BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1372705**
THE HERRICK CORPORATION **2010 CROW CANYON PLACE, SUITE 120** **SAN RAMON, CA 94583** **Employer**	**DECISION**

Statement of the Case

The Herrick Corporation (Employer), fabricates and erects steel framework for building construction. Beginning January 12, 2019, the Division of Occupational Safety and Health (the Division) through Senior Safety Engineer Greg Clark (Clark), conducted an accident investigation at Employer's worksite, a building construction site located at 1900 Petrol Road in Bakersfield, California (the site), following a fatal fall by employee Brian Daunt (Daunt) (the accident).

On July 12, 2019, the Division issued four citations to Employer, alleging five violations of the California Code of Regulations, title 8.[1] Citation 1, Item 1, classified as General, alleges that Employer failed to ensure that a hard hat was maintained in a safe and sanitary condition. Citation 1, Item 2, classified as General, alleges that Employer failed to ensure that a component of a personal fall restraint system issued to its employee was properly labeled in accordance with American National Standards Institute (ANSI) requirements. Citation 2, classified as Serious Accident-Related, alleges that Employer failed to ensure that fall arrest equipment issued to its employee was used in accordance with the manufacturer's recommendations. Citation 3, classified as Serious, alleges that Employer failed to inspect and document its inspections of fall arrest systems used by its employees. Citation 4, classified as Serious, alleges that Employer failed to provide compliant fall hazard training to its employees.

Employer filed a timely appeal contesting the existence of each alleged violation. In addition, Employer appealed Citations 2 through 4 on the grounds that the classifications are incorrect and the proposed penalties are unreasonable. Additionally, Employer raised affirmative

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

defenses to each citation, including, but not limited to, the Independent Employee Action Defense.[2]

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 May 3 and 4, 2022, April 12, 2023, and September 19, 2023. ALJ Chernin conducted the hearing with all participants appearing remotely via the Zoom video platform. Clara Hill-Williams, Staff Counsel, represented the Division. David Donnell of Donnell, Melgoza and Scates, LLP, represented Employer.

This matter was submitted on May 31, 2024.

Issues

1. Did Employer fail to ensure that a hard hat was maintained in a safe and sanitary condition?

2. Did Employer fail to ensure that a component of a personal fall restraint system issued to its employee was properly labeled in accordance with American National Standards Institute (ANSI) requirements?

3. Did Employer fail to ensure that fall arrest equipment issued to its employee was used in accordance with the manufacturer's recommendations?

4. Did Employer fail to inspect and document its inspections of fall arrest systems used by its employees?

5. Did Employer fail to provide compliant fall hazard training to its employees?

6. Did Employer establish any of its affirmative defenses?

7. Did the Division correctly classify Citations 2, 3 and 4?

8. Did Employer rebut the presumption that the violations alleged in Citations 2, 3 and 4 are Serious?

[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).)

9. Did Employer's violation of section 1670, subdivision (f), cause a serious injury to its employee?

10. Did the Division propose reasonable penalties?

Findings of Fact

1. On April 17, 2019, Employer's employee Daunt was working at height on an Amazon warehouse under construction at the site. The work that Daunt was performing required the use of personal fall arrest equipment.

2. At the time of the accident, Daunt was wearing a hard hat that was in an unsafe condition. The hard hat's suspension was broken and held together with baling wire, which compromised the hard hat's internal structure.

3. Daunt was wearing personal fall arrest equipment consisting of an Ultra-Safe brand harness and two Ultra-Safe brand Self-Retracting Lanyards (SRL). One of the SRLs was visibly damaged, and its label was damaged and illegible.

4. Employer's practice was to have one hundred percent tie-off, meaning that one SRL would be connected to a safety line anchored to the structural steel, and the SRL would not be unhooked until the other SRL was hooked to the line, thus ensuring that employees working at height were protected from falls the entire time.

5. Ultra-Safe's recommendations include having a competent person other than the employee to whom the equipment is assigned inspect personal fall arrest equipment. The recommendations also include taking damaged equipment out of service, and reviewing labels on equipment to ensure that proper equipment is used for the assigned task.

6. Employer did not inspect personal fall arrest equipment assigned to its employees and instead relied on employees to inspect their own assigned equipment.

7. Failing to inspect personal fall arrest equipment, and failing to use said equipment in conformity with the manufacturer's recommendations, can lead to serious physical injury or death from a fall.

