

**BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD**

In the Matter of the Appeal
of:

CHARLES PANKOW BUILDERS, LTD.
199 South Los Robles Avenue, Suite 300
Pasadena, CA 91101

Employer

DOCKET 13-R4D1-1759

DECISION

Statement of the Case

Charles Pankow Builders, Ltd. (Employer) is a general contractor. Beginning February 5, 2013, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer C. Renee Jones conducted an accident inspection at a place of employment maintained by Employer at 1705 Ocean Ave., Santa Monica, California (the site). On May 14, 2013, the Division cited Employer for failure to secure a cover for a floor opening to prevent accidental displacement¹.

Employer filed a timely appeal contesting the existence of the alleged violation, its classification, the time allowed to abate, the changes required to abate, and the reasonableness of the proposed penalty. Employer alleged multiple affirmative defenses. At the hearing, Employer withdrew its appeal of the time allowed to abate and the changes required to abate.

This matter came on regularly for hearing before Dale A. Raymond, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at West Covina, California on June 18 and 19, 2015.² Ronald E. Medeiros, Attorney, represented Employer. Tuyet-Van Tran, Staff

¹ The Division alleged a serious violation of section 1632, subdivision (b)(3), with a proposed penalty of \$18,000. Unless otherwise specified, all references are to Sections of California Code of Regulations, Title 8.

² This matter originally came for hearing before ALJ Sandra L. Hitt at West Covina, California on July 1, 2014. The hearing was concluded. ALJ Hitt left the Appeals Board before issuing a decision. Pursuant to Board Regulation 375.1(c), the matter was transferred to ALJ Raymond who held a hearing *de novo*.

Counsel, represented the Division. The parties presented oral and documentary evidence and the matter was submitted on June 19, 2015.

Issues

1. Did Employer violate section 1632, subdivision (b)(3)?
2. Did the Division establish a rebuttable presumption that the violation was serious?
3. Did Employer rebut the presumption of a serious classification by demonstrating that it did not and could not with the exercise of reasonable diligence know of the existence of the violation?
4. Was the violation accident-related?
5. Were extent and likelihood correctly calculated?

Findings of Fact

1. On December 8, 2012, a floor opening on the first floor was completely covered by a plywood board.
2. On December 8, 2012, Foreman Arturo Arellano assigned Employer's employees to sweep the first floor. One of these employees was Laborer Sergio Varela. (Varela)
3. To perform his sweeping duties, Varela stepped backwards. As he walked backwards, he contacted the plywood cover with his feet and accidentally displaced the cover.
4. Varela and his push broom fell through the opening.
5. Varela fell approximately 16 feet onto concrete, landing on the parking level.
6. As a result of his fall, Varela was hospitalized for more than 24 hours.
7. As of the day of the hearing, Varela had not fully recovered from his injuries.
8. The cover was in place but not secured³ for about three days before Varela fell.
9. The cover was in plain view to anyone passing by.
10. On December 5, 6, 7, and 8, 2012, Employer's foreman was at the site. He performed a job hazard analysis for the work to be done on December 8, 2012. He did not inspect the plywood board to determine if it was pinned down or identify any hazard related to the plywood board.
11. Employer stipulated that the penalty was calculated in accordance with the Division's policies and procedures except for the ratings for extent and likelihood.

Analysis

- 1. Did Employer violate section 1632, subdivision (b)(3)?**

³ The parties stipulated that the cover was not secured in place.

The Division has the burden of proving the violation by a preponderance of the evidence. (*Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).)

Section 1632, subdivision (b)(3), states in pertinent part:

1632. Floor, Roof, and Wall Openings to be Guarded.

...

(b)(3)...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."

An "opening" is defined in section 1504, subdivision (a), as follows:

An opening in any floor or platform, 12 inches or more in the least horizontal dimension. It includes: stairway floor openings, ladderway floor openings, hatchways and chute floor openings.

Section 1632, subdivision (a) addresses the hazard of employees or materials falling through openings in floors, roofs, walls or from stairways or runways arising from temporary or emergency conditions. (*Bostrom-Bergen Metal Products*, Cal/OSHA App. 00-1012, Decision After Reconsideration (Jan. 10, 2003).)

Employee exposure is established when employees come within the zone of danger while performing work-related duties. (*Nicholson-Brown, Inc.*, Cal/OSHA App. 77-024 Decision After Reconsideration (Dec. 20, 1979) p. 2.)

The alleged violation description reads as follows:

On December 8, 2012, a covering for a first floor opening was not secured in place to prevent accidental displacement. On this day, a laborer fell through the opening when the plywood cover was displaced while he was sweeping in the area. The employee was seriously injured when he fell approximately 16 feet to the level below.

