Exhibit 19 because it contains evidence of subsequent remedial measures taken by Employer following the accident. The exhibit, however, was also used by the Division to establish, *inter alia*, that Employer exercised control over safety at the site and for that purpose the document is admissible.

[4] There was an unexplained gap in the records between April 29, 2019, and May 28, 2019.

included 1) immediately halting roof access until further notice, 2) covering all roof openings in accordance with applicable regulations, 3) holding an "all hands" safety meeting" and 4) retraining employees on fall protection and awareness.

Owens admitted to Pulido that he had the authority to stop work by contractors at the site in response to safety concerns. Owens's comments to Pulido are corroborated by the testimony of Garcia Roofing employee Oscar Mejia (Mejia). Mejia was the foreman in charge of Comparan's crew on the date of the accident. Mejia testified that following the accident, Owens told Mejia and his crew that they could not go back onto the roof of the building that Comparan had fallen from, so that Employer could conduct an investigation. Although Mejia changed his testimony during cross-examination, and denied that Owens ever told his crew to stop working, Mejia's testimony on direct is consistent with Pulido's testimony as to what Owens told him, and is also consistent with Exhibit D, which reflects that Employer investigated the accident and initiated corrective actions. Finally, Mejia denied being interviewed by Employer as part of an investigation of the accident, and denied that Mejia's employer, Garcia Roofing, conducted a post-accident investigation.

Anspach testified that, upon being hired as safety director, his duties included visiting and auditing construction sites for potential safety hazards, as well as offering corrective suggestions to Employer's project team. Anspach also testified that Employer performs both general contractor and construction manager roles depending on the project. He distinguished Employer's contractor activities from its construction manager activities, noting that Employer acts as general contractor on projects that are awarded directly to it, and thereafter subcontracts with various trades to accomplish the scope of work. Anspach further testified that in Employer's role as general contractor, if it became aware of a hazard, Employer would immediately stop work and demand abatement prior to allowing a subcontractor to continue working.

In contrast to when it was acting as a general contractor, Anspach testified to Employer's role when it acted as a construction manager, Employer was "not dictating means and methods by which the prime contractors perform their work." He further elaborated that "we are simply the mediator or conduit between the owner and the prime contractors as it relates to schedule." Anspach testified that the District selected the contractors who performed the scope of work for the project and that Employer had no role in selecting one contractor over another. He further testified that Employer lacked any contractual relationship with the contractors working in the site.

Anspach denied that Employer had a safety role at the site. Anspach testified that contractors would check in regularly at Employer's trailer as part of its attendance-keeping, in particular on public works projects where the contracting agency required a certified payroll be kept identifying everyone on site on a given day. He denied that the weekly meetings held by

Employer with the trades related to safety, and denied that Employer had the ability to discipline contractors for safety violations. Anspach explained that the meetings' purpose was "to review the contract schedule and to record conversations about what the trades were doing, to give report to the owner of their status or place within the schedule." Anspach also denied that either he or Owens were required as part of their duties to go onto the roof of either of the CTEC buildings under construction at the site, and he denied that Employer directed any of the contractors on how to perform their work at the site, including cutting and covering the HVAC exhaust fan holes in the roof of the CTEC building where the accident occurred. Instead, he testified that each contractor and subcontractor on site was responsible for having its own supervisors or foremen present to direct the work of the employees.

Anspach admitted, however, to the performance of several safety duties. He admitted that as safety director, part of his role included ensuring that the site was safe because he was aware that Employer's superintendent and project manager walked the project site. He also acknowledged that Employer conducted safety inspections at the site, explaining that the purpose was "to observe unsafe conditions for our employees and to communicate to the school district if there were any imminent hazards that they would need to address." Anspach testified that he would walk the site in order to fill out digitized safety inspection forms, but he denied that he ever shared the information from his inspections with the contractors at the site, and said that it was Employer's policy to conduct accident inspections on all of its projects.