8. Daunt fell while wearing and using a damaged SRL while working at height, and suffered fatal injuries.

9. Daunt fell because the damaged SRL that he was wearing was already damaged, and the SRL failed while he was working on the steel erection at the site.

10. Daunt was a safety foreman with responsibility for his own safety and the safety of other employees at the site.

11. The Division's penalties were calculated consistent with the penalty setting regulations, with the exception of Citation 4, which is correctly calculated as $8,435.

Analysis

1. Did Employer fail to ensure that a hard hat was maintained in a safe and sanitary condition?

Section 1514, subdivision (d), which is found within the Construction Safety Orders (CSOs), provides:

> (d) The employer shall assure that all required safety devices and safeguards, whether employer or employee provided, including personal protective equipment for the eyes, face, head, hand, foot, and extremities (limbs), protective clothing, respiratory protection, protective shields and barriers, comply with the applicable Title 8 standards and are maintained in a safe, sanitary condition.

Citation 1, Item 1, alleges:

> Prior to and during the course of the investigation, including but not limited to, January 12, 2019, the employer did not assure that a Bullard ® hard hat Model 502 was maintained in a safe condition as worn by an employee at the job site.

The Division has the burden of proving a violation, including the applicability of the safety order, by a preponderance of the evidence. (*Coast Waste Management, Inc.*, Cal/OSHA App. 11-2385, Decision After Reconsideration (Oct. 7, 2016).) "Preponderance of the evidence" is usually defined in terms of probability of truth, or of evidence that when weighed 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. (*United Parcel Service*, Cal/OSHA App. 1158285, Decision After Reconsideration (Nov. 15, 2018); *Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 483.)

Applicability

The parties do not dispute that Employer is subject to the requirements of section 1514, subdivision (d). Clark credibly testified that the site was a building under construction. Tom Davies (Davies), Employer's Safety Director, testified that the scope of work on the date of the accident was the erection of structural steel in connection with the construction of an Amazon warehouse.

Violation

Clark testified that, during his investigation, Davies identified the hard hat that deceased employee Daunt had been wearing at the time of the accident. (Exhibit 13.) Clark testified that he observed damage to the hard hat, specifically that its yellow suspension, which was a structural element that should have been one piece, was in two pieces and the two pieces were held together with baling wire. Thus, the baling wire was holding the damaged hard hat's internal assembly together. (See Exhibit 32.) Clark concluded that the hard hat was broken at the time of use and should have been "pulled from service and replaced." (Hearing Transcript (TR) 5/4/2022, 26:4-12.) During cross-examination, Clark testified that the condition of the hard hat on the date of the accident could have resulted in an injury to Daunt. Clark's testimony is consistent with the photographs depicting the hard hat worn by Daunt (Exhibits 13 and 32), and therefore Clark's testimony is deemed credible and is afforded significant weight.

Employer did not challenge that Daunt was wearing the hard hat in the condition depicted in Exhibits 13 and 32. Furthermore, Employer offered no evidence during the hearing to contradict Clark's testimony that the hard hat was maintained in an unsafe condition, even though it was afforded a full opportunity to do so. (See Evid. Code §§ 412 and 413.) Rather, Employer argues in its post-hearing brief that Clark's opinion was not supported by credible, reliable evidence. Employer suggests that the Division should have reviewed the hard hat manufacturer's recommendations and/or performed a "structural analysis of the hard hat." (Employer's Brief, p. 5.) Employer's arguments, however, are misplaced and misleading as to the evidence adduced during the hearing. Contrary to Employer's argument, Clark's testimony was based on credible, reliable evidence. Clark testified to his educational background, which includes a degree in environmental health with a focus on industrial hygiene. Clark had over 20 years of work experience in occupational safety and health at the time of the hearing, including approximately four years as a Senior Safety Engineer in the Division's Bakersfield district office. Clark was current in his mandated training at the time of the hearing. In short, Clark was well-qualified based on his knowledge and experience to render an opinion as to whether Daunt's hard hat was safe on the date of the accident based on his physical inspection of the hard hat and the photographs that he took of it (Exhibits 13 and 32). The fact that a structural element of the hard hat was broken and being held together with baling wire supports a conclusion that the hard

hat was not safe to wear on the date of the accident, and Clark's opinion that the hard hat was therefore "broken" and should have been removed from service and not worn is credited.

In sum, preponderant evidence introduced during hearing demonstrates that Employer violated section 1514, subdivisions (d). Accordingly, Citation 1, Item 1, is affirmed.

