

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

In the Matter of the Appeal of:

**REPUBLIC ELECTRIC WEST, INC.
dba NEVADA REPUBLIC ELECTRIC WEST, INC.**
3820 Happy Lane
Sacramento, CA 95827

Employer

Inspection No.
1355061

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to the authority vested in it by the California Labor Code, issues the following decision after reconsideration.

JURISDICTION

Employer is an electrical contractor. Beginning October 22, 2018, the Division, through Associate Safety Engineer Larry Davenport (Davenport), conducted an inspection in response to an accident report at Employer's job site, a residential construction project located in San Ramon, California.

On March 5, 2019, the Division issued three citations to Employer, alleging five violations of California Code of Regulations, title 8.¹ Citation 1, Item 1, alleged that Employer failed to ensure through its Injury and Illness Prevention Program (IIPP) that its employees complied with safe and healthy work practices. Citation 1, Item 2, alleged that Employer failed to ensure that employees exposed to a fall hazard of over 7 ½ feet used an approved personal fall protection system. Citation 1, Item 3, alleged that Employer failed to ensure that an employee selected the appropriate ladder to access attic space at the job site. Citation 2 alleged that Employer failed to ensure that an employee used a ladder that extended at least 36 inches above the attic landing surface. Citation 3 alleged that Employer failed to ensure that an employee working on a step ladder did not step or stand on the top cap of the ladder.

Employer filed a timely appeal of the citations, contesting the existence of the violations in Citation 1, Items 1 through 3, and contesting the existence of the violations, the classifications, and the reasonableness of the penalties in Citations 2 and 3. Employer also asserted a series of affirmative defenses.

This matter was heard by Kerry Lewis, Presiding Administrative Law Judge (ALJ) for the Board, via Zoom on May 17 through 19, 2022, and September 6 and 8, 2023. Manuel Melgoza and Matthew McMillan, attorneys with Donnell, Melgoza and Scates, LLP, represented Employer. Deborah Bialosky, Staff Counsel, represented the Division.

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

On February 27, 2024, ALJ Lewis issued a Decision dismissing Citation 1, Item 1, and affirming Citation 1, Items 2 and 3, and Citations 2 and 3. The Decision reduced the classifications of Citations 2 and 3 from Serious to General and modified the penalties accordingly.

Both parties timely filed their respective Petitions. Both parties filed timely Answers to the others' Petition. Employer's Petition asserts that Citation 1, Item 2 should be vacated because fall protection was not required for the work the injured employee was performing. Employer also asserts that it established the Independent Employee Action Defense (IEAD) as to Citation 1, Items 2 and 3, and Citations 2 and 3. Employer further argues that the violations alleged in Citation 1, Item 3, and Citations 2 and 3, and their associated penalties, are duplicative.

The Division's Petition asserts that the Decision erred in reducing the classifications of Citations 2 and 3 from Serious to General, and accordingly in modifying the penalties associated with Citations 2 and 3. Neither party challenges the ALJ's dismissal of Citation 1, Item 1. The Board took both Employer's and the Division's Petitions under submission. Issues not raised in the Petitions are deemed waived. (Lab. Code § 6618.)

In making this decision, the Board engaged in an independent review of the entire record. The Board additionally considered the pleadings and arguments filed by the parties. The Board has taken no new evidence.

ISSUES

1. Did the work being performed by the injured employee require fall protection?
2. Did Employer establish the IEAD regarding Citation 1, Items 2 and 3, and Citations 2 and 3?
3. Did Employer successfully rebut the presumption that Citations 2 and 3 were properly classified as Serious?
4. Did the ALJ err in modifying the penalties for Citations 2 and 3?
5. Are the penalties for Citation 1, Item 3, and Citations 2 and 3 duplicative?

FINDINGS OF FACT

1. Employer was the electrical subcontractor involved in construction of a residential subdivision, made up of five separate projects. One section of the subdivision, identified as the Highlands project, consisted of approximately 75-100 houses. Each house in the Highlands project had a furnace in the attic.

2. Employer's job was to access the attic space in each house to wire the furnace and install a switch, a light, and a service plug.

3. A plywood platform had been installed in the attic where the furnace was located.

4. To perform the furnace electrical work, employees accessed the attic through an opening in the laundry room ceiling, then stood on the platform to install the necessary hardware.

5. The ceiling was approximately nine feet above the laundry room floor, while the platform was approximately ten feet above the laundry room floor.

6. Employees were not provided with any type of fall protection while accessing or working on these platforms, including guardrails.

7. On October 18, 2018, employee Celestino Cervantes (Cervantes) selected a six-foot A-frame ladder to access an attic platform. Cervantes knew he was using the wrong ladder for the task, in violation of Employer's ladder safety rules.

8. Cervantes climbed to the top cap of the ladder and attempted to pull himself up and jump to the platform.

9. Cervantes lost his grip and fell approximately ten feet to the floor, sustaining spinal fractures that required hospitalization and surgery.

10. Employer had an Injury and Illness Prevention Program and provided employees with safety training every Monday. The weekly training meeting regularly included written and verbal information regarding the proper use of ladders. Employer provided written safety information to its employees during training meetings, provided training in Spanish and English, and kept records of its training meetings.

11. Foreman Alex Mora (Mora) supervised crews working at three of the five projects. He spent about half of his time at the Highlands project.

12. Mora drove a company truck between projects; the truck contained equipment, including ladders of various lengths, which crews might need to perform their work.

13. Mora's job included inspecting each crew's work, and supervising employees to ensure that work was performed safely. Although he visited the houses where his crews were working on multiple occasions each day, Mora was not at the Highlands project when Cervantes' fall occurred.

ANALYSIS

1. Did the work being performed by the injured employee require fall protection?

In Citation 1, Item 2, the Division alleged a violation of section 1670, subdivision (a). This safety order requires, in relevant part:

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 Division alleged:

Prior to and during the course of the investigation, including but not limited to, on October 22, 2018, the employer failed to ensure that an approved personal fall protection system be worn by those employees whose work exposes them to a fall of over 7 1/2 feet when working on a platform with unprotected sides in the attic space of a residential homes [sic].

There is no dispute that Cervantes was working in an area that exposed him to a fall of more than 7 1/2 feet, and he was not wearing fall protection.

Employer offers three defenses. First, Employer asserts that section 1670, subdivision (a), does not apply to the circumstances of the work site in this matter. Second, Employer asserts that using fall protection in the attic space would create a greater hazard than not using fall protection. Third, Employer asserts that it is excused from liability by the IEAD. This section addresses the first two defenses; the IEAD will be discussed separately.

Does the cited safety order apply?

First, Employer argues that section 1670, subdivision (a), is inapplicable to the circumstances in the attic space of the residential home at issue. Employer asserts that the working area of the attic is more accurately described in section 1669, which includes “thrustouts or similar locations, such as trusses, beams, purlins, or plates of 4-inch nominal width, or greater[.]” The threshold height for requiring fall protection in locations covered under section 1669 is 15 feet. Employer asserts that it was in compliance with this safety order, because the attic’s working level was 10 feet from the floor below, and thus below the 15-foot trigger in that section. (Employer’s Petition, p. 3.)

