BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1205077**
HANOVER R S CONSTRUCTION LLC **233 A STREET, SUITE 706** **SAN DIEGO, CA 92101** **Employer**	**DECISION**

Statement of the Case

Hanover RS Construction LLC (Employer or Hanover) is a construction general contractor. Beginning February 7, 2017, in response to a report that a worker had been injured on the job, the Division of Occupational Safety and Health (the Division), through Safety Engineering Technician Paul Espino (Espino), conducted an accident investigation at 6151 Fairmount Avenue, San Diego, California (worksite).

On May 19, 2017, the Division cited Employer for three violations of title 8 of the California Code of Regulations.[1] The citations alleged that: 1) Employer did not properly implement and maintain an effective Injury and Illness Protection Program (IIPP) by failing to identify and correct hazards with regard to floor openings; and 2) Employer failed to guard and secure a floor opening cover resulting in a worker falling 10 feet, sustaining a broken wrist requiring surgery and hospitalization.[2]

Employer filed timely appeals of the citations, contesting the existence of the violation for both citations. As to Citation 2, Employer contested the classification of the citation and the reasonableness of the proposed penalty. Additionally, Employer's appeals asserted unspecified affirmative defenses to be established at hearing.[3]

This matter was heard by J. Kevin Elmendorf, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (Appeals Board), in San Diego,

[1] Unless otherwise specified, all references are to sections of California Code of Regulations, title 8.
[2] By stipulation of the parties, Citation 1, Item 2, is reduced to a Notice in Lieu of Citation, and the penalty is reduced to zero. See Exhibit J-1.
[3] 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).)

California, on August 2 and 3, 2018 and June 25, 2019. David Donnell, Esq., of the law firm of Donnell, Melgoza and Scates LLP, represented Employer. Clara Hill-Williams, Esq., Staff Counsel, represented the Division. The matter was submitted for decision on January 15, 2020.

Law and Motion

Prior to the final day of hearing, the Division filed a Motion to Amend Citation 2, Item 1. Division's Motion to Amend Citation sought leave to amend Citation 2 to replace section 1632, subdivision (h), as the section that was allegedly violated with section 1632, subdivision (b). Section 1632, subdivision (h), refers to floor "Holes" which are holes less than 12 inches in width whereas section 1632, subdivision (b), refers to floor "Openings" which are 12 inches or more in the least horizontal dimension. The motion was granted.

Issues

1. Did Employer violate section 1509, subdivision (a), referencing General Industry Safety Orders section 3203, subdivisions (a)(4) and (a)(6), by failing to implement and maintain an effective IIPP as to floor opening hazards?

2. Did Employer violate section 1632, subdivision (b), by failing to guard and secure floor opening covers?

3. Did the Division establish a rebuttable presumption that it properly classified Citation 2 as Serious?

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

5. Is the proposed penalty for Citation 2 reasonable?

Findings of Facts

1. Bomel Construction Company (Bomel) was a subcontractor of Employer.

2. Employer's IIPP contained the required components and procedures pertaining to floor opening hazards.

3. The subject floor opening was rectangular in shape and was 26 inches wide and 192 inches in length.

4. Sean Perrington (Perrington), a foreman/superintendent for subcontractor Bomel, removed the floor opening cover and replaced the cover without securing it.

5. Samuel Alvarez, Jr. (Alvarez) walked on the unsecured floor opening cover and when it became displaced, he fell 10 feet to the concrete surface below.

6. Only a few moments elapsed between the time the cover was replaced without being secured and the time Alvarez walked onto the cover and fell through.

7. As a result of his fall, Alvarez suffered a broken wrist which required hospitalization and surgery.

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

Analysis

1. Did Employer violate section 1509, subdivision (a), referencing General Industry Safety Orders, section 3203, subdivisions (a)(4) and (a)(6), by failing to implement and maintain an effective IIPP as to floor opening hazards?

Section 1509, subdivision (a), provides:

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

Section 3203, subdivisions (a)(4) and (a)(6), provide in relevant part:

(a) Effective July 1, 1991, every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program (Program). The Program shall be in writing and, shall, at a minimum: [...]

> (4) Include procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices. Inspections shall be made to identify and evaluate hazards. […]
>
> (6) Include methods and/or procedures for correcting unsafe or unhealthy conditions, work practices and work procedures in a timely manner based on the severity of the hazard.

In Citation 1, Item 1, the Division alleges:

> Prior to and during the course of the inspection, including, but not limited to, November 26, 2016, Employer failed to implement and maintain an effective IIPP by not identifying the floor opening hazard during inspections under (a)(4) and not correcting the hazards Employees were exposed to under (a)(6). Employees were exposed to floor openings covers that were not secured properly.