2. Did Employer fail to ensure that a component of a personal fall restraint system issued to its employee was properly labeled in accordance with American National Standards Institute (ANSI) requirements?

Section 1670, subdivision (l), which is found within the CSOs, provides:

> (l) All personal fall arrest, personal fall restraint and positioning device systems purchased or placed in service after February 1, 1997, shall be labeled as meeting the requirements contained in ANSI A10.14-1991 American National Standard for Construction and Demolition Use, or ANSI Z359.1-1992 American National Standard Safety Requirements for Personal Fall Arrest Systems, Subsystems and Components.

Citation 1, Item 2, alleges:

> Prior to and during the course of the investigation, including, but not limited to, January 12, 2019, an Ultra-Safe ® self-retracting lanyard as part of a personal fall arrest system worn by an employee at the job site was not labeled as meeting the requirements contained in ANSI A10.14-1991 American National Standard for Construction and Demolition Use, or ANSI Z359-1992 American National Standard Safety Requirements for Personal Fall Arrest Systems, Subsystems and Components.

Applicability

The parties do not dispute that section 1670, subdivision (l) applied to the work that Employer was performing at the site on the date of the accident.

Violation

Clark testified that, during his inspection, he was shown a SRL that Daunt was wearing at the time of the accident. (Exhibit 19.) Clark testified that, through employee interviews, he learned that Employer used Ultra-Safe brand SRLs as a component of the fall arrest systems provided to employees. Employer issued two SRLs to each employee, which were attached to the employee's harness on one end via a carabiner hook, and onto an anchor point or catenary line at the other end. Clark further testified that he learned that Employer had a "hundred percent tie-off rule," described to him as follows:

> But the company had a hundred percent tie-off rule. And essentially before you unhook one SRL, you have to have the other one hooked up so you don't have any moment where there's not fall protection.

(TR 5/3/2022, 162:1-11)

Clark testified that the Division issued Citation 1, Item 2, to Employer because one of the two Ultra-Safe brand SRLs that Daunt had been using at the time of the accident was missing its label. (Exhibit 19.) Employer did not dispute during the hearing that Daunt was using the damaged SRL (the one missing its label) at the time of the accident, or that it supplied to its employees SRLs of the same make and model as that worn by Daunt. Clark testified that he concluded that the SRLs that Daunt was wearing were both provided by Employer because they were both the same Ultra-Safe brand provided by Employer. Nobody told Clark during the investigation that the damaged SRL came from anywhere else besides Employer, thus he concluded that it had been provided by Employer. Clark's testimony is deemed credible and is afforded significant weight. It is reasonable to conclude based on the evidence, as Clark did, that Employer provided the SRL with the missing label to Daunt.

Although Employer argues in its post-hearing brief that it complied with the "spirit and intent" of the safety order (Employer's Brief, p. 7), Employer offered no evidence of its own to disprove a violation despite having a full opportunity to do so. (See Evid. Code §§ 412 and 413.) Although there was some evidence that Daunt had spent a period working for a different employer prior to the accident, there was no reliable or credible evidence offered that the SRL with the missing label came from Daunt's prior Employer or that Daunt supplied it himself. Here, it is found based on the totality of the evidence offered at hearing and on reasonable inferences drawn therefrom that Employer placed an SRL into service that was missing the required label attesting that it met applicable ANSI requirements. Specifically, it was the same brand as SRLs that Employer admitted it provided to its employees, Daunt used the SRL while performing work that required the use of fall protection, and Daunt was using it to perform work for Employer at a site that Employer controlled. Thus, preponderant evidence introduced during hearing demonstrates that Employer violated section 1670, subdivision (l). Accordingly, Citation 1, Item 2, is affirmed.

3. Did Employer fail to ensure that fall arrest equipment issued to its employee was used in accordance with the manufacturer's recommendations?

Section 1670, subdivision (f), states:

> (f) All fall arresting, descent control, and rescue equipment shall be approved as defined in Sections 1504 and 1505 and used in accordance with the manufacturer's recommendations.