The basis for the Division’s citation was an unprotected attic access point to a work platform, which is identified in section 1670, subdivision (a), as an area that requires fall protection when workers are exposed to a fall of at least 7 1/2 feet “through shaftways and openings.” (§1670, subd. (a)). Section 1504, subdivision (a), defines “opening” as, “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.” Here, the access point in the ceiling of the laundry room was more than 12 inches wide and thus was an opening, through which employees were exposed to a fall of greater than 7 1/2 feet.²

The opening was the access point to the attic. There were areas of the attic space that were unfinished beams, but the attic area where the furnace was located had plywood installed, creating a platform on which the furnace rested. (Exhibits 21-MOD 1, 21-MOD 2, 23-MOD, 38-MOD.) The opening was next to this platform. Employees accessed the attic through the opening, then stood on the platform to perform their work. Because employees worked from this platform, the attic location does not match a working area described by the “trusses, beams, purlins, or plates of

² The attic opening also falls within the dictionary definition of “hatchway”: “A passage giving access usually by ladder or stairs to an enclosed space (such as a cellar).” (Merriam-Webster online [merriam-webster.com-/dictionary/hatchway].)

4-inch nominal width, or greater” identified in section 1669. The ALJ correctly concluded that section 1670, subdivision (a), is the applicable safety order.

Employer cites *Schuck and Sons Construction Co., Inc.*, Cal/OSHA App. 92-1564, Decision After Reconsideration (Sep. 29, 1997) in support of its argument that the cited safety order is inapplicable to the facts. However, that Decision is distinguishable. In *Schuck*, the employer was engaged in framing wood-framed, single story residential units. Employees were working nine feet above ground level on the 2x4 top plate of a unit. The Division cited Employer under section 1670, subdivision (a), for failing to provide fall protection for employees working at a height greater than 7 ½ feet. There, the ALJ found that work on a top plate was governed by section 1669, subdivision (a), which specifically refers to plates of “four inch nominal width or greater.” Those employees were working on a top plate of 4-inch width, as described in section 1669, subdivision (a), unlike in this case, where Cervantes was accessing a work platform.

Employer also asserts, “If the Decision is affirmed, the result is a change in the law, reducing the height where fall protection is required for any trade working in the unfinished frame of a house. There would no longer be any need for Title 8, CCR§ 1669. This is not what the legislature intended.” (Employer’s Petition, pp. 4-5.)

This assertion is without support. The two safety orders apply to different work conditions, as seen in *Schuck and Sons Construction Co., Inc.*, *supra*, Cal/OSHA App. 92-1564. Further, which safety order applies is determined on a case-by-case basis, upon close examination of the facts. While the Division has the burden to prove in each case that it cited the correct safety order, the employer may “rais[e] as a defense that the wrong safety order was cited. If a different safety order applies to the work activity other than, or in addition to the one cited, an employer may only be relieved of a citation if it establishes that another safety order is more applicable, and that it also complied with that safety order.” (*Vernon Melvin Antonsen & Colleen K. Antonsen, individually and dba Antonsen Construction*, Cal/OSHA App. 06-1272, Decision After Reconsideration (Jul. 19, 2012); *Gal Concrete Construction Co.*, Cal/OSHA App. 91-271, Decision After Reconsideration (Feb. 28, 1992); § 361.3, subd. (b)(1)(B).)

Moreover, as the court noted in *Carmona v. Division of Industrial Safety* (1975) 13 Cal.3d. 303, at 312, “the relevant Labor Code provisions speak in the broadest possible terms” to promote safety in employment. This is echoed in Labor Code section 3202, which requires that the California Occupational Safety and Health Act be “liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment.” Following this mandate, we have held: “when two safety orders arguably overlap the employer must adhere to that order which provides the “most protection” to employees. (*Webcor Builders*, Cal/OSHA App. 02-2834, Decision After Reconsideration (May 24, 2005), citing *Beutler Heating & Air Conditioning*, Cal/OSHA App. 98-556, Consolidated Decision After Reconsideration (Nov. 6, 2001).) By requiring fall protection at a lower height for certain types of work, section 1670, subdivision (a), is the safety order that provides greater protection to workers.

We agree with the ALJ’s determination that section 1670, subdivision (a), is the applicable safety order.

- b. *Did Employer establish that complying with section 1670, subdivision (a), would create a “greater hazard” than working without fall protection?*

Employer next argues that complying with section 1670, subdivision (a), would create a “greater hazard” than using fall protection. In certain circumstances, section 1671.1 allows an employer to utilize alternative fall protection measures where the use of conventional fall protection is infeasible or creates a greater hazard. Section 1671.1 provides, in relevant part:

(a) This section applies to all construction operations when it can be shown by the employer that the use of conventional fall protection is infeasible or creates a greater hazard.

Note: There is a presumption that conventional fall protection is feasible and will not create a greater hazard. Accordingly, *the employer has the burden of establishing that conventional fall protection is infeasible or creates a greater hazard.*

(Emphasis added.)

To be exempted from the otherwise applicable fall protection requirements of section 1670, section 1671.1 requires employers to create a fall protection plan, which “shall be prepared by a qualified person and developed specifically for the site where the construction work is being performed [.]” (§ 1671.1, subd. (a)(1).) “The fall protection plan shall document the reasons why the use of conventional fall protection systems (guardrails, personal fall arrest systems, or safety nets) are infeasible or why their use would create a greater hazard.” (§ 1671.1, subd. (a)(5).)

Employer argues that complying with the fall protection requirements of section 1670, subdivision (a), would create a greater hazard than allowing employees to work in the attic without fall protection. Specifically, Employer argues that the installation of a fall protection system in the attic would be impracticable because it would take longer to install fall protection than the brief amount of time – approximately 15 to 30 minutes – that the employees were working unprotected in the attic, resulting in much longer exposure to a hazard that would not otherwise have been present but for the installation of the fall protection. (Employer’s Petition, p. 4.)

Employer asserts, “fall protection and/or guard rails are not required when working in unfinished frames of buildings. It would cause more hazards than it solves.” (Employer’s Petition, p. 4.) This is because of “the impracticality of installing fall protection guards” around the platform every time a worker enters the attic. (Employer’s Petition, p. 4.) The implied greater hazard appears to be exposure to falls during the time required to for employees to “build[] a box around themselves” before commencing work, then “disassembling the box so that he could escape,” fifteen minutes later. (Employer’s Petition, p. 4.)

However, Employer cannot avail itself of the greater hazard exception here. First, Employer did not submit a fall protection plan, which is a requirement for the exception to apply. Second, Employer failed to identify or utilize other alternative fall protection measures and did not implement a safety monitoring system. Employer’s IIPP requires usage of a, “Conventional Fall Protection System” for “[e]mployees working at elevations above 6 feet in height.” (Exhibit 16, p.

27.) The required “conventional fall protection system” specifies the use of guardrails, safety lanyards and harnesses (i.e., personal fall arrest systems), and safety nets. (Exhibit 16.) None of those methods were used here, where employees were working at an elevation of ten feet.

