BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No.
XL CONCRETE MASONRY, LLC	**1563307**
Employer	**DECISION**

Statement of the Case

XL Concrete Masonry, LLC, (Employer) is a concrete and masonry contractor. On November 10, 2021, the Division of Occupational Safety and Health (the Division), through Senior Safety Engineer Richard Beane, commenced an investigation of a work site located at 5365 Arch Road in Stockton, California (the job site).

On March 22, 2022, the Division issued three citations to Employer alleging three violations of California Code of Regulations, title 8.[1] Citation 1, Item 1, alleges a failure to provide fall protection where required. Citation 1, Item 2, alleges a failure to comply with requirements for portable ladders. Citation 2 alleges a failure to provide impalement protection from reinforcing steel.

Employer filed timely appeals of the citations. Employer appealed all citations on the ground that the safety orders were not violated. Employer appealed Citation 2 on the additional grounds that the classification is incorrect and the proposed penalty is unreasonable. Additionally, Employer asserted a series of affirmative defenses to each citation.[2]

On February 1, 2024, an Order on Motion issued on a motion to amend citation filed by the Division. The Order on Motion added an alternative theory of liability to Citation 1, Item 1. The alternative theory of liability alleges a failure to establish, implement, and maintain an effective injury and illness prevention program (IIPP).

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

[2] Except where discussed in this Decision, Employer did not present evidence in support of its affirmative defenses, and said defenses are therefore deemed waived. (*RNR Construction, Inc.,* Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017).)

This matter was heard by Mario L. Grimm, Administrative Law Judge (ALJ) for the Occupational Safety and Health Appeals Board (the Appeals Board). The hearing was conducted on July 23 and 24, 2025, from West Covina, California, with the parties and witnesses appearing remotely via the Zoom video platform. Perry P. Poff, attorney with Donnell, Melgoza & Scates, LLP, represented Employer. Lidia J. Marquez, Staff Counsel, represented the Division. The matter was submitted on February 25, 2026.

Issues

1. Was Employer required to provide fall protection where an employee stood on the boom of a laser screed?

2. Did Employer implement and maintain an effective IIPP?

3. Did Employer comply with requirements for the use of portable ladders?

4. Did Employer provide impalement protection from concrete stakes?

5. Did Employer establish the Logical Time defense?

6. Did the Division establish a rebuttable presumption of a Serious violation for Citation 2?

7. Did Employer rebut the presumption of a Serious violation for Citation 2?

8. Is the proposed penalty for Citation 2 calculated in accordance with the penalty-setting regulations?

Findings of Fact

1. On November 8, 2021, an employee stood on and worked from the boom of a laser screed.[3]

2. Employer performed periodic inspections, identified and evaluated hazards, and corrected unsafe work conditions as directed by its IIPP.

3. Employer used a self-supporting ladder as a non-self-supporting ladder by leaning it against a wall.

4. The concrete stakes at the job site were made of steel.

[3] A laser screed is a machine used for leveling freshly poured concrete.

5. Employer used the concrete stakes at the job site to support the formwork into which concrete was poured.

6. Employer did not cap concrete stakes until it finished the set of formwork and abandoned the area.

7. Employer's concrete stakes presented an impalement hazard immediately after placement.

8. Employees were exposed to impalement hazards from concrete stakes.

9. Impalement on concrete stakes can result in serious injuries, including death.

10. Employer did not have a history of Serious, Repeat, or Willful violations within the three years prior to the issuance of Citation 2.

11. Employer had approximately 32 employees at the job site at the time of the inspection.

12. Employer had capped all of its concrete stakes when the Division inspected the job site on November 10, 2021.

13. The appealed proposed penalty is not calculated correctly.

Analysis

1. Was Employer required to provide fall protection where an employee stood on the boom of a laser screed?

Citation 1, Item 1, alleges two alternative theories of the violation. The first theory alleges a violation of section 1670, subdivision (a), and is examined here.

Section 1670, subdivision (a), requires employers at construction sites to provide fall protection as follows:

> Approved personal fall arrest, personal fall restraint or positioning systems shall be worn by those employees whose work exposes them to falling in excess of 7 1/2 feet from the perimeter of a structure, unprotected sides and edges, leading edges, through shaftways and openings, sloped roof surfaces steeper than 7:12, or other sloped surfaces steeper than 40 degrees not otherwise adequately protected under the provisions of these Orders.