Citation 2 alleges:

> Instance 1 – Prior to and during the course of the investigation, the employer did not use fall arresting equipment in accordance with the manufacturer's recommendations, including, but not limited to, effective inspection of an Ultra-Safe® personal fall arrest system including harness and self-retracting lanyard that was deteriorated. As a result, on or about January 12, 2019, an employee suffered fatal injuries when the personal fall arrest system failed resulting in a fall of approximately 48 feet to ground surface.
>
> Instance 2 – Prior to and during the course of the investigation, the employer did not use fall arresting equipment in accordance with the manufacturer's recommendations, including, but not limited to, removal from service and replacement of an Ultra-Safe ® personal fall arrest system including harness and self-retracting lanyard that was deteriorated. As a result, on or about January 12, 2019, an employee suffered fatal injuries when the personal fall arrest system failed resulting in a fall of approximately 48 feet to ground surface.

Applicability

The parties do not dispute that section 1670, subdivision (f), applied to the work that Employer was performing at the site on the date of the accident.

Violation

Clark testified that the Division issued Citation 2 to Employer because, at the time of the accident, employee Daunt was using a damaged SRL as part of his fall arresting system, in contradiction with the manufacturer's recommendations.

Clark testified that he inspected the harness and SRLs that were reported to have been worn and in use by Daunt at the time of the accident. Clark observed visible damage to the SRL that failed, including excessive wear on the hook and damage to a plastic piece meant to protect the webbing attached to the hook, as well as visible damage to the retracting lanyard. (Exhibits 14, 14-MOD, 15 and 16.) Clark testified that the damage appeared to have occurred over time, as opposed to during the accident. Clark also testified that he observed damage to the harness that Daunt was wearing. (Exhibits 18 and 21.) Given Clark's education and experience, his testimony is deemed credible and is afforded significant weight.

Clark testified to the manufacturer's recommendations (Exhibits 33 and 34). Page 2 of the manufacturer's SRL user manual (Exhibit 34) states, "Inspect all your personal fall protection equipment before each use." The manual further states that users should inspect the SRL for damage prior to use. On the bottom of the page, it states in bright blue typeface, "if inspection

reveals an unsafe or defective condition, remove the safety retractable lanyard from service…." (*Id*.)

Employer offered no evidence to contradict the Division's credible evidence, despite having a full opportunity to do so. (See Evid. Code §§ 412 and 413.) The record clearly demonstrates that Daunt was wearing a damaged harness and SRL, both of which were visibly damaged prior to the date of the accident. The manufacturer requires that fall protection and fall arrest systems should be inspected before each use and advises to remove from service any fall protection equipment, including an SRL, if it is in an unsafe or defective condition. It is found, based on the evidence summarized above, that Daunt was wearing unsafe and defective fall protection equipment at the time of the accident, including a damaged harness and a damaged SRL. It is further found that Daunt did not inspect these items before using them on the date of the accident, because the evidence shows he did not remove them from service before the accident.

Rather than attack the evidence or present evidence of its own to disprove a violation, Employer instead relies on two tactics in its post-hearing brief to attempt to avoid liability. Although both tactics lack merit, they are addressed here briefly for completeness of the record. First, Employer complains that Exhibits 33 and 34 should not have been admitted because they were not lodged in OASIS, the Appeals Board's online case management system, prior to the hearing as required by the Order After Prehearing Conference issued on April 4, 2022. Section 376.1, subdivision (d), provides:

> The taking of evidence in a hearing shall be controlled by the Appeals Board in the manner best suited to ascertain the facts and safeguard the rights of the parties.

Employer does not argue that it was unaware of the existence of the manufacturer's recommendations contained in Exhibits 33 and 34 prior to the hearing, and the citation on its face should have alerted Employer that the Division may seek to introduce these items into evidence during the hearing. Employer was afforded a full and fair opportunity to challenge the evidence through cross-examination and through the production of its own witnesses and evidence at hearing. Employer has not demonstrated that any prejudice ensued from allowing these pieces of evidence into the record. In sum, there was no error in permitting the evidence of the manufacturer's recommendations into the evidentiary record of this appeal.

Second, Employer argues that the Division has somehow conflated the concepts of "use" and "inspect," while section 1670 governs the use of fall protection systems, Employer argues it does not apply to inspection and removal from service. The manufacturer's recommendations make inspection of fall protection equipment an integral part of how the equipment is to be used. Relatedly, the manufacturer's recommendations call for removing from service any fall protection equipment that is determined upon inspection to be unsafe or defective. It logically

follows that performing work while wearing such equipment when it is unsafe or defective is using the equipment within the plain meaning of section 1670, subdivision (f). Interpreting the regulation in this manner resolves any perceived ambiguities in a way best suited to achieve employee safety. (See *Carmona v. Division of Industrial Safety,* 13 Cal.3d 303, [Holding that occupational safety and health regulations "are to be given a liberal interpretation for the purpose of achieving a safe working environment."]) Thus, Employer's second argument also lacks merit.