Further, beyond speculation about the impracticability of installing guard rails, Employer offered no evidence that the use of fall protection would be impractical or create a greater hazard. (See *Preferred Framing, Inc.*, Cal/OSHA App. 99-2808, Decision After Reconsideration (Aug. 20, 2002).) There was no testimony from any of Employer’s witnesses that the use of a personal fall arrest system was impractical or created a greater hazard. To the contrary, Davenport testified that Mora, Cervantes’s supervisor, stated during his interview that “fall protection was not required,” but never stated it would have created a greater hazard to install a fall protection system. Davenport testified that it would have been possible and feasible to install a personal fall arrest system involving a safety harness, lanyard, and anchor point.

Moreover, as the ALJ pointed out here:

The Appeals Board has addressed this argument before:

Employer’s contention that the fall protection systems required by section 1670, subdivision (a), are unworkable and/or ineffective is beyond the power the Appeals Board to adjudicate. Its function is confined to interpreting and applying the safety orders adopted by the [Occupational Safety and Health] Standards Board. It may not go beyond that function and ignore or revise the requirements of an order. If an Employer believes an order unwise or unworkable, its recourse is with the Standards Board – the agency which conducted the regulatory hearing, heard from the experts, and fashioned the terms of the order, and the agency vested with power to grant variances from it. (*Superior Construction, Inc.*, Cal/OSHA App. 96-2267, Decision After Reconsideration (Dec. 21, 2000).)

As such, with regard to Employer’s argument about the “greater hazard” of installing fall protection in the attic, Employer’s recourse is with the Standards Board, not the Appeals Board.

Finally, on a related note, Employer argues that “no other trades use fall protection while working in these attics.” This argument is easily dismissed. “An industry practice is no defense to a violation of a safety practice prescribed by a safety order [sic].” (*Lusardi Construction Company*, Cal/OSHA App. 86-1400, Decision After Reconsideration (May 31, 1989).)

We agree with the ALJ’s conclusion that the work in question required fall protection and that Employer was not entitled to the “greater hazard” defense, and we therefore uphold the ALJ’s finding of a violation of section 1670, subdivision (a), as alleged in Citation 1, Item 2.

2. Did Employer establish the IEAD regarding Citation 1, Items 2 and 3, and Citations 2 and 3?

Before beginning the IEAD analysis, we briefly review the alleged violations at issue.

In Citation 1, Item 2, as discussed, the Division alleged a violation of section 1670, subdivision (a), which requires fall protection for employees exposed to the hazard of “falling in excess of 7 ½ feet from the perimeter of a structure, unprotected sides and edges, leading edges, [or] through shaftways and openings [.]” It is undisputed that Employer did not require or provide fall protection for employees climbing through the attic opening to stand on the plywood platform and work on the furnace.

Citation 1, Item 3, alleged a violation of section 1675, subdivision (b), with reference to section 3276, subdivision (d)(1)(B). This safety order requires, in relevant part, “When selecting a ladder for use, consideration shall be given to the ladder length or height required ... [and] worker position to the task to be performed [.]” The parties stipulated that Cervantes selected a ladder that was too short to safely access the attic.

Citation 2 alleged a Serious violation of section 1675, subdivision (b), with reference to section 3276, subdivision (e)(11). This safety order requires that when accessing an upper landing surface, an employer must ensure that employees use a ladder with side rails that extend at least 36 inches above the landing surface, or, if such an extension is not possible, employees must secure the ladder’s top to a rigid support with a grasping device, to assist safely in mounting and dismounting the ladder. Employer does not dispute that Cervantes’s actions violated this safety order.

Citation 3 alleged a Serious violation of section 1675, subdivision (b), with reference to section 3276, subdivision (e)(15)(E). This safety order provides, “Employees shall not sit, kneel, step or stand on the pail shelf, topcap [sic] or the step below the topcap [sic] of a step ladder.” Again, there is no dispute that Cervantes stood on the top cap of the ladder while attempting to access the attic.

However, Employer asserts that it is not responsible for the violations alleged in Citation 1, Items 2 and 3, and Citations 2 and 3, based on the IEAD. The IEAD is an affirmative defense which requires an employer to establish each of 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).)

A single missing element defeats the IEAD. (*Home Depot USA, Inc.*, Cal/OSHA App.10-3284, Decision After Reconsideration (Dec. 24, 2012).) In addition, the IEAD is premised upon an employer’s compliance with its non-delegable statutory and regulatory responsibilities for ensuring safety in the workplace. (*Pierce Enterprises*, Cal/OSHA App. 00-1951, Decision After

Reconsideration (Mar. 20, 2002); *Sacramento County Water Agency Department of Water Resources*, Cal/OSHA App. 1237932, Decision After Reconsideration (May 21, 2020).)

Rather than addressing each alleged violation separately in the Decision, the ALJ addressed all four alleged violations together. The ALJ reasoned that, because Employer failed to provide fall protection for employees working in the attic space, in violation of the regulatory responsibility imposed by section 1670, subdivision (a), as well as its own written IIPP, it could not establish the IEAD regarding Citation 1, Item 2; in addition, it could not establish the IEAD for any of the other three alleged violations, including those related not to fall prevention but to ladder safety.

The ALJ found that, regarding each alleged violation, Employer failed to establish the second, third, and fourth IEAD elements. Employer argues that the ALJ incorrectly analyzed each of those elements.

- a. *Does Employer have a well-devised safety program which includes training employees in matters of safety respective to their particular job assignments?*

Regarding the second IEAD element, a safety program that fails to comply with a safety order cannot be well-devised. (*Dade Behring, Inc.*, Cal/OSHA App. 05-2203, Decision After Reconsideration (Dec. 30, 2008); *Sacramento County Water Agency Department of Water Resources*, *supra*, Cal/OSHA App. 1237932.) The second element asks whether an employer has a well-devised safety program, not whether employer has a well-devised safety program as to a specific citation.

Here, Employer's written IIPP required fall protection for employees working at elevations greater than six feet. The ALJ found that Employer did not have a well-devised safety program, because Employer failed to provide and require fall protection for its employees exposed to a fall through an opening from an elevation of at least 7 ½ feet, in violation of both section 1670, subdivision (a), and Employer's written IIPP. The ALJ therefore reasoned that Employer's safety program was not in compliance with the fall protection safety order.

Employer argues that it did have a well-devised safety program "in compliance with applicable fall protection safety orders." In other words, in compliance with section 1669, which Employer asserts is the applicable safety order regarding Citation 1, Item 2. Employer's argument is premised on the assertion that section 1670, subdivision (a), did not apply. However, as discussed above, we find that the ALJ correctly determined that section 1670, subdivision (a), is the applicable safety order regarding Citation 1, Item 2, and it was violated, thus this argument fails.

As noted, the Decision specifically addresses only the fall protection violations alleged in Citation 1, Item 2. Employer argues that the ALJ erroneously failed to separately analyze this element with regard to the violations regarding ladder safety. However, if Employer did not have a well-devised safety program regarding fall protection, then we cannot find that Employer's safety program, as a whole, was well-devised. We affirm the ALJ's finding that Employer failed to establish this element regarding each of the alleged violations.