Although he denied that Employer exercised a safety role with regard to employees of other contractors at the site, Anspach stated that "if there was an imminent hazard where someone was putting themselves at risk, I would … maybe ask them to remove themself from the hazard and then look for their supervisor…." Finally, although Anspach denied that he or Owens ever went on the roof of the CTEC building, and testified that they would have only viewed roof openings from the ground, Anspach admitted to going up to the roof level via scaffolding adjacent to the CTEC building in order to conduct Employer's accident investigation following Comparan's fall.

Owens denied "inspecting, evaluating, and correcting rooftop hazards at this site," but this testimony is contradicted by his own testimony that he walked the site and observed the roof openings, as well as Anspach's testimony that he and Owens walked the site as part of regular safety inspections. Like Anspach, Owens admitted that during these inspections he would "make note of any possible hazards or violations," but denied that these inspections were for the benefit of any employees besides Employer's five employees at the site. Owens also admitted that on at least one occasion prior to the accident, a contractor informed him that there were uncovered roof openings on the lower roof of the CTEC building. Owens testified that he e-mailed Simco "a reminder that they needed to be covered, per their contract."

Although Employer characterizes the role it played at the site as not including responsibility for safety, the evidence during the hearing contradicts Employer's position. It is found, based on the evidence, that Employer's actual practices at the site included taking responsibility for safety of the various contractors and trades present. This finding is based on the credible testimony of Anspach and Owens, who both admitted that Employer conducted walk-arounds at the site for purpose of conducting safety inspections. These inspections were memorialized by Employer (Exhibits 16, 17 and 19). Although Employer contends that these reports were for its own benefit and were not for the benefit of other employees of contractors at the site, this contention is viewed skeptically and is not credited. In particular, notes on Exhibit 19 from Owens demonstrate that Employer instructed contractors to make changes in order to correct hazards identified during Employer's safety inspections. Moreover, as Employer's safety director and site project superintendent, respectively, Anspach's, and Owens's admissions, which go against Employer's interests, are afforded substantial weight.

This finding is also based on the testimony of Pulido, Mejia, and Owens, who all testified consistently that employees of contractors at the site would go to Owens with safety concerns. Owens admitted receiving and communicating such concerns on at least one occasion. Owens also testified that if he were aware of hazards at the site, he would inform the affected employees and contractor and ask them to stop work until the hazard could be corrected.

This finding is also based on the testimony of Pulido, Anspach, and Owens that Employer conducted an accident investigation following Comparan's fall. (Exhibit D.) Employer's accident investigation report includes an analysis of the root cause of the accident, and proposed corrective actions and identifies what corrective actions were taken. Although Anspach and Owens characterized this report as an internal report created consistent with Employer's own policies, this testimony is viewed skeptically and is not credited.

Finally, this finding is based on the evidence of the relationship between Employer and the District. Employer contends that its limited contractual responsibilities to the District did not encompass safety, but the evidence shows that Employer acted in the place of the District at the site in performing activities relating to safety. Far from merely maintaining a schedule, Employer undertook inspection and corrective activities that would ordinarily have been reserved to the owner-builder or its contractors.

In sum, the evidence shows that Employer took an active role at the site with regard to safety, not just for its own employees, but for the benefit of employees of contractors performing work at the site. Because Employer took and active role at the site, including conducting an accident investigation following Comparan's fall, and instructed contractors on how to correct the hazards that were identified as leading to the accident, it is determined that Employer was a

controlling employer at the site, and therefore, can be held responsible for the alleged violation cited by the Division.

2. Did Employer fail to guard a roof opening?

Section 1632, subdivision (b) states, in relevant part:

> (b)(1) Floor, roof and skylight openings shall be guarded by either temporary railings and toeboards or by covers.
>
> [. . .]
> (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.

Citation 1 alleges:

> Prior to and during the course of the investigation, including, but not limited to May 28, 2019, employees were permitted to work on a roof near openings with improper covers. S.C. Anderson, Inc. was responsible for safety and health conditions at the site and failed to protect the employees of Garcia Roofing, Inc. from exposure to the dangerous openings. As a result, on or about May 28, 2019, an employee of Garcia Roofing, Inc. suffered a serious injury when he fell through the cover of one of the roof openings. The cover was not capable of supporting 400 pounds and did not bear a pressure sensitized, painted or stenciled sign with legible letters not less than one inch high, stating: Opening-Do Not Remove.