In sum, preponderant evidence introduced during hearing demonstrates that Employer violated section 1670, subdivision (f). Accordingly, Citation 2 is affirmed.

4. Did Employer fail to inspect and document its inspections of fall arrest systems used by its employees?

Section 1670, subdivision (b), states in relevant part:

> (b) Personal fall arrest systems and their use shall comply with the provisions set forth below. Effective January 1, 1998, except as permitted in subsections (c) and (d), body belts shall not be used as part of a personal fall arrest system.
> [. . .]
> (19) Each personal fall arrest system shall be inspected not less than twice annually by a competent person in accordance with the manufacturer's recommendations. The date of each inspection shall be documented.

Citation 3 alleges:

> Instance 1 – Prior to and during the course of the investigation, including, but not limited to, January 12, 2019, the employer did not ensure compliance with the provisions of this section by not conducting required twice annual inspections of personal fall arrest systems (Ultra-Safe ® harness and self-retracting lanyard) worn by employees in accordance with the manufacturers recommendations of personal fall arrest systems.
>
> Instance 2 – Prior to and during the course of the investigation, including but not limited to, January 12, 2019, the employer did not ensure compliance with the provisions of this section by not documenting the required twice annual inspections of personal fall arrest systems (Ultra-Safe® harness and self-retracting lanyard) worn by employees in accordance with the manufacturer's recommendations of personal fall arrest systems.

Applicability

The parties do not dispute that section 1670, subdivision (b), applied to the work that Employer was performing at the site on the date of the accident.

Violation

Instance 1:

Clark testified that the Division issued Citation 3 because during the inspection he determined that Employer did not inspect fall arrest systems at least twice annually. Furthermore, when Clark interviewed Employer's superintendent Edward Palacio (Palacio), Palacio was unable to identify who the competent person would be to perform such an inspection. Palacio instead told Clark that each employee inspected their own fall protection. This is in direct conflict with the manufacturer's recommendations, which state that "ANSI requires a formal inspection of fall protection equipment to be completed by a competent person other than the user…."[3] (Exhibit 34, p. 2.) The credible evidence summarized above raises a reasonable inference that Employer did not conduct at minimum twice annual inspections of fall arrest systems by a competent person in accordance with the manufacturer's recommendations.

Employer argues that Humberto Olmos Jr. (Olmos), Employer's safety foreman, was a competent person to perform inspections, and that the Division did not establish by a preponderance of the evidence that Employer failed to inspect fall arrest systems at least twice annually by a competent person. Employer's corporate safety manager Thomas Davies (Davies) testified that Olmos was responsible for training employees on the use of fall arrest equipment, and for issuing equipment to employees and inspecting said equipment. Employer offered evidence that it provides comprehensive fall protection training to employees (Exhibit O), which training includes statements that "all fall protection equipment will be inspected daily and before each use. Never use damaged fall protection equipment. Always alert your foreman when you find damaged equipment." (Exhibit O, p. 56.) Missing from Employer's evidence, however, was any indication that a competent person *other than the user* was responsible for inspecting fall arrest systems at least twice annually. Olmos, who testified during the hearing, did not provide any testimony that he performed twice annual inspections of fall arrest systems provided by Employer to employees. Finally, although Palacio testified that fall arrest systems were inspected daily by a competent person, Palacio's uncorroborated testimony was at odds with the remainder of the evidence received during the hearing, and therefore, his testimony on this point is afforded no weight.

[3] Employer renews its objection that Exhibit 34 should not have been admitted into evidence. Employer's argument is rejected for the same reasons as given in section 3, *ante*.

In summary, competent and credible evidence offered during the hearing established that Employer did not ensure that fall arrest systems were inspected at least twice annually by a competent person and in accordance with the manufacturer's recommendations. Employer required its employees to inspect their own equipment, which directly conflicts with the manufacturer's recommendations, and offered no credible evidence that fall arrest systems were inspected by a separate competent person. Thus, the Division established a violation of section 1670, subdivision (b).

Instance 2:

Clark credibly testified that he requested documentation of inspections required by the safety order, and received none from Employer. Employer did not offer any evidence during the hearing that it documented inspections of fall arrest systems as required by section 1670, subdivision (b), and conceded in its post-hearing brief that it did not document inspections of its issued fall arrest systems. (Employer's Brief, p. 15.) The evidence therefore supports an inference that Employer did not document inspections of fall arrest systems by a competent person, and a violation is therefore established.