- b. *Does Employer effectively enforce the safety program?*

To satisfy the third IEAD element, “meaningful enforcement of a well-devised safety program must be presented.” (*Dade Behring, Inc.*, *supra*, Cal/OSHA App. 05-2203; *Tri-Valley Growers*, Cal/OSHA App. 94-3355, Decision After Reconsideration (Sept. 15, 1999).) “[E]nforcement is accomplished not only by means of disciplining offenders but also by compliance with safety orders during work procedures.” (*FedEx Freight, Inc.*, *supra*, Cal/OSHA App. 12-0114, citing *Martinez Steel Corp.*, Cal/OSHA App. 97-2228, Decision After Reconsideration (Aug. 7, 2001).) Having a satisfactory written program, but not following it in actual practice, undermines Employer’s ability to establish it has a well-devised, effectively enforced safety plan. (*Glass Pak*, Cal/OSHA App. 03-750, Decision After Reconsideration (Nov. 4, 2010).)

Here, neither Cervantes nor Mora thought fall protection was required while working in the attic spaces, and neither used fall protection when doing so. (HT Day 2, p. 129, 139.) As noted, the ALJ found that because Employer’s practices were not compliant with the cited safety order regarding fall protection at heights over 7 ½ feet, Employer could not establish that it enforced a well-devised safety program. An employer cannot effectively enforce a safety program that is not well-devised; that is, not in compliance with the safety order(s) at issue. (*Dade Behring, Inc.*, *supra*, Cal/OSHA App. 05-2203.)

Employer argues, “The correct analysis is whether the employer effectively enforced the employer’s safety program which was in effect at the time. If elements 2 and 3 were intended to be conflated in such a way, they would be one element.” (Employer’s Petition, p. 6.) However, the IEAD “is *premised* on an employer’s *compliance* with non-delegable statutory and regulatory duties.” (*Dade Behring, Inc.*, *supra*, Cal/OSHA App. 05-2203. [Emphases in original].) Where there is lax enforcement of safety policies, an employer cannot be said to have effectively enforced its safety plan. (*Glass Pak*, *supra*, Cal/OSHA App. 03-750.)

Employer has not met its burden of showing effective enforcement, as the evidence tends to show ongoing failures to follow Employer’s basic safety policies. The ALJ found that Employer failed to establish this element. We affirm the ALJ’s finding that Employer failed to establish this element regarding each of the alleged violations.

c. *Does Employer enforce a policy of sanctions against employees who violate the safety program?*

Regarding the fourth IEAD element, an employer may demonstrate that it enforces a policy of sanctions against employees who violate safety rules by producing records of disciplinary actions related to safety. (*Synergy Tree Trimming, Inc.*, Cal/OSHA App. 15-0828, Decision After Reconsideration (May 15, 2017).) The fourth element requires evidence that safety rules were enforced by a policy of sanctions prior to an accident occurring. (*Marine Terminals Corporation*, Cal/OSHA App. 95-896, Decision After Reconsideration (September 28, 1999).)

Employer’s written IIPP required progressive discipline that started with a written warning, followed by suspension and then demotion or termination. As evidence that it consistently enforced its disciplinary policies, Employer produced 21 written notices of safety infractions that had been issued to employees for various safety violations. The ALJ noted, “[O]f the 21 notices

Employer offered into evidence, only four are dated prior to the ladder incident at issue. Six of the notices are not dated at all. The overall persuasiveness of the safety infraction notices is greatly diminished by the lack of documented warnings during the period prior to the Cervantes accident relative to the warnings after the accident.”

The ALJ found, first, that Employer failed to present adequate evidence that it issued written warnings for safety infractions that occurred before Cervantes’s accident. (Exhibit V.) Second, the ALJ found that Cervantes received only a verbal warning for violating ladder safety rules, in contravention of Employer’s own policy requiring a written warning for the first warning issued. (HT Day 1, p. 125.) The ALJ therefore found that Employer failed to establish the fourth IEAD element.

Employer argues, in seeming agreement with the ALJ, “What should be material to the analysis is what happened before the accident, not afterwards.” However, Employer goes on to argue, “If infractions issued after the accident are important to the analysis, then those 17 written infractions should hold great weight. Furthermore, it misrepresents testimony to claim the company had a policy of always issuing a written warning the first time an employee commits a safety infraction.”

Contrary to Employer’s characterization, its IIPP states that its sanctions for violating safety rules begin with a written warning, not a verbal one. (Exhibit 16.) Testimony to the contrary only established that Employer did not always follow, and enforce compliance with, its IIPP. Employer did not follow its own IIPP policy in issuing a verbal warning to Cervantes. The record indicates that Employer failed to appropriately enforce its safety program. The ALJ properly found that Employer did not satisfy the fourth element of the IEAD.

Because we agree with the ALJ’s findings that Employer failed to establish the second, third, and fourth IEAD elements, we affirm the Decision’s holding that Employer failed to establish the IEAD as to Citation 1, Items 2 and 3, and Citations 2 and 3.

3. Did Employer successfully rebut the presumption that Citations 2 and 3 were properly classified as Serious?

The Division argues that the ALJ erred in reducing the classifications of Citations 2 and 3 from Serious to General. Labor Code section 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 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. [...]

Associate Safety Engineer Davenport testified that his division-mandated training was current. Therefore, under Labor Code section 6432, subdivision (g), Davenport was deemed competent to offer testimony to establish each element of the Serious violation and to offer evidence on the custom and practice of injury and illness prevention in the workplace relevant to the issue of whether a violation is a Serious violation.

The actual hazard created by the violations asserted in Citations 2 and 3 is that an employee using a ladder unsafely may fall and suffer injury. Both citations relate to safety practices that are designed to ensure that ladders do not fall while employees are on them, and that employees do not fall off ladders.

Davenport testified that a fall such as occurred here creates a realistic possibility that the employee will suffer major fractures, head injuries, and possibly even death. Cervantes required surgery and hospitalization for fractured bones in his spine. Not only was there a realistic possibility of serious physical harm, but the fall here resulted in actual serious physical harm. The Division established a rebuttable presumption that Citations 2 and 3 were properly classified as Serious.

The burden of proof then shifts to Employer to rebut this presumption. “[S]hould the Board find that there is ‘a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation,’ Labor Code section 6432(c) explicitly provides an employer the opportunity to rebut the presumption of a serious violation,” by proving that it “did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation.” (*Orange County Sanitation District*, Cal/OSHA App. 13-0287, Decision After Reconsideration (May 29, 2015).)

Labor Code section 6432, subdivision (c) 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).

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

The Division argues, “Reasonable diligence is an affirmative defense codified in Labor Code section 6432, subdivision (c), and if established, reduces the serious classification of a violation to a general violation.” However, Labor Code section 6432, subdivision (c), is better characterized not as an affirmative defense but as a burden shifting analysis. (See, e.g., *Synergy*

Tree Trimming, Inc., *supra*, Cal/OSHA App. 15-0828; *United Parcel Service*, Cal/OSHA App. 1158285, Decision After Reconsideration (Nov. 15, 2018); *Home Depot USA, Inc., dba Home Depot # 6683*, Cal/OSHA App. 1014901, Decision After Reconsideration (July 24, 2017).) This burden shifting analysis (classification analysis), determines if an employer rebutted the presumption that a citation was properly classified as Serious.