The Division has the burden of proving a violation of the cited safety order by a preponderance of the evidence. *(Howard J. White. Inc., Howard White Construction, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (Jun. 16, 1983).) "'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." (*Timberworks Construction, Inc*., Cal/OSHA App. 1097751, Decision After Reconsideration (March 12, 2019).)

a. The Accident

The facts of the accident are not in dispute. The construction project was the building of a multi-level parking garage. Perrington left the opening cover unsecured to retrieve tools to secure the opening cover. Within moments, Alvarez walked across the unsecured cover and fell through to the concrete 10 feet below, suffering a broken wrist requiring hospitalization and surgery.

b. Alleged violations of section 3203

Merely having a written IIPP is insufficient to establish implementation. (*Los Angeles County Department of Public Works*, Cal/OSHA App. 96-2470, Decision After Reconsideration (Apr. 5, 2002).) Proof of implementation requires evidence of actual responses to known or reported hazards. (*Bay Area Rapid Transit District*, Cal/OSHA App. 09-1218, Decision After Reconsideration and Order of Remand (Sep. 6, 2012), citing *Los Angeles County Department of Public Works, supra*, Cal/OSHA App. 96-2470.) A single, isolated failure to "implement" a detail within an otherwise effective program does not necessarily establish a violation for failing to maintain an effective program where that failure is the sole imperfection. (*GTE California*, Cal/OSHA App. 91-107, Decision After Reconsideration (Dec. 16, 1991); *David Fischer, dba Fischer Transport, A Sole Proprietorship*, Cal/OSHA App. 90-762, Decision After Reconsideration (Oct. 16, 1991).)

1. Alleged violations of section 3203, subdivision (a)(4)

To sustain the Division's Citation 1, Item 1, as to section 3203, subdivision (a)(4), the Division needs to establish that Employer's IIPP [4] failed to include procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices. Further, inspections must be made to identify and evaluate floor opening hazards.

The Appeals Board has found that "[w]hat is required [by section 3203, subdivision (a)(4)] is for Employer to have procedures in place for identifying and evaluating workplace hazards, and these procedures are to include 'scheduled periodic inspections.'" (*Brunton Enterprises, Inc*., Cal/OSHA App. 08-3445, Decision After Reconsideration (Oct. 11, 2013).)

In *Coast Waste Management, Inc*., Cal/OSHA App. 11-2385, Decision After Reconsideration (Oct. 7, 2016), the Division similarly alleged that an employer had failed to identify and evaluate a workplace hazard. The Appeals Board found that the employer had not violated the IIPP safety order, finding that the hazard had been identified and the employer "had promulgated a rule in its safety program designed to address the hazard." (*Id*.)

Hanover's Site Specific Safety Plan (Hanover's SSSP) addresses the hazard of floor openings and the requirement that such openings be covered and secured. Hanover's SSSP requires: "Hole covers shall be secured in place and marked with high visibility paint for any hole 2" in diameter or greater. Also, it is required that "weekly safety meetings and inspections are to be performed and documented." Adam Parr (Parr), Hanover's Project Manager, credibly testified that Employer complies with this requirement and holds weekly safety meetings and inspections. Additionally, subcontractor Bomel's Site Specific Safety Plan (Bomel's SSSP) contains rules regarding floor opening covers, including specifying that covers are to be secured to prevent displacement.

In addition to Employer's IIPP requiring that inspections are to be performed and corrections completed, Employer utilizes an electronic program that generates suggested hazards to inspect when conducting inspections. This program allows Employer's personnel to identify hazards and immediately enter that information into a hand held device which serves as a reminder and a log of completions and a list of unfinished corrections. The program can track safety issues from the time the hazard is identified to the date of its correction.

[4] Employer's IIIP is a combination of Hanover's Site Specific Safety Plan (Hanover's SSSP) and subcontractor Bomel Construction's Site Specific Safety Plan (Bomel SSSP)

As to the Division's Citation 1, Item 1, section 3203, subdivision (a)(4), it is found that Employer established that it properly implemented and maintained its IIPP which included procedures for identifying and evaluating work place hazards including conducting scheduled periodic inspections to identify unsafe conditions and work practices. Further, inspections were made to identify and evaluate floor opening hazards.

2. Alleged violations of section 3203, subdivision (a)(6)

To sustain the Division's Citation 1, Item 1, as to section 3203, subdivision (a)(6), the Division needs to establish that Employer's IIPP failed to include procedures to correct the floor opening hazards once identified.