For all of the foregoing reasons, therefore, the Division established a violation of section 1670, subdivision (b), by a preponderance of the evidence. Accordingly, Citation 3 is affirmed.

5. Did Employer fail to provide compliant fall hazard training to its employees?

Section 1710, subdivision (q), states in relevant part:

(q) Training.

The following provisions supplement the requirements of Section 1509 "Injury and Illness Prevention Program" regarding the hazards associated with structural steel erection.

[. . .]
(2) Fall hazard training. The employer shall provide a training program for all employees exposed to fall hazards. The program shall include training and instruction in the following areas:

(A) The recognition and identification of fall hazards in the work area;
(B) The use and operation of guardrail systems (including perimeter safety cable systems), personal fall arrest systems, positioning device

systems, fall restraint systems, safety net systems, and other protection to be used;
(C) The correct procedures for erecting, maintaining, disassembling, and inspecting the fall protection systems to be used;
(D) The procedures to be followed to prevent falls to lower levels and through or into holes and openings in walking/working surfaces and walls; and
(E) The fall protection requirements for structural steel erection.

Applicability

The parties do not dispute that section 1710, subdivision (q), applied to the work that Employer was performing at the site on the date of the accident.

Violation

Clark testified that the Division issued Citation 4 because he determined during his inspection that Employer did not effectively train its employees on how to correctly maintain personal fall arrest systems. He testified that he interviewed employees, and some knew what to look for, while others did not. Additionally, he testified that employees were not properly trained because Employer's fall arrest system training (Exhibit O) did not address inspecting the labels. Clark testified that it is important to train employees to inspect the labels because the labels inform them of any relevant design limitations of the equipment, as well as the age of the equipment.

Employer provided training to employees on fall protection and the use and maintenance of fall arrest systems. (Exhibit O.) Nothing in the record, however, indicates that Employer trained its employees to inspect the labels of their issued equipment. Davies testified that Employer only provided one brand and type of fall arrest equipment to employees, therefore a label missing from one piece of equipment would not pose a risk to employees because all of the equipment was identical. This testimony, however, overlooks the fact that the label includes such information as the age of the equipment and its rated capacity. This information is important when determining whether a piece of equipment is safe to use or not. The manufacturer cautions against using inappropriate equipment and specifically states that "labels must be present and fully legible" for equipment to be safe to use. (Exhibit 34, p. 2.) By failing to train employees to inspect the labels of their assigned personal fall arrest equipment, Employer left a gap in the employees' training regarding an important aspect of their safety while performing assigned duties.

For the foregoing reasons, therefore, the Division established a violation of section 1710, subdivision (q), by a preponderance of the evidence. Citation 4 is therefore affirmed.

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.*, Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017).) Here, Employer was given the opportunity to present evidence in support of its affirmative defenses during the hearing. Employer did not directly address any of its pleaded affirmative defenses either during the hearing or in its post-hearing brief. However, for purposes of creating a complete record, the undersigned ALJ exercises his discretion to review the record as it pertains to Employer's raised affirmative defenses. Here, the ALJ has determined from a review of the record that the only defense actually litigated by Employer was the Independent Employee Action Defense (IEAD). Therefore, discussion of Employer's affirmative defenses shall be limited to IEAD, and all other defenses are deemed waived.

In order to successfully assert the affirmative defense of IEAD, an employer must establish the following elements:

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

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

The IEAD is an affirmative defense, thus Employer bears the burden of proof and must establish that all five elements of the IEAD are present by a preponderance of the evidence. (*Sacramento County Water Agency Department of Water Resources*, Cal/OSHA App. 1237932, Decision After Reconsideration (May 21, 2020).)

As explained by the Appeals Board in *General Dynamics NASSCO*, Cal/OSHA App. 1300984, Decision After Reconsideration (Jan. 23, 2023):

> The defense is premised upon the employer's compliance with non-delegable statutory and regulatory duties. (*Pierce Enterprises*, Cal/OSHA App. 00-1951, Decision After Reconsideration (Mar. 20, 2002).) The IEAD "recognizes that where the employer has done its best to comply with OSHA, the purposes of the

act would not be furthered by punishing it for the violation" (*Davey Tree Surgery Co. v. Occupational Safety and Health Appeal Bd*. (1985) 167 Cal.App.3d 1232, 1242; *Marine Terminals Corp. dba Evergreen Terminals*, Cal/OSHA App. 08-1920, Decision After Reconsideration (Mar. 5, 2013).)