The two alternative theories of violation use the same alleged violation description, as follows:

> Prior to and during the course of the inspection, including, but not limited to November 10, 2021, the day of the inspection, the employer failed to assure that employees did not stand on an elevated boom. On November 16, 2021, an employee was observed standing on an elevated boom section of a laser screed at approximately +/- eight feet above the ground without any means of fall protection at a commercial construction site located at 5365 Arch Road in Stockton, California.

The Division bears the burden of proving a violation by a preponderance of the evidence. (*Howard J. White, 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. (*Nolte Sheet Metal, Inc*., Cal/OSHA App. 14-2777, Decision After Reconsideration (Oct. 7, 2016).)

On November 8, 2021, Employer was performing concrete and masonry work at the job site. This work included building forms into which concrete would be poured. Employer hammered concrete stakes (which are made of steel) into the ground to support the formwork.

Outside the job site on November 8, 2021, a laborer's union was picketing as a result of a labor dispute with Employer. Daniel Garcia (Garcia) was picketing outside the job site. Garcia testified that he took the photographs in Exhibits 2, 3, and 4. These photographs show a laser screed with a worker standing on the boom of the laser screed. Garcia testified that the worker in the photograph was using a pressure washer to perform cleaning. Garcia estimated the fall height to be approximately eight feet. Garcia further testified that a fall from the height shown in the photographs could result in severe injuries. Garcia did not measure the height of the boom. Garcia initially estimated that, at the time he took the photographs, he was approximately 20 feet away from the laser screed.

On November 10, 2021, the Division received a complaint regarding the job site. The complaint included photographs of employees and conditions at the job site. The Division commenced an investigation through Senior Safety Engineer Richard Beane (Beane). Beane went to the job site on the day that the complaint was received. Beane testified that he spoke with the General Contractor at the job site. Beane also testified that he spoke with Employer's safety consultant Virginia Toalepai.

The evidence here establishes that an employee was exposed to a fall when he stood on the boom of a laser screed. (Exs. 2, 3, 4.) However, the photographs do not establish the fall height to which the employee was exposed. In its post-hearing brief, the Division cites the testimony of Garcia and Beane regarding the severity of injuries that could result from the worker falling. However, testimony regarding the potential injuries does not establish the fall height. Garcia's estimate of the fall height depicted in the photographs is not credited as being reliable with respect to the precise fall height. The reliability of Garcia's estimate is undermined by his estimate that he had been only 20 feet away when he took the photographs in Exhibits 2, 3, and 4. The photographs show that Garcia was quite a greater distance away.

Although the photographs and testimony indicate that the fall height was in the general range of 7.5 feet, it is equally likely that the fall height was one or more inches below or above 7.5 feet. Thus, it is equally likely that the height did not require Employer to provide fall protection under the cited safety order. Therefore, the Division did not meet its burden to prove by a preponderance of the evidence that Employer was required to provide fall protection under the cited safety order.

Accordingly, the evidence does not establish the first theory of a violation under Citation 1, Item 1.

2. Did Employer implement and maintain an effective IIPP?

The second theory of a violation in Citation 1, Item 1, alleges a violation of section 1509, subdivision (a), and is examined here.

Section 1509, subdivision (a), requires employers engaged in construction work to comply with section 3203. In turn, section 3203, subdivision (a), requires employers to have an IIPP.

Section 3203, subdivision (a), provides, 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 . . . .

As noted above, the alternative theory refers to the same alleged violation description, included here again for ease of reference:

> Prior to and during the course of the inspection, including, but not limited to November 10, 2021, the day of the inspection, the employer failed to assure that employees did not stand on an elevated boom. On November 16, 2021, an employee was observed standing on an elevated boom section of a laser screed at approximately +/- eight feet above the ground without any means of fall protection at a commercial construction site located at 5365 Arch Road in Stockton, California.

The Division does not contend that Employer's written IIPP procedures are deficient. Rather, the Division contends that Employer failed to implement and maintain its IIPP. Implementation of an IIPP is a question of fact. (*Papich Construction Company Inc*., Cal/OSHA App. 1236440, Decision After Reconsideration (Mar. 26, 2021).)