Section 3203, subdivision (a)(6), requires employers to take appropriate corrective action to abate the hazards. (*BHC Fremont Hospital, Inc*., Cal/OSHA App. 13-0204, Denial of Petition for Reconsideration (May 30, 2014).)

A written plan that states action shall be taken on reported unsafe or unhealthy conditions may satisfy the requirement to have a written plan to correct an unsafe or unhealthy condition. Implementation under section 3203, subdivision (a)(6), consists of actual responses to known or reported hazards. (*Bay Area Rapid Transit District*, Cal/OSHA App. 09-1218, Decision After Reconsideration and Order of Remand (Sep. 6, 2012), citing *Los Angeles County Department of Public Works*, Cal/OSHA App. 96-2470, Decision After Reconsideration (Apr. 5, 2000).)

Here, Hanover's SSSP required that hazards be corrected immediately when discovered and that the corrective actions be documented. (Exhibit B-8). Specific procedures need not be identified in the IIPP. An IIPP that states action shall be taken satisfies the requirement to have a plan to correct an unsafe or unhealthy condition, as long as it is implemented. (*Bay Area Rapid Transit District*, Cal/OSHA App. 09-1218, Decision After Reconsideration and Order of Remand (Sep. 6, 2012), citing *Los Angeles County Department of Public Works*, Cal/OSHA App. 96-2470, Decision After Reconsideration (Apr. 5, 2000).)

Employer's implementation of its IIPP and related safety programs was sufficient to mandate that workers are to identify and correct the hazard of unsecured floor opening covers. Perrington's momentary error in walking away from the unsecured opening for only a few brief moments was an isolated incident that does not constitute a deficiency that is essential to the overall program.

As such, it is found that the Division did not meet its burden of proof to establish Employer's IIPP violated section 1509, subdivision (a), in accordance with General Industry

Safety Orders section 3203, subdivisions (a)(4) and (a)(6). Employer's appeal of Citation 1, Item 1, is granted.

2. Did Employer violate section 1632, subdivision (b), by failing to guard and secure floor opening covers?

Section 1632, entitled "Floor, Roof, and Wall Openings to Be Guarded," provides, in relevant part:

> a) This section shall apply to temporary or emergency conditions where there is danger of employees or materials falling through floor, roof, or wall openings, or from stairways or runways.
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> b) (1) Floor, roof and skylight openings shall be guarded by either temporary railings and toeboards or by covers.
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> . . .
>
> (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." Markings of chalk or keel shall not be used.

In Citation 2, the Division alleges:

> Prior to and during the course of the inspection, including, but not limited to, on November 21, 2016, the controlling employer failed to guard and secure floor opening covers as required by this section. On 12/21/16 [*sic*] an employee was seriously injured when he walked over a floor opening cover that was not secured falling from 10 feet from the second level of a parking structure onto the ground sustaining multiple fractures.

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

> Opening. 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 1504)

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

Parr credibly testified that Perrington, a superintendent for subcontractor Bomel, was at the site of the accident and removed the opening cover following the completion of a tension test on cables underneath the cover. After replacing the cover, Perrington left the area to retrieve a tool, leaving the cover unsecured. Thus, the second element is met.

Alvarez, the injured worker, reported in his statement that he fell through the opening when he walked across the unsecured floor opening cover when it became displaced. He fell ten feet to the concrete slab below. Alvarez, Perrington and Rogers were exposed to the hazard and the third element is met.

Therefore, the Division established that Employer violated section 1632, subdivision (b), by demonstrating that Employer failed to secure the floor opening cover, which resulted in a worker falling 10 feet and suffering serious injuries. Accordingly, Citation 2 is sustained.

3. Did the Division establish a rebuttable presumption that it properly classified Citation 2 as Serious?

Labor Code section 6432 states, in pertinent parts:

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

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

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

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

[…]

Under Labor Code section 6432, subdivision (a), "In order to establish a rebuttable presumption that a serious violation exists, the Division must demonstrate a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation." (*N B Baker Electric, Inc. dba Baker Electric Solar*, Cal/OSHA Insp. 1070836, Denial of Petition for Reconsideration (Aug. 10, 2017).) The term "realistic possibility" means that it is within the bounds of reason, and not purely speculative. (*Langer Farms, LLC*, Cal/OSHA App. 13-0231, Decision After Reconsideration (Apr. 24, 2015).)

Prior to the hearing in this matter, the parties stipulated that there is a realistic possibility that a fall from 10 feet could result in a serious injury.[5] In this case, not only is it a realistic possibility that a fall of 10 feet could cause serious injuries, in actuality, Alvarez did suffer a broken wrist that required hospitalization and surgery as a result of the actual hazard created by the violation. Accordingly, it is found that the Division established a rebuttable presumption that Citation 2 was properly classified as Serious.