Labor Code section 6432, subdivision (c)(1) requires us to evaluate several factors when determining whether “[t]he 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 ...” declaring, “[f]actors relevant to this determination include, but are not limited to, those listed in subdivision (b).”

Labor Code section 6432, subdivision (b), paragraph (1) requires the Division, prior to issuing a Serious citation, to “attempt to determine and consider” the following five factors, which “include, but are not limited to”:

- (A) Training for employees and supervisors relevant to preventing employee exposure to the hazard or to similar hazards.
- (B) Procedures for discovering, controlling access to, and correcting the hazard or similar hazards.
- (C) Supervision of employees exposed or potentially exposed to the hazard.
- (D) Procedures for communicating to employees about the employer's health and safety rules and programs.
- (E) Information that the employer wishes to provide [...].

(Labor Code § 6432 (b)(1) (emphasis added).)

The Division argues that Employer failed to prove the factors described in Labor Code section 6432(b)(1)(A) - (D). The Division also argues that the ALJ erred in failing to consider “all of the factors enumerated in Labor Code section 6432(b)(1)(A)-(D),” implying that each of the factors must be individually satisfied to rebut the presumption.

Although not explicitly stated, the Division essentially asks us to treat the classification analysis the same as the IEAD analysis and require Employer to satisfy all factors of both. Also of note is that the Division fails to include subdivision (b)(1)(E) in its discussion of the classification analysis. “Information that the employer wishes to provide” may include evidence, such as that provided here, showing that the employee deliberately violated their safety training. (Lab. Code § 6432, subd. (b)(1)(E).)

We have not previously held that all factors enumerated in the sub-paragraphs of Labor Code section 6432, subdivision (b), paragraph (1) must be satisfied for an employer to rebut the presumption that a violation was properly classified as Serious, and we decline to do so here. The Division cites no authority in support of its argument. A contention is waived where a party fails to cite legal authority and to the record. (*Shimmick Construction Company, Inc.*, Cal/OSHA App. 1080515, Denial of Petition for Reconsideration (Mar. 30, 2017).)

To fully address the Division's arguments, however, it is necessary to review each factor in the classification analysis. In doing so it is also important to note that while the factors considered under subdivision (b)(1) may somewhat overlap with the IEAD elements, that does not necessarily mean that the same result will be reached. The IEAD requires an Employer to prove all five elements, as discussed above. In contrast, an employer attempting to rebut the presumption that a violation was properly classified as Serious need not satisfy all of the factors set forth under Labor Code section 6432, subdivision (b)(1). Rather, we reach a determination on whether a violation was properly classified as Serious on a case-by-case basis, balancing and deciding the appropriate weight to be given to the various factors based on the facts established at the hearing.

a. Did Employer provide training for employees and supervisors relevant to preventing employee exposure to the hazard or to similar hazards?

To determine if Employer rebutted the presumption of a serious violation we must examine whether Employer provided "[t]raining relevant to preventing employee exposure to the hazard or similar hazards." (Lab. Code., § 6432, subd. (b)(1)(A).) Based on the statute, we consider not only Employer's training with respect to the "hazard," but also with respect to "similar hazards." The relevant hazard in Citations 2 and 3 is that an employee using a ladder unsafely may fall and suffer injury. The "similar hazard" alleged in Citation 1 Item 2 is that an employee working at or above a height of 7½ feet without fall protection may fall and suffer injury.³ With the issue so framed, we consider first whether Employer provided adequate training as to ladder safety and then turn to fall protection.

Weighting against finding Employer provided adequate ladder training was Cervantes' testimony that the "adequate ladder" he "regularly used" to access the attics was eight feet. The Division argues that Cervantes's use of an eight-foot ladder is evidence Cervantes was not properly trained, because an eight-foot ladder would also have been too short to satisfy ladder safety requirements. Conversely, the record suggests the type of eight-foot ladder Cervantes had used in the past was an extension ladder that folded out to the correct height, so the testimony regarding Cervantes using an eight-foot ladder does not necessarily weigh against Employer. Davenport testified that, during his interview with Cervantes, Cervantes stated that he had previously used a six-foot ladder to access other attics at the worksite on more than one occasion. In opposition to Davenport's testimony, at the hearing, Cervantes testified that he did not recall making such statements to Davenport, and that he could not recall whether he had ever used a six-foot ladder to access an attic space before his accident.

Cervantes was an experienced employee and had received Employer's training on the safe use of ladders. (Exhibit 8; Exhibits A, D, E, F, G; HT Day 1, pp. 186-187, 212.) Cervantes' knowledge that he was violating Employer's safety rules both by using the wrong ladder and by using it improperly is evidence tending to show that Employer had provided Cervantes with training.

³ We do not necessarily conclude that the failure to provide fall protection always creates a similar hazard to the improper usage of a ladder. However, it is a similar hazard here because both hazards arose from the same activity, i.e., seeking to gain access to an attic platform 10 feet above the level below.

As to training provided to other employees, no evidence was provided to establish that the two other employees with whom Cervantes was working on the day of the accident had received safety training on proper ladder use. Davenport interviewed both employees, Ruben Castro (Castro) and Hugo Lopez (Lopez). Castro told Davenport that he had only received ladder safety training after the accident. Both Lopez and Castro stated in their interviews that they did not know how to set up extension ladders, and that someone else set up extension ladders for them when needed. Cervantes' supervisor Mora suggested that the correct ladder to access the attic was a 12-foot "Little Giant" extension ladder. Davenport testified that a 12-foot ladder would not have been sufficient to access a ten-foot platform because it would not extend the required 36 inches above the platform. This tends to indicate that even Mora, a supervisor, was not adequately trained on ladder safety.

The record established that Employer provided training on ladder safety through weekly toolbox meetings which included demonstrations on proper ladder setup. David Bloom (Bloom), a supervisor, testified that he conducted safety training on proper ladder use. Employer's safety manager, Scott Stewardson (Stewardson), also testified that Employer conducted weekly ladder safety training. This weekly training included the directive to use a ladder extending at least 36 inches above the landing, and not to step on the two top rungs or top cap of a ladder. (HT Day 1, pp. 149, 152, 156; HT Day 5, pp. 20-21.)

However, as discussed above, Labor Code section 6432, subdivision (b)(1)(A) requires us to also consider Employer's training on the "similar hazard" of working at a height of 7½ feet or greater without fall protection. Employer did not provide any fall protection to employees seeking to gain access to the attic work platforms 10 feet above the level below. This omission was the basis of the ALJ's correct finding that Employer did not have a "well-devised safety program." Employer's lack of training on the similar hazard noted in Citation 1, Item 2, militates against finding Employer's training was adequate.

The ALJ held that Employer had provided training, despite indications in the record that there were some deficiencies in Employer's training program. However, on review, Employer's failure to train on the use of fall protection compels us to reverse the ALJ's finding. We hold that Employer failed to provide training relevant to preventing the hazard or similar hazards.

b. Did Employer have procedures for discovering, controlling access to, and correcting the hazard or similar hazards?