Although the Division contends Employer failed to implement its own IIPP procedures, the Division does not identify which of Employer's IIPP procedures were not implemented. The Division argues only generally that Employer's IIPP requires various individuals to perform inspections to identify, evaluate, and correct hazards. (Ex. 18, p. 10.)

With respect to section 3203, subdivision (a)(4), the Division's argument is premised on an employee standing on a laser screed, as established by Garcia's testimony and photographic evidence. In its post-hearing brief, the Division describes the action as "openly and highly visible." Based on this circumstance, the Division concludes that Employer failed to implement its procedures for periodic inspections and identifying hazards. However, the evidence does not establish when Employer carried out its periodic inspections or that such inspections coincided with the time period when the employee stood on the laser screed. Moreover, the evidence does not rule out that Employer found the employee standing on the laser screed while performing its periodic inspection and then directed him to get down. Such a circumstance would validate the IIPP requirement for periodic inspections. In sum, the mere fact an employee stood on a laser screed does not establish that Employer failed to implement its procedures for periodic inspections and for identifying and evaluating hazards.

With respect to section 3203, subdivision (a)(6), the Division's argument is premised on the same facts. The Division argues that the hazard was "obvious, open, easily preventable . . . ." Based on this circumstance, the Division concludes that Employer failed to implement its procedures for correcting hazards and unsafe work conditions. However, the evidence does not

establish that Employer became aware of the hazard and subsequently failed to correct the hazard. Moreover, the evidence does not rule out that Employer found the employee standing on the laser screed while performing its periodic inspection and then directed him to get down. Such a circumstance would validate the IIPP requirement for procedures to correct unsafe conditions. In sum, the mere fact that an employee stood on a laser screed does not establish that Employer failed to implement its procedures for correcting hazards.

In its post-hearing brief, Employer raises an additional argument against this alternative theory of a violation. Employer notes that the alternative theory was added via Order on Motion, dated February 1, 2024, (the Order) following the Division's motion to amend Citation 1, Item 1. Employer argues that the Order was issued in error, citing hearing testimony in support of its argument. However, the Order resolved the motion to amend citation. The motion to amend and the Order were not issues in the evidentiary hearing. Additionally, the post-hearing briefs were ordered to be limited to issues raised in the hearing record. Finally, Employer's argument is in the nature of a motion for reconsideration, yet Employer did not provide notice of this request for reconsideration. For these reasons, Employer's argument is improperly raised, and the merits are not addressed.

In sum, the evidence does not establish either theory cited in Citation 1, Item 1. Accordingly, Citation 1, Item 1, is vacated.

3. Did Employer comply with requirements for the use of portable ladders?

Section 1675, subdivision (b), requires employers engaged in construction work to comply with the portable ladder requirements of section 3276. In turn, section 3276, subdivision (e)(16)(C), provides: "Step ladders shall not be used as single ladders or in the partially closed position."

Section 3726, subdivision (a), defines step ladder and single ladder as follows:

> A step ladder is a self-supporting portable ladder, nonadjustable in length, having flat steps and a hinged back. Its size is designated by the overall length of the ladder measured along the front edge of the side rails.
>
> A single ladder is a non-self-supporting portable ladder, nonadjustable in length, consisting of but one section. Its size is designated by the overall length of the side rail.

Citation 1, Item 2, alleges:

> Prior to and during the course of the inspection, including, but not limited to November 10, 2021, the day of the inspection, the employer failed to assure that employees did not use step ladders or A frame ladders improperly. On December 1, 2021, an employee was observed standing on an A frame ladder that was leaning against a CMU block wall at a commercial construction site located at 5365 Arch Road in Stockton, California.

Luis Hernandez (Hernandez) was one member of the laborer's union picketing Employer at the job site. Hernandez testified that he picketed outside the job site on multiple days. Hernandez testified that he took the photographs in Exhibits 5 and 7. These photographs show workers using ladders in various assignments.

Exhibit 7 shows an employee standing on a ladder that is leaning against a block wall. The photograph shows that the ladder is self-supporting, portable, and nonadjustable in length, with flat steps and a hinged back. Thus, the ladder is a step ladder under subdivision (a) of section 3276. The step ladder is closed while being supported by a block wall. Thus, the step ladder is being used as a non-self-supporting ladder. Therefore, the step ladder is being used as a single ladder, which is prohibited by subdivision (e)(16)(C).