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

The Division classified Citation 2 as Serious. Labor Code section 6432 sets forth the evaluative framework for determining whether a citation has been properly classified as Serious. It states:

> If the division establishes a presumption pursuant to subdivision (a) that a violation is serious, the employer may rebut the presumption and establish that a violation is not serious by demonstrating that the employer did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation. The employer may accomplish this by demonstrating both of the following:
>
> > (1) The employer took all the steps a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation, taking into consideration the severity of the harm that could be expected to occur and the likelihood of that harm occurring in connection with the work activity during which the violation occurred. Factors relevant to this determination include, but are not limited to, those listed in subdivision (b).

[5] The parties used the term "serious injuries" in their stipulation. Labor Code section 6432, subdivision (a), uses the term "serious physical harm." In the context of this case, "serious injuries" is considered synonymous with "serious physical harm" because Alvarez's injuries meet both legal definitions.

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

To prove that an employer could not have known of the violative condition by exercising reasonable diligence, an employer must establish that the violation occurred at a time and under circumstances which could not provide the employer with a reasonable opportunity to have detected it. (*Vance Brown, Inc.,* Cal/OSHA App. 00-3318, Decision After Reconsideration (April 1, 2003).)

In this case, there were no Hanover employees at the accident site. Employer's Project Manager and Superintendent were walking the worksite but they were out of visual range of the accident site. As such, there were no Hanover supervisory employees whose presence and knowledge of the violation might be imputed to Employer. Because the event happened within moments, a reasonably diligent employer could not have discovered this hazard between the time it occurred and when the worker fell through the unsecured cover.

Employer demonstrated it had adequate training and safety procedures in place to detect and enforce its safety requirements, but failed to catch this particular instance due to its momentary nature. Even with all due diligence, Employer could not oversee each employee's every action at every moment. Thus, Employer did not know and could not have known that Perrington, an employee of subcontractor Bomel, would walk away from the floor opening cover for a few moments without securing it from displacement. During this time, Alvarez walked on the unsecured cover, and when it became displaced, he fell to the concrete below. Employer demonstrated that it lacked the knowledge required to support the Serious classification.

Employer demonstrated that it did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation. As such, Employer provided sufficient evidence to rebut the presumption that a Serious violation exists. Accordingly, Citation 2 is reclassified as a General violation.[6]

5. Is the proposed penalty for Citation 2 reasonable?

Employers appeal challenged the reasonableness of the penalty imposed on Citation 2. However, at the commencement of the hearing, the parties submitted a stipulation agreeing that the penalty calculations were completed in accordance with the Division's Policies and Procedure Manual and applicable regulations, as set forth on Division's Proposed Penalty Worksheet. Further, the stipulation provided, "If the classification of the alleged violation is reduced, the Appeals Board shall do so consistent with the proposed penalty worksheet."

As discussed above, Citation 2 has been reclassified as a General. The gravity factors of Severity, Extent and Likelihood are properly found to be assigned a Medium ranking. Thus, the

[6] As it is found that Citation 2 must be reduced to a General, the Accident-Related designation is removed.

Gravity Based Penalty as to the General violation is $1,500. Deducting the total of 65 percent for the Good Faith, History and Size adjustment factors, and then applying the abatement credit of 50 percent, the penalty for the Citation 2 is reduced to $260, which is found to be reasonable.

Conclusions

Citation 1, Item 1, alleged a violation of section 1509, subdivision (a). The Division did not meet its burden to prove by a preponderance of the evidence that Employer failed to ensure that its IIPP was effectively implemented and enforced with regard to the hazards of floor openings and the securing of floor opening covers. The citation and the associated penalty are vacated.

In Citation 2, the Division met its burden to establish that Employer violated section 1632, subdivision (b), because Employer failed to ensure that floor opening covers were properly secured. Employer successfully rebutted the presumption that the classification was Serious by establishing that it did not know, and could not with the exercise of reasonable diligence have known, of the existence of the violation. The citation is reclassified as General. The modified penalty of $260 is reasonable.

Orders

It is hereby ordered that Citation 1, Item 1, is vacated.

It is hereby ordered, by stipulation, that Citation 1, Item 2, is reduced to Notice in Lieu of Citation with no penalty.

It is hereby ordered that Citation 2 is sustained as a General violation with a modified penalty of $260.

Dated: 02/07/2020

J. Kevin Elmendorf
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.**