When determining whether Employer rebutted the presumption of a serious violation, another factor relevant to that determination is whether Employer had "procedures for discovering, controlling access to, and correcting the hazard or similar hazards." (Lab. Code., § 6432, subd. (b)(1)(A).) As discussed above, first we evaluate this factor in connection with the hazard of using the wrong ladder unsafely and then consider the "similar hazard" related to the failure to use fall protection.

The Division argues that more frequent safety inspections "could have discovered that there was no ladder of the correct height available for Cervantes to use or that Cervantes had been using a shorter A-frame ladder to attempt to access the attic space." However, it was established that a ladder of the correct height was available to Cervantes -- either in the house, in other houses

nearby, or on Mora's truck, and this includes extension ladders that extended to over 13 feet. [HT Day 1, pp. 56-57, 80, 83, 184; HT Day 2, pp. 43, 131; HT Day 5, pp. 28-29, 44, 70.] Additionally, Cervantes testified that he had access to ladders of the appropriate height to safely access the attic space. [HT Day 1, pp. 200-201.]

The knowledge element of a serious classification requires that the employer either knew, or with the exercise of reasonable diligence, should have known of, the violative condition. (*Davis Development Co.*, Cal/OSHA App. 10-3360, Decision After Reconsideration (June 18, 2014); *West Coast Steel*, Cal/OSHA App. 81-0191, Decision After Reconsideration (May 15, 1985).) This element is designed "to encourage employers to conduct reasonably diligent inspections for violative conditions so that the hazard associated with that condition can be timely corrected or, otherwise, face the prospect of a serious violation and heightened civil penalty." (*Andersen Tile Company*, Cal/OSHA App. 94-3076 Decision After Reconsideration (Feb. 16, 2000), citing *Lift Truck Services Corp.*, Cal/OSHA App. 93-384, Decision After Reconsideration (Mar. 14, 1996).) A hazard that could have been discovered through periodic safety inspections is deemed discoverable through reasonable diligence. (*Anheuser-Busch, Inc.*, Cal/OSHA App. 84-113, Decision After Reconsideration (July 30, 1987); *Sturgeon & Son, Inc.*, Cal/OSHA App. 91-1025, Decision After Reconsideration (July 19, 1994).)

We have examined Employer's procedures for discovering hazards like the ladder violations at issue here. The record indicates that Employer conducted regular inspections of the job site, which included making sure employees were using the proper ladders. However, while Mora, Cervantes' supervisor, visited the houses where his crews were working multiple times a day, it was also established Mora did not know the proper ladder required for the task. This both brings into question his training and renders his inspections inadequate to discover and correct the violation. Stewardson testified that, in addition to weekly safety meetings, both managers and outside safety auditors conducted regular inspections of the job site. He estimated that between 15 and 20 managers conducted regular inspections. These managers issued warnings to employees observed violating safety rules.

Labor Code section 6432, subd. (b)(1)(A) requires us to also consider Employer's procedures for discovering, controlling access to, and correcting the "similar hazard" of working at a height of 7½ feet or greater without fall protection. Because Employer's IIPP did not require fall protection, Employer had no procedures to discover and correct the fall risk faced by employees trying to access and work on a platform 10 feet above the level below without such protection. Employer's lack of procedures and ways to correct the similar hazard covered in Citation 1, Item 2, militates against finding Employer's procedures and supervision was adequate.

As noted in the Decision, even if we assume Employer had sufficient procedures for discovering and correcting the risks faced by employees accessing the attic platform using an improper ladder, such procedures would have been thwarted by Cervantes' actions. Cervantes knowingly violated Employer's safety rules by using a ladder too short for the task and by standing on its top rungs. Cervantes knew he was violating Employer's safety rules by using the wrong ladder and using it improperly. It is also reasonable to presume that Cervantes would not knowingly violate the safety rules during an inspection, or when a supervisor was present. The record is unclear as to whether, or how many times, Cervantes had previously violated Employer's rules.

While we don't assume Cervantes would also deliberately disregard training on using fall protection just as he deliberately disregarded his training on ladder safety, his perilous approach to ladder safety does indicate he might have done so. This accident resulted from Cervantes's deliberate and knowing improper use of an improper ladder. In examining this factor, the ALJ found that Employer could not, through reasonable diligence, have discovered that Cervantes would deliberately disregard his training. We agree with the ALJ.

c. Did Employer provide adequate supervision of employees exposed or potentially exposed to the hazard?

The Division argues that Employer failed to demonstrate that it adequately supervised employees exposed or potentially exposed to the hazard of improper ladder use. (Labor Code, § 6432, subd. (b)(1)(C).) The Division argues that adequate supervision would, or should have discovered and corrected Cervantes's practice of using a six-foot ladder, instead of a ladder of an appropriate height for the task of accessing the attic spaces. Employer conducted regular job site inspections, and it was established at hearing this was done by managers, outside safety auditors, and Mora, Cervantes' supervisor (as discussed above).

Failure to exercise reasonable supervision, adequate to ensure employee safety, is equivalent to failing to exercise reasonable diligence, and will not excuse a violation on the claim of lack of employer knowledge. (See *Davis Development Company*, *supra*, Cal/OSHA App. 10-3360; *Stone Container Corporation*, Cal/OSHA App. 89-042, Decision After Reconsideration (March 9, 1990).) However, we recognize the difficulty employers face in detecting certain infractions which can arise very quickly despite reasonable diligence in training and supervising employees. (See *Mladen Buntich Construction Co.*, Cal/OSHA App. 85-1489, Decision After Reconsideration (Sept. 14, 1988); *C. W. Forcum Construction, Inc.*, Cal/OSHA App. 83-183, Decision After Reconsideration (Dec. 31, 1986).) We have never held that every employee must be supervised at every moment. (See *Signal Energy LLC*, Cal/OSHA App. 1155042, Decision After Reconsideration (Aug. 19, 2022).)

While Mora visited each house where the electrical crews were working once or twice a day, no supervisor was present at the time of the accident. As noted, Mora testified that he believed a 12-foot ladder was correct for accessing the attic. Observing that the supervisor himself was incapable of detecting the ladder hazard, we could conclude that Employer failed to provide adequate supervision to ensure employee safety. However, Mora's testimony does not necessarily defeat this factor, as "[e]ach employer has an affirmative duty to anticipate hazards within a reasonable degree of foreseeability." (*Tri-Valley Growers, Inc.*, Cal/OSHA App. 81-1547, Decision After Reconsideration (Jul. 25, 1985).)

Cervantes had worked for Employer for over nine years and had a good safety record. Employer had no reason to expect or anticipate that he would deliberately break safety rules. Cervantes testified that the accident occurred because he was "careless" in knowingly violating safety rules by using a too-short ladder to access the attic. [HT, Day 1, pp. 183-184.] Cervantes testified that he was aware he was violating Employer's safety rules when he stood on the top-cap of the ladder. [HT, Day 1, pp. 208-212; Day 2. p. 160; Exhibit 7.]

We agree with the ALJ that Employer could not have foreseen Cervantes's actions despite taking all steps a reasonable employer would take to anticipate and prevent the accident and thus we find that Employer provided adequate supervision.