The IEAD is inapplicable, however, where the violation is committed by a supervisor or foreperson. (*Davey Tree Surgery Co. v. Occupational Safety & Health Appeals Bd*., 167 Cal.App.3d 1232, 1241.)

Here, it is found that Daunt was a foreman, and therefore, the IEAD does not apply to the alleged violations, which all involved Daunt. Clark credibly testified that Palacio informed him during the inspection that Daunt was the "safety foreman" at the site. Palacio was Employer's superintendent, and his statement to Clark was made during Clark's inspection. Palacio's statement as a superintendent for Employer is an admission against interest. Admissions adverse to an employer made by a representative of that employer are an exception to the hearsay rule and may support a finding of fact. (§ 376.2; Evidence Code § 1222; *Macco Construction*, Cal/OSHA App. 84-1106, Decision After Reconsideration (Aug. 20, 1986).) Moreover, Palacio's statement to Clark is consistent with Employer's accident report. (Exhibit 29.) It is undisputed that this report was prepared by Employer, and it identifies Daunt as a part of the safety crew, specifically the "safety cable foreman." In addition, Clark interviewed employee Matt Finkle, who informed him that Daunt was Finkle's supervisor. Finally, Davies testified at the hearing that Daunt was the "safety foreman." Taken together, the evidence strongly supports a finding that Daunt was a foreperson, with supervisory authority and, more critically, authority over safety for himself and other employees at the worksite. Accordingly, Employer may not avail itself of the IEAD.

For the foregoing reasons, Employer did not establish any affirmative defense.

7. Did the Division correctly classify Citations 2, 3 and 4?

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

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

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

> "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.

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, supra*, Cal/OSHA App. 1237932.)

The parties stipulated during the hearing that the Division complied with Labor Code section 6432, subdivision (b)(1), by sending Employer a Notice of Intent to Classify Citation as Serious (1BY).

At the time of the hearing, Clark testified he had been employed in employment health and safety positions for over 20 years. Clark was the Senior Safety Engineer for the Division's Bakersfield office at the time of the hearing and had previously been employed by the Division as an Associate Safety Engineer. Clark received a bachelor's degree in environmental health with a focus on industrial hygiene. Clark testified that he was current in his Division-mandated training. On the basis of these facts, Clark is found to be competent to give opinions related to the Serious classifications of Citations 2, 3 and 4 pursuant to Labor Code section 6432, subdivision (g).

Citation 2:

Clark testified that the Division classified Citation 2 as Serious because the failure to use and maintain fall protection equipment according to the manufacturer's recommendations creates a realistic possibility of serious injury or death. Clark credibly testified that misusing fall protection equipment or using poorly maintained equipment could result in organ damage, head injuries, or bone injuries resulting in permanent physical impairment. Furthermore, Clark testified that the violation led to a fatal fall.

Citation 3:

Clark testified that The Division classified Citation 3 as Serious because not inspecting fall protection equipment created a realistic possibility of a serious physical injury or death. Clark credibly testified that failing to inspect fall protection could lead to damaged fall protection being used that could fail, which could lead to broken bones, organ damage, head injuries or lacerations.

Citation 4:

Clark testified that the Division classified Citation 4 as Serious because employees who were not properly trained in the safe use of their fall protection equipment would not know how to correctly maintain it or be able to identify unsafe equipment. This in turn created a realistic possibility of a serious physical injury such as those described above.

Clark's credible testimony is credited. Accordingly, the Division established a rebuttable presumption that Citations 2, 3 and 4 were properly classified as Serious.

8. Did Employer rebut the presumption that the violations alleged in Citations 2, 3 and 4 are 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.

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.

(*Id*.)

The Appeals Board has long held employers accountable for the acts and knowledge of their foremen. In *Greene and Hemly, Inc*., Cal/OSHA App. 76-435, Decision After Reconsideration (Apr. 7, 1978), the Board held that a foreman's knowledge of a violative

condition could be imputed to his employer even though upper management had no actual knowledge. Whether foremen or supervisors know the condition is unlawful is immaterial, since ignorance of the specific safety order's mandates is no defense. (*McKee Electric Company*, Cal/OSHA App. 81-0001, Decision After Reconsideration (May 29, 1981); and *Southwest Metals Company*, Cal/OSHA App. 80-068, Decision After Reconsideration (May 22, 1985).)