To establish a violation, the Division must show that Employer failed to guard a roof opening with either: 1) temporary railings and toeboards; or, 2) by covers. In addition, where the Division alleges that a roof opening was not appropriately covered, the Division must show that the cover was not capable of supporting the required weight, or was not secured in place against displacement, or was not adequately labeled with the required warning.

When a safety standard includes two or more distinct requirements, if an employer violates any one of the requirements, it is considered a violation of the safety standard. (*Golden State Erectors*, Cal/OSHA App. 85-0026, Decision After Reconsideration (Feb. 25, 1987); *California Erectors Bay Area Inc.*, Cal/OSHA App. 93-503, Decision After Reconsideration (Jul.

31, 1998).) Here, if Employer failed to satisfy any one of those elements of safety order section 3212, subdivision (b) regarding roof openings, it has violated section 3212, subdivision (b).

Pulido credibly testified that, during his inspection, he learned that there were six roof openings on the roof of the CTEC building at the time of the accident. Pulido testified that he visually observed the openings from the scaffolding surrounding the building. Anspach also credibly testified that he used a remote controlled flying drone equipped with a camera to take a photograph of the roof shortly after the accident. (Exhibit 30.) Mejia credibly testified that the openings on the roof of the CTEC building were surrounded by a low curb. Pulido did not observe temporary railing or toeboards surrounding any of the roof openings. The photograph in Exhibit 30, taken near in time to the accident, explicitly shows that there were no railings in place.

Mejia credibly testified that Exhibit 32 accurately depicted the location where Comparan landed, shortly after the accident occurred. The exhibit shows a pool of blood, and to its right, some debris, including thin sheets of flat and corrugated metal. Mejia testified that the flat metal was placed on top of the corrugated metal in each roof opening, and the metal was screwed into the curb surrounding the opening. Neither the metal shown in Exhibit 32, nor the covers shown in Exhibit 30, bear any written warning against removal.

Employer did not produce any evidence at hearing to dispute the accuracy of the photographs in Exhibits 30 and 32, and offered no evidence to contradict Mejia's testimony about the manner in which roof openings were covered. Nothing in the record suggests that the roof coverings, comprised of a thin sheet of flat metal placed atop a thin sheet of corrugated metal, affixed to the curb surrounding the roof opening with screws, was sufficient to support either 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. The fact that Comparan fell through one of the roof openings, and the evidence of the metal covers described by Mejia close in proximity on the cement floor to where Comparan landed, strongly supports a finding that the covers were not sufficient to support the required weight. The fact that the covers apparently gave way under Comparan's weight also strongly supports a finding that the covers were not appropriately secured against displacement. Finally, the evidence at hearing demonstrates that none of the roof openings at the CTEC building bore warnings as required by the safety order.

Accordingly, for all of the reasons set forth above, it is determined that Employer violated Section 1632, subdivision (b). Citation 1 is therefore affirmed.

3. Did the Division establish that Citation 1 was properly classified as Serious?

Labor Code section 6423, 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. (*Sacramento County Water Agency Department of Water Resources*, Cal/OSHA App. 1237932, Decision After Reconsideration (May 21, 2020).)

Pulido has been employed as an Associate Safety Engineer with the Division since July, 2013. Prior to that, he was an Assistant Safety Engineer from March 2010 through July 2013. Pulido testified at hearing that his Division-mandated training was up to date. Pulido testified that he classified Citation 1 as Serious because he determined as part of his investigation that there was a realistic possibility of serious physical harm that could result from failing to appropriately guard a roof opening. Pulido specifically identified fractures, head injuries and death as the types of harm that could result from a fall through a roof opening.