- d. *Did Employer have procedures for communicating to employees about the employer's health and safety rules and programs?*

The Division argues that Employer failed to adequately communicate its disciplinary policies because a number of the written warnings issued for safety violations that were entered into evidence at the hearing were not signed by the employee. The Division asserts, "While this evidence was offered to support Employer's claim of the IEA defense, Employer's discipline policy is an element of its overall health and safety programs. Thus, the evidence presented by Employer on its discipline policy should be reviewed to see whether Employer adequately communicated its policy to employees." The Division concludes that the evidence of unsigned warnings demonstrates Employer failed to communicate to employees that they were being disciplined for a safety infraction.

Employer disputes this interpretation. Employer argues that the unsigned written warnings were copies which Stewardson emailed to supervisors, who then provided the warnings to employees to sign. Supervisor Bloom's testimony corroborated that this was why the written warnings were unsigned. As covered in the discussion of the IEAD, Employer's written IIPP required progressive discipline that started with a written warning, followed by suspension and then demotion or termination. The ALJ found that Employer failed to present adequate evidence that it issued written warnings for safety infractions occurring prior to Cervantes's accident. The ALJ also found, based on Mora's testimony, that Cervantes received only a verbal warning for violating ladder safety rules, in contravention of Employer's own policy requiring a written warning.

However, the analysis of this factor does not focus solely on employee discipline. It also includes consideration of evidence such as the employer's IIPP, weekly toolbox meetings, and employee training on safety topics. (See *A. Teichert and Son, Inc. dba Teichert Water Works Services*, Cal/OSHA App. 1431672, Decision After Reconsideration (Jul. 10, 2025).)

Employer did present evidence that it conducted weekly toolbox meetings on employee safety, demonstrating that it engaged in efforts to communicate its health and safety rules and programs to its employees. However, other evidence tended to indicate that Employer's communication efforts were insufficient. For example, it appeared that even Mora, a supervisor, was not properly trained on the correct height of ladder to use when accessing the attics. Further, Employer presented no evidence contradicting Davenport's testimony that the other two employees who were working with Cervantes had received no training on ladder safety until after the accident.

Accordingly, we find Employer did not adequately communicate its health and safety rules and programs regarding ladder safety to employees.

- e. *Did Employer provide evidence that established why it believed its actions were reasonable and responsible?*

Labor Code section 6432 (b)(1), sub-paragraph (E), requires the Division to consider, prior to issuing a Serious citation, and the Board to consider, upon appeal:

Information that the employer wishes to provide, [. . .] including, any of the following:

- (i) The employer's explanation of the circumstances surrounding the alleged violative events.
- (ii) Why the employer believes a serious violation does not exist.
- (iii) Why the employer believes its actions related to the alleged violative events were reasonable and responsible so as to rebut, pursuant to subdivision (c), any presumption established pursuant to subdivision (a).
- (iv) Any other information that the employer wishes to provide.

(Labor Code § 6432 (b)(1)(E).) Labor Code section 6432(b)(1)(E)(i) is the first factor of employer-provided information we must consider, and this factor addresses Employer's explanation of the circumstances surrounding Cervantes' fall. Employer's view of Cervantes' fall is quite different than the view of the accident the ALJ upheld in the Decision. Starting in Employer's initial appeal, Employer consistently asserted that section 1669 applies to where Cervantes was working, not section 1670(a), as was alleged in the violation. Section 1669 sets the threshold height for fall protection to be 15 feet, so if that section was the applicable regulation section, then no fall protection would have been required.

As we note above, those two safety orders apply to different work conditions, but we also acknowledge that those work conditions flow sequentially. It starts with section 1669's initial unfinished wood framed attic and progresses to when there is enough of a "floor or platform to have an opening 12 inches or more in the least horizontal dimension[.]" and when that happens, the work falls under the purview of section 1670. *Carmona, supra*, 13 Cal.3d 303, acknowledges that safety orders can arguably overlap. As a job proceeds, employers must assess the changing conditions and as those changes occur, comply with the applicable regulation(s). While we agree with the ALJ that Employer made the wrong call as to how far along this job was and failed to undertake the required additional safety measures, we also recognize that the platform here covered only a relatively small area near the furnace, in relation to the entire, mostly unfinished, attic. [Exs. 38, 21MOD2, and 38MOD.]

Employer's view of Cervantes' fall is also grounded in its belief that installing a fall protection system in the attic area would be unworkable, ineffective, and expose employees to greater risks than faced during the brief amount of time that employees were working unprotected in the attic. Employer seems to only consider a fall protection system involving guard rails and provided testimony detailing how such a system requires an employee accessing the attic area to essentially build a box around themselves and take it down once their work is completed. But as noted above, Davenport testified it was possible and feasible to use a system involving a safety harness, a lanyard, and an anchor point. [HT 5/19/22, p. 76-77.] Employer presented no evidence rebutting that testimony or showing that use of such a personal fall arrest system was impractical or created a greater hazard.

The practical challenges of employers recognizing when a work area has transitioned from the early requirements of CCR section 1669 to the more stringent requirements of CCR section

1670, and the issues raised in Employer's "greater hazard" argument are matters that must be taken up with the Occupational Safety and Health Standards Board (Standards Board). We must stick to our role as the Occupational Safety and Health Appeals Board and simply interpret and apply the safety orders the Standards Board has adopted.

Labor Code section 6432(b)(1)(E)(ii) sets out a second factor of employer-provided information we must consider, and this factor asks us to consider why Employer believes a serious violation does not exist. Employer's belief that a serious violation does not exist is rooted in unfounded confidence in its training programs and its procedures for communicating its health and safety programs with employees. As noted above, the Board finds substantial deficiencies in Employer's training on ladder and fall safety and finds that Employer's procedures for communicating with employees about its health and safety procedures and programs were inadequate.

While the fall protection-related violation should have been known to Employer, we note that Citation 1 item 2 was classified as General, and thus that violation is not included in our analysis of this Labor Code section 6432(b)(1)(E)(ii) factor. As noted above regarding our classification analysis, due to the multiple references to "the violation" (singular) in Labor Code section 6432 subdivision (c), we need not consider similar hazards here, only the two ladder citations. This is because only two of the Labor Code Section 6432 (b)(1) sub-paragraphs, sub-paragraphs (A), regarding training, and (B), regarding procedures to discover, control access to, and correct the hazard, require consideration of similar hazards.

We have considered Employer's position and arguments as to why a serious violation does not exist and we disagree. While Cervantes knowingly violated ladder safety rules of which he was fully aware and this was an action that Employer could not reasonably have predicted or foreseen, the hazard of falling from a ladder or from a height of greater than 7 ½ feet presents a very serious risk of harm.

There are third and fourth factors of employer-provided information we are to consider, but here these factors essentially reiterate the evidence and issues discussed above. Taken together, we have balanced and weighed the factors and find we cannot affirm the ALJ's overall conclusion that Employer successfully rebutted the presumption that Citations 2 and 3 were properly classified as Serious.

Weighing all of the factors we are required to consider, we reverse the ALJ's ruling that reduced the classifications of Citations 2 and 3 to General.

4. Did the ALJ err in modifying the penalties for Citations 2 and 3?

Next, we must determine whether the ALJ erred in modifying the penalties for Citations 2 and 3. The Division's Petition argues that it presented sufficient evidence to demonstrate that it correctly calculated the penalties in accordance with its policies and procedures. (Division's Petition, p. 18.)