The elements of the violation are: 1) existence of a floor opening, 2) a cover over the opening that was not secured⁴, and 3) employee exposure to the hazard of an unsecured cover for a floor opening.

On December 8, 2012, Foreman Arturo Arellano (Arellano) assigned Employer's employee Laborer Sergio Varela (Varela) to sweep the first floor at the site.

The first floor had an opening that was large enough for a man and his push broom to fall through. The opening was more than 12 inches in the least horizontal dimension⁵. Thus, the first element is met.

The opening was covered by a plywood board. Employer stipulated that the cover was not secured against displacement. Thus, the second element is met.

Varela stepped backwards as he swept the first floor. Not seeing the cover, he contacted it with his feet and displaced the cover. He fell through the floor opening. The fact that Varela fell through the opening establishes employee exposure to the hazard. Laborer Pedro Aguilera (Aguilera) was also working on the first floor near the unsecured cover at the time of the accident. On December 8, 2012, Arellano lifted the cover to look down the opening. Thus, Varela, Aguilera, and Arellano were exposed to the hazard and the third element is met.

All the elements of the violation being met, a violation of section 1632, subdivision (b)(3) is established.

2. Did the Division establish a rebuttable presumption that the violation was serious?

Labor Code § 6432, subdivision (a) states:

(a) There shall be a rebuttable presumption that a "serious violation" exists in a place of employment if the division demonstrates that there is a realistic

⁴ Section 1632, subdivision (b)(3), contains other requirements regarding the floor cover, and there is evidence that Employer violated some of the other requirements. Where a safety standard includes two or more distinct requirements, a violation of the safety standard exists where an employer violates any one requirement. *California Erectors Bay Area, Inc.*, Cal/OSHA App 93-503, Decision After Reconsideration (July 31, 1998); *Golden State Erectors*, Cal/OSHA App. 85-0026, Decision After Reconsideration (Feb. 25, 1987). Analyzing the requirements other than failure to secure the cover is not necessary as Employer stipulated that the cover was not secured.

⁵ The opening was about 30 inches by 68 inches. (Exhibit 5, p. 3) The plywood was 8 feet by 3 feet 8 inches.

possibility that death or serious physical harm could result from the actual hazard created by the violation. The actual hazard may consist of, among other things: ...

(2) The existence in the place of employment of one or more unsafe or unhealthful practices that have been adopted or are in use.

The Appeals Board has defined “realistic possibility” to mean a prediction that is within the bounds of human reason, not pure speculation. (*Bellingham Marine Industries, Inc.*, Cal/OSHA App. 12-3144, Decision After Reconsideration (Oct. 16, 2014), citing *Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (September 27, 2001), citing *Oliver Wire & Plating Co., Inc.*, Cal/OSHA App. 77-693, Decision After Reconsideration (April 30, 1980).)

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

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

(1) Inpatient hospitalization for purposes other than medical observation.

(2) The loss of any member of the body.

(3) Any serious degree of permanent disfigurement.

(4) Impairment sufficient to cause a part of the body or the function of an organ to become permanently and significantly reduced in efficiency on or off the job, including, but not limited to, depending on the severity, second-degree or worse burns, crushing injuries including internal injuries even though skin surface may be intact, respiratory illnesses, or broken bones.

Here, the fall distance was about 16 feet onto a concrete surface. Varela suffered various injuries as a result of his fall. He was hospitalized for three days and two nights. When he fell, his left arm landed on a reinforcing steel bar. It impaled soft tissue in the upper portion of his left arm. He fractured his pelvis and injured his knees and right shoulder in the fall. The doctors wanted to do surgery on a knee, but he declined the surgery. While he was in the hospital, he was placed on an IV and given a catheter. His kidneys started bleeding when he was in the hospital. He still suffers pain from injuries sustained in his fall.

Varela was hospitalized for purposes other than medical observation. Therefore, his injuries met the definition of “serious physical harm” in Labor Code section 6432(e).

The occurrence of serious physical harm caused by the actual hazard is proof that a serious physical harm is a realistic possibility.

Additionally, Associate Safety Engineer Renee Jones (Jones) testified that the type of injury that usually results from an accident caused by a fall of 10 to 16 feet caused serious physical harm in all of the cases she investigated and may result in death. Factors considered include fall distance and the type of landing surface. The greater the fall distance, the greater the force with which a body hits. Some surfaces absorb energy, but concrete is hard and does not absorb energy. Jones’s unrebutted opinion that serious injury or death from falling about 16 feet to a concrete surface below is a realistic possibility is found credible and is accepted.⁶

The realistic possibility of serious physical harm combined with existence of the actual hazard caused by failure to secure the cover comes within the definition of “serious” set forth in section 6432.