Pulido also testified that previous inspections that he had done involving falls from similar had resulted in serious injuries and fatalities. Pulido testified that Comparan received serious injuries from the accident, as reported to the Division by Employer. Specifically, he credibly testified that Employer reported that Comparan suffered "a head injury, fractured arms, and leg." Employer did not offer any evidence to rebut Pulido's testimony; therefore, Pulido's credible testimony is credited. Here, it is found that Comparan in fact did suffer a serious injury when he fell through a roof opening 31 feet to the cement floor below. Accordingly, the Division established a rebuttable presumption that the citation was properly classified as Serious.[5]

4. Did Employer rebut the presumption that the violation alleged in Citation 1 was Serious?

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 that:

> (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.

As discussed previously, Anspach and Owens testified that they conducted regular safety inspections of the CTEC building. However, both steadfastly denied that their inspections took them onto the roof of the building, and both asserted that they lacked a means to access the roof. Their testimony about lack of access is deemed as lacking in credibility in light of other evidence in the record showing that the CTEC building was surrounded by scaffolding affording access to the level of the roof, as well as evidence that employees of (its) contractors, including Simco and Garcia Roofing, had access the roof of the building.

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[5] Labor Code section 6432, subdivision (b)(1) requires the Division, prior to issuing a citation classified as Serious to first "make a reasonable attempt to determine and consider" certain enumerated information. Under subdivision (b)(2), the Division meets its obligation if, "not less than 15 days prior to issuing a citation for a serious violation, the division delivers to the employer a standardized form containing the alleged violation descriptions ("AVD") it intends to cite as serious and clearly soliciting the information specified in this subdivision." Here, Pulido testified that he sent a timely 1BY to Employer, and Employer's 1BY response was entered into evidence as Exhibit 9. Thus, it is found that the Division did what is required under section 6432, subdivision (b), and Employer did not offer any evidence suggesting that the Division failed to comply with this statutory obligation.

Given Employer's active role at the site with regard to safety, and given that part of Employer's routine inspections involved assessing roof openings for potential hazards, Employer's failure to take measures to more accurately assess the condition of the roof openings does not demonstrate that Employer took all the steps that a reasonable and responsible employer in like circumstances would be expected to take. Even assuming, for sake of argument, that Employer inspected the roof openings solely to identify potential hazards to its own employees who walked the site, Employer's limited inspections were not sufficient to determine whether the roof openings posed hazards to employees at the site. Accordingly, Employer failed to rebut the presumption that the Division correctly classified Citation 1 as Serious.

5. Did the Division establish that Citation 1 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." (*RNR Construction, Inc.*, Cal/OSHA Insp. No. 1092600, Denial of Petition for Reconsideration (May 26, 2017).) "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." (*Id.)*

Here, the uncontroverted evidence shows that Gonzalez suffered serious injuries from his fall through an inadequately guarded roof opening. Although medical records were not introduced at the hearing, and Comparan did not testify, Pulido credibly testified that he learned during his investigation that Comparan suffered serious injuries from Employer's report of the accident. In addition, Mejia testified that a mutual friend of his and Comparan informed Mejia that Comparan suffered an injury to his head that required hospitalization for more than 24 hours. Mejia's testimony, although hearsay, corroborates Pulido's testimony and also corroborates Exhibit 32, which shows a pool of blood where Comparan landed after falling 31 feet onto a concrete cement floor.

Thus, for all of the foregoing reasons, Citation 1 is properly characterized as Accident-Related.

6. Did Employer establish any of its affirmative defenses?

Employers bear the burden of proving their pleaded affirmative defenses by a preponderance of the evidence, and any such defenses that are not presented during the hearing are deemed waived. (*RNR Construction, Inc*., *supra,* Cal/OSHA App. 1092600.) Here, Employer was given the opportunity to present evidence in support of its affirmative defenses during the

hearing. Employer presented evidence which, viewed in the light most favorable to Employer, goes to the due diligence defense. "The evaluation of due diligence requires consideration of the totality of circumstances and various factors may be relevant to its determination." (*McCarthy Building Companies, Inc.*, Cal/OSHA App. 11-1706 and 2046, Decision After Reconsideration (Jan. 11, 2016).) Those factors include, but are not limited to:

> […] contractually requiring the subcontractor to provide all safety equipment required to do the job, or providing the safety equipment itself; establishing work rules designed to prevent safety violations, such as developing an accident prevention program that is reasonably specific and tailored to the safety and health requirements of particular job sites and/or operations, and that includes training and corrective action; engaging in efforts to ensure that subcontractors have appropriate and reasonably specific accident prevention programs; engaging in appropriate efforts to communicate work rules to its subcontractors; establishing an overall process to discover and control recognized hazards, with the degree of oversight dependent on a number of factors such as the subcontractor's activity, experience, and level of specialized expertise; and, the general contractor must effectively enforce its accident prevention and safety plans via contractual language, appropriate disciplinary action, and documentation.