Employer argues that the evidence does not establish that the employee standing on the ladder is one of Employer's employees. However, Hernandez testified that he took the picture during the course of picketing and observing Employer's operations at the job site. He testified that he knew the worker to be one of Employer employees because they wore safety vests and red hard hats, although he further testified that "a select few" wore other color hard hats. This testimony is corroborated by Employer's Exhibit J, which shows most, but not all, of Employer's employees with red hard hats and safety vests with Employer's logo. Additionally, Beane testified that he spoke to the General Contractor at the job site and was told that Employer was the only contractor working at the site. Beane further testified that the General Contractor had only one employee, its Superintendent, at the job site. Thus, the preponderance of the evidence establishes that the worker on the ladder in Exhibit 7 is an employee of Employer.

Employer also contends that the ladder may be a "lean safe" type ladder, designed to be safe even if used as a non-self-supporting ladder. However, Employer did not offer evidence in support of the ladder being a lean safe ladder. In contrast, Beane testified that the ladder is not a lean safe ladder. Thus, the evidence weighs in favor of a finding that the ladder is not a lean safe ladder. Finally, Employer provided no legal authority that a "lean safe" ladder is exempt from section 3276, subdivision (e)(16)(C).

Accordingly, Employer violated section 1675, subdivision (b).

4. Did Employer provide impalement protection from concrete stakes?

Section 1712, subdivision (c)(1), requires impalement protection as follows:

> Employees working at grade or at the same surface as exposed protruding reinforcing steel or other similar projections, shall be protected against the hazard of impalement by guarding all exposed ends that extend up to 6 feet above grade or other work surface, with protective covers, or troughs.

Citation 2 alleges:

> Prior to and during the course of the inspection, including, but not limited to November 10, 2021, the employer failed to protect their employees from the impalement hazard of exposed rebar by providing rebar caps, protective covers or troughs at their jobsite located at 5365 Arch Road in Stockton.

Here, Exhibits 6, 8, 9, 10, and J, are photographs showing uncapped concrete stakes and employees in the immediate vicinity. Beane testified that the uncapped stakes create an impalement hazard because employees could trip and fall on the uncapped stakes. Beane further testified that this hazard is present whether an employee in the vicinity is working on the concrete stakes or performing some other task.

Employer's Superintendent Adrian Ornelas (Ornelas) was present at the job site. Ornelas testified that he accompanied Beane around the job site on one of Beane's visits. Ornelas further testified that the concrete stakes are made of steel and are used to hold the formwork into which concrete is poured. Employer does not argue that the concrete stakes were capped or that employees were not exposed to an impalement hazard. Rather, Employer raises an affirmative defense, which is discussed below.

Accordingly, the evidence establishes that Employer did not protect employees from the hazard of impalement by guarding exposed ends with protective covers or troughs.

5. Did Employer establish the Logical Time defense?

Employers bear the burden of proving their pleaded affirmative defenses by a preponderance of the evidence. (*RNR Construction, Inc.*, Cal/OSHA App. 1092600, Decision After Reconsideration (May 26, 2017).)

With regard to the Logical Time defense, the Appeals Board has explained that "[t]he requirements of any safety order will not begin to apply until the necessary and logical time has arrived for an employer to make provisions to correct the violation and abate the hazard." (*JSA Engineering, Inc.* Cal/OSHA App. 00-1367, Decision After Reconsideration (Dec. 3, 2002),

citing *Nicholson-Brown, Inc.*, Cal/OSHA App. 77-024, Decision After Reconsideration (Dec. 20, 1979); *Bay Cities Paving & Grading, Inc.*, Cal/OSHA App. 12-1665, Denial of Petition for Reconsideration (May 16, 2014).) "The logical time defense exists [in part] to protect employees from situations where the otherwise suitable application of a safety rule illogically exposes the employee to greater danger" and does not completely excuse compliance with the safety order; it merely acts to delay the duty to comply with the safety order until an appropriate logical time. (*Bay Cities Paving & Grading, Inc., supra*, Cal/OSHA App. 12-1665; *Nicholson-Brown, supra*, Cal/OSHA App. 77-024.)