Therefore, the Division established a rebuttable presumption that the violation was properly classified as a serious.

3. Did Employer rebut the presumption of a serious classification by demonstrating that it did not and could not with the exercise of reasonable diligence know of the existence of the violation?

Employer argued that the presumption of a serious classification was rebutted due to lack of Employer knowledge despite the exercise of reasonable diligence.

Section 6432, subdivision (c), provides as follows:

⁶ Jones testified that she was current in her Division-mandated training, and has experience conducting accident inspections involving falls. Jones’s opinion was also based upon her 20 years of experience working for the Division and prior jobs within the industry in which she had health and safety responsibilities and conducted inspections. She had investigated 40 to 50 accidents involving falls of 10 to 16 feet, all of which resulted in serious injuries. The types of injuries included multiple fractures, concussions, and internal bleeding. Jones has a Master’s Degree from UCLA in Environmental Health Science with a specialty in Industrial Hygiene. She has a Bachelor of Arts Degree in Biology from the University of Cincinnati. Her opinion was based upon a reasonable evidentiary foundation consisting of her education, experience and training. Thus, Jones is competent to give her opinion per Labor Code section 6432, subdivision (g). (See *Wright & Associates, Inc.*, Cal/OSHA App. 95-3649, Decision After Reconsideration (Nov. 29, 1999).)

If the Division establishes a presumption pursuant to subdivision (a) that a violation is serious, the employer may rebut the presumption and establish that a violation is not serious by demonstrating that the employer did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation.

Reasonable diligence includes the obligation by foremen to oversee the entire work site where safety and health hazards are present if exposure to an unsafe condition exists. (*A.A. Portanova & Sons, Inc.*, Cal/OSHA App. 83-891, Decision After Reconsideration (Mar. 19, 1986) pp. 4-5.) A hazard that could have been discovered through safety inspections is deemed discoverable through reasonable diligence. (*Sturgeon & Son, Inc.*, Cal/OSHA App. 91-1025, Decision After Reconsideration (July 19, 1994); *Anheuser-Busch, Inc.*, Cal/OSHA App. 84-113, Decision After Reconsideration (July 30, 1987).)

A foreman's knowledge is imputed to Employer because a foreman is a member of management. (*Louisiana-Pacific Corporation*, Cal/OSHA App. 82-1043, Decision After Reconsideration (Oct. 21, 1985).)

A subcontractor installed the cover without informing Employer. The cover in question was in place for at least three days before the accident.⁷

Pursuant to Employer's policy, Foreman Arturo Arellano (Arellano) performed a job hazard analysis for his crew before any work began. Arellano performed an analysis on December 5, 6, and 7.⁸ The analysis performed on December 7 included the jobs to be performed on December 8. Clean up was one of the jobs listed. The analysis specifically states, "The tasks for today have been reviewed *in the work area where they will be performed.*" [Emphasis added]

Arellano knew that his crew would be sweeping the first floor. Arellano had a duty to inspect the first floor to identify the hazards. The plywood cover was in plain sight and easily visible to anyone in the area. The cover was placed in an area about 20 to 30 feet square with nothing obstructing its view. Reasonable diligence required Arellano to inspect the plywood floor cover to determine if it was secured to prevent accidental displacement.

Employer therefore failed to exercise reasonable diligence to ensure employee safety. As such, Employer's assertion that it lacked actual

⁷ Project Manager Eduardo Nochez (Nochez) testified that he did not know about the cover because it was a very large project, and he did not walk every square foot of the job every day. He could not cover every aspect of the project every day.

⁸ Exhibit 7

knowledge of the existence of the violation does not rebut the presumption that the violation was properly classified as serious.

4. Was the violation accident-related?

“To establish the characterization of the violation as accident-related, the Division must show by a preponderance of the evidence a causal nexus between the violation and the serious injury.” (*Pierce Enterprises*, Cal/OSHA App. 00-1951, Decision After Reconsideration (Mar. 20, 2002) citing *Obayashi Corporation*, Cal/OSHA App. 98-3674, Decision After Reconsideration (June 5, 2001).) The Division establishes that a violation is accident-related by showing that the violation more likely than not was the cause of the injury. (*Mascon, Inc.*, Cal/OSHA App. 08-4270, Denial of Petition for Reconsideration (Mar. 4, 2011).)

Here, Varela would not have fallen through the opening if the cover had been secured to prevent movement. His fall 16 feet to concrete below was the cause of his serious injuries.

Therefore, it is found that the violation was accident-related.

5. Were extent and likelihood correctly calculated?

Employer stipulated that the penalty was correctly calculated except for the ratings for extent and likelihood.