Here, as discussed above, it is found that Daunt was a foreperson with supervisory responsibility and responsibility for safety at the worksite.

Citation 2 alleges that Employer failed to ensure that fall arrest equipment issued to its employee was used in accordance with the manufacturer's recommendations. Daunt's failure to use fall arrest equipment in accordance with the manufacturer's recommendations was known to Employer because Daunt was a foreperson. Thus, Employer had knowledge of the violation and did not take appropriate actions to prevent it.

Citation 3 alleges that Employer failed to inspect and document its inspections of fall arrest systems used by its employees. As discussed previously, the evidence at hearing showed that Employer relied on employees to inspect their own assigned equipment. Thus, Employer had knowledge of the violation and did not take appropriate actions to prevent it.

Finally, Citation 4 alleges that Employer failed to provide compliant fall hazard training to its employees. Employer was aware, or should have been aware, of the manufacturer's recommendations regarding inspection and use of the fall arrest equipment that it provided to its employees because Employer selected the equipment. Employer therefore knew, or should have known, that the manufacturer recommended inspection of tags to ensure that they were present and legible to aid employees in ensuring that they correctly and safely used appropriate fall arrest equipment. Employer did not train its employees regarding this aspect of their safety. Thus, Employer had knowledge of the violation and did not take appropriate actions to prevent it.

Based on the foregoing facts, it is determined that Employer did not rebut the Serious classification for Citations 2, 3 or 4.

9. Did Employer's violation of section 1670, subdivision (f), cause a serious injury to its employee?

For a citation to be characterized 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.*, *supra*, Cal/OSHA Insp. No. 1092600.) Here, Citation 2 alleges that Daunt died because the

fall arrest equipment that he was wearing, specifically a damaged SRL, failed while he was working at height, causing him to fall and suffer fatal injuries. There is no dispute that Daunt fell while working at height, and the evidence shows that Daunt was wearing damaged fall arrest equipment at the time of the fatal accident. Had Employer inspected and removed the damaged SRL from service as was required, Daunt would not have been wearing it at the time of the accident, and presumably he would not have fallen to his death because he would have been using an SRL that was in appropriate (safe) condition for the work he was performing.

Accordingly, it is determined that Employer's violation of section 1670, subdivision (f), caused Daunt's fall and ensuing fatal injuries. Citation 2, therefore, was properly classified as Accident-Related.

10. Did the Division propose reasonable penalties?

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 introduced its proposed penalty worksheet (Exhibit 26), and the parties stipulated that, should violations be proven, the penalties for all the citations were correctly calculated, except for Citation 4. The parties stipulated that the calculation of the penalty for Citation 4 should have included an abatement credit and should have been calculated as $8,435.

In summary, the record supports a finding that the Division proposed reasonable penalties for Citation 1, Items 1 and 2, Citation 2 and Citation 3. It further supports a finding that the penalty for Citation 4 should have been set at $8,435.

Conclusion

The evidence supports a conclusion that Employer violated section 1514, subdivision (d), by failing to ensure that a hard hat was maintained in safe and sanitary condition.

The evidence supports a conclusion that Employer violated section 1670, subdivision (l) by failing to ensure that a component of a personal fall restraint system issued to its employee was properly labeled in accordance with ANSI requirements.

The evidence supports a conclusion that Employer violated section 1670, subdivision (f), by failing to ensure that fall arrest equipment issued to its employee was used in accordance with the manufacturer's recommendations. The citation was properly classified as Serious Accident-Related, and the Division proposed a reasonable penalty.

The evidence supports a conclusion that Employer violated section 1670, subdivision (b), by failing to inspect and document its inspections of fall arrest systems used by its employees. The citation was properly classified as Serious, and the Division proposed a reasonable penalty.

The evidence supports a conclusion that Employer violated section 1670, subdivision (b), by failing to inspect and document its inspections of fall arrest systems used by its employees. The citation was properly classified as Serious, and the penalty is correctly calculated as $8,435.

Order

Citation 1, Items 1 and 2, Citation 2 and Citation 3, and their associated penalties are affirmed and their penalties are assessed as set forth in the attached Summary Table. Citation 4 is affirmed and the penalty for Citation 4 is assessed at $8,435 in accordance with this Decision.

Howard I. Chernin

Dated: 06/03/2024

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.**