Here, Employer's President, Russell Frazier (Frazier), testified that Employer does not cap concrete stakes until the crew finishes the set of formwork and "abandons" the area. Frazier further testified that the crew is trained regarding the caps and the job hazard analysis so that they know to be careful near uncapped stakes. According to Frazier, capping each stake as soon as it is installed results in a greater danger than capping the stakes when the crew abandons the area. Frazier testified that capping a stake immediately upon placement would result in repeatedly uncapping and re-capping the stakes. Frazier further testified that repeatedly capping and uncapping the stakes presents a greater danger because a cap could fall into the concrete being poured and an employee would be at risk of impalement while trying to get the cap out of the wet concrete.

Employer's argument that immediate capping of stakes is a greater hazard relies on a speculative hazard. Although it is possible that a cap could fall into wet concrete, it is not a foregone conclusion. Such a circumstance may never arise. By contrast, leaving the stakes uncapped created an actual impalement hazard, as established by Beane's testimony and the photographic evidence. Employer did not provide protection at this time when protection was actually needed. Moreover, Employer's practice of capping the stakes when the crew abandons the area defeats the protection offered because employee exposure is removed when the crew abandons the area.

For these reasons, Employer's Logical Time defense fails.

6. Did the Division establish a rebuttable presumption of a Serious violation for Citation 2?

Labor Code section 6432, subdivision (a), defines a Serious violation as follows:

> 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:

(1) A serious exposure exceeding an established permissible exposure limit.
(2) The existence in the place of employment of one or more unsafe or unhealthful practices, means, methods, operations, or processes that have been adopted or are in use.

With respect to the term "realistic possibility," the Appeals Board has defined it to mean a prediction that is within the bounds of human reason, not pure speculation. (*A. Teichert & Son, Inc. dba Teichert Aggregates*, Cal/OSHA App. 11-1895, Decision After Reconsideration (Aug. 21, 2015), citing *Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (Sep. 27, 2001).)

"Serious physical harm" is any injury or illness occurring in the place of employment that results in:

(1) Inpatient hospitalization for purposes other than medical observation.
(2) The loss of any member of the body.
(3) Any serious degree of permanent disfigurement.
(4) Impairment sufficient to cause a part of the body or the function of an organ to become permanently and significantly reduced in efficiency on or off the job, including, but not limited to, depending on the severity, second-degree or worse burns, crushing injuries including internal injuries even though skin surface may be intact, respiratory illnesses, or broken bones.

(Lab. Code § 6432, subd. (e).)

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

A division safety engineer or industrial hygienist who can demonstrate, at the time of the hearing, that his or her division-mandated training is current shall be deemed competent to offer testimony to establish each element of a serious violation, and may offer evidence on the custom and practice of injury and illness prevention in the workplace that is relevant to the issue of whether the violation is a serious violation.

Beane testified that his division-mandated training is current and that the impalement hazard can result in serious injury, including death. Employer did not rebut this evidence. Accordingly, the Division established the rebuttable presumption that the citation was properly classified as a Serious violation.

7. Did Employer rebut the presumption of a Serious violation for Citation 2?

Labor Code section 6432, subdivision (c), provides that an employer may rebut the presumption that a Serious violation exists by "demonstrating that the employer did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation." In order to satisfactorily rebut the presumption, the employer must demonstrate both:

> (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.

(Lab. Code, § 6432, subd. (c).)

Labor Code section 6432, subdivision (b), provides that the following factors may be taken into account: (i) Training for employees and supervisors relevant to preventing employee exposure to the hazard or to similar hazards; (ii) Procedures for discovering, controlling access to, and correcting the hazard or similar hazards; (iii) Supervision of employees exposed or potentially exposed to the hazard; and (iv) Procedures for communicating to employees about the employer's health and safety rules and programs.

An employer bears the burden of rebutting the presumption established by the Division as to a Serious violation. (*Kaiser Steel Corporation*, Cal/OSHA App. 75-1135, Decision After Reconsideration (Jun. 21, 1982).)

Here, the violation is the failure to protect employees from the hazard of impalement. As discussed above, there is a realistic possibility of serious physical harm, including death, from working near uncapped concrete stakes. In such circumstances, an employer should take immediate action to protect employees from the hazard of impalement.