Penalties proposed in accordance with the penalty setting regulations promulgated by the Director of the Department of Industrial Relations (§§333-336) are presumptively reasonable and will not be reduced absent evidence that the proposed penalty was miscalculated, the regulations were improperly applied or that the totality of the circumstances warrant a reduction. (*Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (May 27, 2006).)

Where a serious violation causes a serious injury, the only downward penalty adjustment allowable is for size. (Labor Code § 6319(d); §336(d)(7); *Dennis J. Amoroso Construction Co., Inc.*, Cal/OSHA App. 98-4256, Decision After Reconsideration (Dec. 20, 2001).)

Jones calculated the proposed penalty by beginning with a base of \$18,000 for severity⁹ and making no other adjustments.¹⁰ Extent¹¹ and

⁹ Section 335, subdivision (a)(1)(B)

¹⁰ Exhibit 6, Proposed Penalty Worksheet, Form C-10

¹¹ Section 335, subdivision (a)(2)

likelihood¹² may be rated as low, medium, or high. Jones testified that extent was low because only one cover out of 200 covers was out of compliance and only two employees out of over 100 employees were exposed to the hazard. However, she rated extent as medium because no downward adjustment is allowed when a serious violation causes a serious injury. She rated likelihood as medium.

Here, since a serious violation caused a serious injury, the only downward adjustment possible is for size. Since Employer has over 100 employees, no adjustment for size is allowable. The ratings for extent and likelihood may not be given a lower rating than medium. As Jones rated extent and likelihood as medium, it is found that her ratings are appropriate.

Therefore, the proposed penalty of \$18,000 is found reasonable and is affirmed.

Conclusion

Therefore, Employer's appeal is denied. The Division established a serious accident-related violation of section 1632, subdivision (b)(3). The Division's extent and likelihood ratings for the penalty were properly calculated.

Order

Citation 1 and the proposed \$18,000 penalty are affirmed.

It is further ordered that the penalty indicated above and set forth in the attached Summary Table be assessed.

Dated: July 09, 2015

DALE A. RAYMOND
Administrative Law Judge

DAR:ml

¹² Section 335, subdivision (a)(3)

APPENDIX A

**SUMMARY OF EVIDENTIARY RECORD
CHARLES PANKOW BUILDERS, LTD.
Docket 13-R4D1-1759**

Dates of Hearing: June 18 and 19, 2015

Division's Exhibits--Admitted

Exhibit Number	Exhibit Description
1	Jurisdictional Documents
2	Photo—plywood cover on Feb. 5, 2015
3	Photo—rebar
4	Photo—underside of openings
5	Accident Report (20 pages)
6	Proposed Penalty Worksheet—Form C-10
7	Job Hazard Analyses
8	Photo—accident site on Dec. 8, 2012
9	Notice of Intent to Issue Serious Violation—Form 1BY
10	Cover for Notice of Intent to Issue Serious Violation

Employer's Exhibits

Exhibit Letter	Exhibit Description
	No exhibits offered

Witnesses Testifying at Hearing

1. Sergio Varela
2. C. Renee Jones
3. Eduardo Nochez

CERTIFICATION OF RECORDING

I, Dale A. Raymond, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hear the above matter, hereby certify the proceedings therein were electronically recorded. The recording was monitored by the undersigned and constitutes the official record of said proceedings. To the best of my knowledge, the electronic recording equipment was functioning normally.

DALE A. RAYMOND
Signature

July 9, 2015
Date

SUMMARY TABLE DECISION

In the Matter of the Appeal of:

CHARLES PANKOW BUILDERS LTD
Docket 13-R4D1-1759

Abbreviation Key: Reg=Regulatory
 G=General W=Willful
 S=Serious R=Repeat
 Er=Employer DOSH=Division

IMIS No. 314863317

DOCKET	C I T A T I O N	I T E M	SECTION	T Y P E	MODIFICATION OR WITHDRAWAL	A F F I R M E D	V A C A T E D	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT HEARING	FINAL PENALTY ASSESSED BY BOARD
13-R4D1-1759	1	1	1632(b)(3)	S	ALJ affirmed violation	X		\$18,000	\$18,000	\$18,000
Sub-Total								\$18,000	\$18,000	\$18,000

Total Amount Due* **\$18,000**

(INCLUDES APPEALED CITATIONS ONLY)

NOTE: *Please do not send payments to the Appeals Board.*
All penalty payments should be made to:
 Accounting Office (OSH)
 Department of Industrial Relations
 P.O. Box 420603
 San Francisco, CA 94142

*You will owe more than this amount if you did not appeal one or more citations or items containing penalties.
 Please call (415) 703-4291 if you have any questions.

ALJ: DAR/ml
 POS: 07/09/15