(*McCarthy Building Companies, Inc.*, *supra,* Cal/OSHA App. 11-1706 and 2046.) These factors are not exclusive, and not every factor need be considered in every case. (*Id.*) Moreover, the weight afforded to any particular factor is within the discretion of the ALJ. (*Id*.)

Here, it is found that Employer did not act with due diligence. This finding is based on testimony from Anspach and Owens that Employer did not engage in vetting or selecting the contractors, did not supervise activities on the roof of the CTEC building, did not ensure that contractors' employees worked with appropriate supervision, and relied upon but did not ensure that contractors conducted appropriate inspections of the worksite prior to permitting their employees to engage in work at the site. Especially in light of Employer's stated purpose of inspecting the site to ensure the safety of its own employees, it is determined that Employer did not act with due diligence.

The hazard of an inadequately guarded roof opening is not something that required particular expertise to discover, and the undersigned affords great weight to the undisputed facts that the hazard was readily visible from the scaffolding alongside the building, and was visible even by means of aerial photographs such as Exhibit 30. Employer therefore could have easily discovered the hazard through minimally burdensome inspections. Employer's failure to take these *de minimis* steps defeats the asserted due diligence defense.

7. Is the proposed penalty for Citation 1 reasonable?

Penalties calculated in accordance with the penalty setting regulations set forth in sections 333 through 336 are presumptively reasonable and will not be reduced absent evidence that the amount of the proposed civil penalty was miscalculated, the regulations were improperly applied, or that the totality of the circumstances warrant a reduction. (*RNR Construction, Inc.*, *supra*, Cal/OSHA App. 1092600, citing *Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).)

Generally, the Division, by introducing its proposed penalty worksheet and testifying to the calculations being completed in accordance with the appropriate penalties and procedures, will be found to have met its burden of showing the penalties were calculated correctly. (*M1 Construction, Inc.*, Cal/OSHA App. 12-0222, Decision After Reconsideration (Jul. 31, 2014).) The Appeals Board has held that maximum credits and the minimum penalty allowed under the regulations are to be assessed when the Division fails to indicate the basis of its adjustments and credits. (*Armour Steel Co.*, Cal/OSHA App. 08-2649, Decision After Reconsideration (Feb. 7, 2014).)

Here, the Division presented its proposed penalty worksheet, and Pulido credibly testified as to the manner in which he calculated the penalty for Citation 1. Serious classification begin at $18,000, and Serious violations that are deemed to have resulted in serious injury, illness or fatality are not subject to any further adjustment except for size, pursuant to section 336, subdivision (c)(7). Here, Pulido credibly testified that Employer was eligible to receive a size adjustment of 20 percent. Applying the 20 percent size adjustment results in a calculated penalty of $14,400, which is found appropriate. Thus, a final penalty of $14,400 will be assessed.

CONCLUSION

Employer was a controlling employer at the site by virtue of its actual practices which included conducting an accident investigation following Comparan's fall, and instructing contractors to correct hazards and proposing how to correct the hazards that were identified as leading to the accident.

The evidence supports a finding that Employer violated section 1632, subdivision (b), by failing to ensure that a roof opening was appropriate guarded or covered.

The violation was properly classified as Serious.

The violation was properly characterized as Accident-Related.

The Division proposed a reasonable penalty for the alleged violation.

ORDER

Citation 1 is affirmed and the associated penalty is assessed as set forth in the attached Summary Table.

Howard I. Chernin

Dated: 01/26/2023

Howard I. Chernin
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.**