Employer provided some protection by training employees on the hazards and making employees familiar with the job hazard analysis. However, Employer was aware that the impalement hazard persisted. Frazier's testimony establishes that Employer had a policy and practice of not providing the required impalement protection until the crew abandoned the area. Because employees remained exposed to the impalement hazard for essentially all of their time

building the formwork, Employer did not take all of the steps a reasonable and responsible employer in like circumstances should be expected to take.

Accordingly, Employer did not rebut the presumption that Citation 2 is properly classified as a Serious violation.

8. Is the proposed penalty for Citation 2 calculated in accordance with the penalty-setting regulations?

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).)

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

The Appeals Board has held that, when the Division does not provide evidence to support its proposed penalty, it is appropriate that an employer be given the maximum credits and adjustments provided under the penalty-setting regulations such that the minimum penalty provided under the regulations for the violation is assessed. (*RII Plastering, Inc*, *supra*, Cal/OSHA App. 00-4250.)

The Division submitted its Proposed Penalty Worksheet showing the penalty calculations and presented Beane's testimony. (Ex. 2.)

The base penalty for a Serious violation is $18,000, which is then adjusted for Extent and Likelihood. (§ 336, subd. (c).)

Extent

Section 335, subdivision (a)(2)(ii), in relevant part, provides:

> When the safety order violated does not pertain to employee illness or disease, Extent shall be based upon the degree to which a safety order is violated. It is related to the ratio of the number of violations of a certain order to the number of possibilities for a violation on the premises or site. It is an indication of how widespread the violation is. Depending on the foregoing, Extent is rated as follows:
>
> > LOW --When an isolated violation of the standard occurs, or less than 15% of the units are in violation.
> > MEDIUM --When occasional violation of the standard occurs or 15-50% of the units are in violation.
> > HIGH --When numerous violations of the standard occur, or more than 50% of the units are in violation.

Here, the Division rated the Extent as Moderate. (Ex. 16.) However, the photographs show many instances of uncapped stakes. (Exs. 6, 8, 9, 10, and J.) Additionally, Frazier's testimony that Employer leaves stakes uncapped until the crew abandons the area is consistent with numerous violations and more than 50 percent of the units in violation. Therefore, the Extent is rated as High. When Extent is High, 25 percent of the base penalty is added to the penalty. (§ 336, subd. (c)(1).)

Likelihood

Section 335, subdivision (a)(3), provides as follows:

> Likelihood is the probability that injury, illness or disease will occur as a result of the violation. Thus, Likelihood is based on (i) the number of employees exposed to the hazard created by the violation, and (ii) the extent to which the violation has in the past resulted in injury, illness or disease to the employees of the firm and/or industry in general, as shown by experience, available statistics or records. Depending on the above two criteria, Likelihood is rated as:
> LOW, MODERATE OR HIGH.

Here, the Division rated the Likelihood as Moderate. (Ex. 16.) However, the Division did not submit evidence of the extent to which the violation has in the past resulted in injury, illness or disease to the employees of the firm and/or industry in general, as shown by experience, available statistics or records. Thus, the Division did not establish the probability that injury, illness, or disease will occur as a result of the violation. As set forth above, Employer is afforded maximum credit for Likelihood for Citation 2. (*RII Plastering, Inc*, *supra*, Cal/OSHA App. 00-

4250.) Therefore, the Likelihood rating is modified to Low. When Likelihood is Low, 25 percent of the base penalty is subtracted from the penalty. (§ 336, subd. (c)(1).)

Accordingly, the base penalty of $18,000 is increased by 25 percent for Extent and reduced by 25 percent for Likelihood. These adjustments to the base penalty result in a Gravity-Based Penalty of $18,000.

Penalty Adjustments – Good Faith

Section 335, subdivision (c), provides:

> Good Faith of the Employer is based upon the quality and extent of the safety program the employer has in effect and operating. It includes the employer's awareness of Cal/OSHA, and any indications of the employer's desire to comply with the Act, by specific displays of accomplishments. Depending on such safety programs and the efforts of the employer to comply with the Act, Good Faith is rated as: GOOD--Effective safety program; FAIR--Average safety program; POOR--No effective safety program.

Section 336, subdivision (d)(2), provides that the Gravity-Based Penalty shall be reduced by 30 percent for a rating of Good, 15 percent for a rating of Fair, and zero percent for a rating of Poor.

In determining the rating for Good Faith, the Appeals Board considers the employer's attitude toward safety of its employees, as well as peculiar circumstances affecting the application of safety orders, and the employer's experience. A determination that the employer did not intend to disregard its employees' safety may be taken into consideration for potential reduction of penalties. (*Watkins Contracting, Inc.*, Cal/OSHA App. 93-1021, Decision After Reconsideration (Sep. 24, 1997), citing *Wunschel and Small, Inc.*, Cal/OSHA App. 78-1203, Decision After Reconsideration (Feb. 29, 1984).)

Here, Employer has a detailed IIPP and Heat Illness Prevention Plan. (Ex. 18.) Employer has personal protective gear such as hard hats and vests. (Exs. 10, J.) Employer has job hazard analyses and training for employees. Thus, it is clear that Employer is aware of the Division and generally desires to comply with safety orders. However, there were multiple safety orders violated at the job site. Additionally, there were numerous instances of employees exposed to impalement hazards based on Employer's practice of leaving stakes uncapped until the crew abandons the area. Based on these considerations, the safety program was not fully effective and is not rated as Good.

Accordingly, the Good Faith rating is Fair, and Employer is entitled to a 15 percent reduction to the Gravity-Based Penalty.

Size

Section 335, subdivision (b), and section 336, subdivision (d)(1), provide that adjustment may be made for Size when an employer has 100 employees or fewer.

Beane testified that Employer had 32 employees at the job site. Employer did not rebut Beane's testimony or provide evidence of a different number of employees. Although Beane testified that Employer had over 300 employees total, the record does not indicate that all employees worked in California. Employer is based in Las Vegas, Nevada. Thus, it is found that Employer had 32 employees. Accordingly, the Gravity-Based Penalty shall be reduced by 20 percent. (§ 336, subd. (d)(1).)

History

Section 335, subdivision (d), and section 336, subdivision (d)(3), provide that adjustment may be made for an employer's history of violations in the past three years.

Here, the Division rated Employer's history of violations as Good. Thus, it is found that Employer's history of violations is Good. Accordingly, the Gravity-Based Penalty shall be reduced by 10 percent. (§ 336, subd. (d)(3).)

In sum, Employer is entitled to credits of 15 percent for Good Faith, 20 percent for Size, and 10 percent for History. Application of these adjustment factors results in a reduction of the Gravity-Based Penalty by 45 percent. Forty-five percent of $18,000 is $8,100. Accordingly, the Adjusted Penalty is $9,900.

Abatement Credit

Section 336, subdivision (e), provides for a penalty reduction of 50 percent where the employer abates the Serious violation at the time of the initial visit during an inspection and prior to the issuance of a citation. Application of the 50 percent abatement credit is not discretionary. It must be applied wherever it is not prohibited. (*Luis E. Avila dba E & L Avila Labor Contractors*, Cal/OSHA App. 00-4067, Decision After Reconsideration (Aug. 26, 2003).)

Here, the proposed penalty for the citation included credit for abatement. (Ex. 16.) Beane testified that he considered the violation abated because the stakes were capped when he visited the job site on November 10, 2021. Thus, the Adjusted Penalty shall be reduced by 50 percent.

Accordingly, the assessed penalty is $4,950.

Conclusion

The evidence does not support a finding that Employer violated section 1670, subdivision (a), or section 1509, subdivision (a).

The evidence supports a finding that Employer violated section 1675, subdivision (b), for failure to comply with the portable ladder requirements of section 3276.

The evidence supports a finding that Employer violated section 1712, subdivision (c)(1), for failure to provide impalement protection from reinforcing steel. The violation was properly classified as Serious. The proposed penalty is modified to $4,950.

Order

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

It is hereby ordered that Citation 1, Item 2, and the $750 penalty is affirmed.

It is hereby ordered that Citation 2, Item 1, is affirmed and a recalculated penalty of $4,950 is assessed.

It is further ordered that the penalties indicated above shall be assessed as set forth in the attached Summary Table.

/s/ Mario L. Grimm

Dated: 03/26/2026

Mario L. Grimm
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.**

If no petition is filed, the penalty amount set forth in the Summary Table is due and payable 30 days after the Order or Decision is issued. If the Appeals Board approved a payment plan, all payments are due in accordance with the dates indicated in the Summary Table. If a Petition for Reconsideration is filed, no payment should be made until the final outcome of the appeal.