Penalties calculated in accordance with the Director's regulations, set forth in sections 333 through 336, will be deemed presumptively reasonable. (*Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).) However, "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[.]" (*Plantel Nurseries*, Cal/OSHA App. 01-2346, Decision After Reconsideration (Jan. 8, 2004), quoting *DPS Plastering, Inc.*, Cal/OSHA App. 00-3865, Decision After Reconsideration (Nov. 17, 2003).) The Division must still demonstrate that it calculated penalties in accordance with the penalty-setting regulations. (*Plantel Nurseries, supra*, Cal/OSHA App. 01-2346; *RII Plastering, Inc.*, Cal/OSHA App. 00-4250, Decision After Reconsideration (Oct. 21, 2003).)

We do not simply rubber-stamp the Division's penalty calculations. We must engage in a critical review of all relevant evidence to ensure that the Division's actions are supported by the law. Maximum credit and the minimum penalty allowed under the regulations must be assessed when the Division fails to demonstrate its proposed penalty by a preponderance of the evidence. (*Armour Steel Co.*, Cal/OSHA App. 08-2649, Decision After Reconsideration (Feb. 7, 2014); *Plantel Nurseries, supra*, Cal/OSHA App. 01-2346.)

Base Penalty, Severity:

Davenport identified the Division's penalty calculation worksheet, referred to as the C-10. (Exhibit 2.) Davenport testified that the Division calculated the Base Penalties for Citations 2 and 3 based on their Serious classification. (HT Day 2, pp. 166, 169.)

We reverse the ALJ's reclassification of Citations 2 and 3 as General. Section 336, subdivision (b), provides that the Base Penalty is initially set based on the Severity of the violation. Both Citations 2 and 3 were found to be Serious under the definition set out in Labor Code section 6302, subdivision (h), "[A]ny injury . . . that requires inpatient hospitalization, for other than medical observation or diagnostic testing . . ."

Section 335, subdivision (a)(1)(B), provides that the Severity of a Serious violation is automatically set as High. Section 336, subdivision (c)(1), provides that the Base Penalty for a Serious violation is \$18,000. Thus, the Base Penalty for Citations 2 and 3 is \$18,000.

Gravity-Based penalty calculations:

a. Citation 2

Citation 2 was an Accident-Related Serious violation. When a citation is characterized as Accident-Related Serious the only permissible adjustment is for Size. (§ 336, subds.(c)(2), (d)(7), (e)(3)(D).) Thus, no reductions for Extent or Likelihood are allowed for Citation 2 yielding a Gravity-Based penalty of \$18,000. The reduction for Size for Citation 2 is discussed below.

b. Citation 3

The Base Penalty for a Serious violation is subject to further adjustment for “Extent” and “Likelihood,” These adjustments combine to produce the “Gravity-Based penalty.” (§ 336, subd. (b).)

Extent:

Extent, in this context, is defined as follows:

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:

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.

(§ 335, subd. (a)(2).)

Section 336, subdivision (b), provides that for a rating of “LOW,” 25 percent of the base penalty shall be subtracted; for a rating of “MEDIUM,” no adjustment to the base penalty shall be made; and for a rating of “HIGH,” 25 percent of the base penalty shall be added.

For Citation 3, the Division rated Extent as Medium, applying no adjustment from the \$18,000 Base Penalty. (Exhibit 2; HT Day 2, pp. 166, 169.) Davenport testified he applied this rating based on statements made during interviews by Cervantes, in which Cervantes allegedly stated that using the six-foot ladder to access the attic was “something that he did regularly.” (HT Day 2, pp. 166, 169; Exhibit 8.)

The ALJ reasoned that those hearsay statements were not sufficient to support the Medium rating for the two citations. Accordingly, the ALJ found that Employer was entitled to the maximum credits for Extent and lowered both Extent ratings from Medium to Low. (*Plantel Nurseries, supra*, Cal/OSHA App. 01-2346; *RII Plastering, Inc., supra*, Cal/OSHA App. 00-4250.)

When Extent is rated as Low, this reduces the Base Penalty by 25%. (§336, subd. (c).) We affirm the ALJ’s determination of the Extent rating as Low. 25 percent of the Base Penalty of \$18,000 is \$4,500, so the penalty is reduced to \$13,500.

Likelihood:

Section 335, subdivision (a)(3), defines the adjustment for Likelihood:

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

Section 336, subdivision (b), provides that for a General violation with a Likelihood rating of “LOW,” 25 percent of the base penalty shall be subtracted; for a rating of “MODERATE,” no adjustment to the base penalty shall be made; and for a rating of “HIGH,” 25 percent of the base penalty shall be added.

The Division rated the Likelihood of both Citation 3 as Medium, applying no adjustment from the Base Penalty. (Exhibit 2.) Davenport testified that he set both citations’ Likelihood as Medium based on the number of times the violations had allegedly occurred, again drawing on Cervantes’ statements made when interviewed. (HT Day 2, pp. 167, 170; Exhibit 8.) In addition, Davenport testified that he took into account that there were three employees in the house, one of whom was using the wrong ladder at the time of the accident, and two of which had not yet received ladder training. Davenport also testified that the Medium Likelihood rating was partially based upon his own experience in investigating the injuries which could result from using the wrong ladder. (HT Day 2, p. 168.)

The ALJ concluded that this evidence was insufficient to support a Medium rating for Likelihood. (Decision, p. 25.) As noted, the maximum credit and the minimum penalty allowed under the regulations must be assessed where the Division fails to justify its proposed penalty. (*Armour Steel Co.*, *supra*, Cal/OSHA App. 08-2649; *Plantel Nurseries*, *supra*, Cal/OSHA App. 01-2346.) The ALJ therefore reduced the Likelihood for Citation 3 to Low.

The Division argues that Cervantes testified he regularly used an eight-foot ladder to access the attics. (HT Day 1, p. 185.) However, as noted, the record is unclear as to whether the eight-foot ladder in question was, in fact, an extension ladder which unfolded to the correct height. Based in part on this reason, we affirm the ALJ’s reduction of the Likelihood rating to Low.

When Likelihood is rated as Low, it reduces the Base Penalty by 25%. (§336, subd. (c).) With a Base Penalty of \$18,000, a 25% reduction of the Base penalty for Likelihood is again \$4,500, resulting in a total Gravity-Based penalty of \$9,000.

Further Adjustments: Size, Good Faith, History, and Abatement:

Size:

Section 335, subdivision (b), and section 336, subdivision (d)(1), provide for the following reductions to the Gravity-based penalty based on Size:

10 or fewer employees -- 40% of the Gravity-based Penalty shall be subtracted.

11-25 employees -- 30% of the Gravity-based Penalty shall be subtracted.

26-60 employees -- 20% of the Gravity-based Penalty shall be subtracted.

61-100 employees -- 10% of the Gravity-based Penalty shall be subtracted.

More than 100 employees -- No adjustment shall be made.

The Division gave no Size adjustment to either Citation 2 or Citation 3. Davenport testified that Employer had over 100 employees at the time of the inspection. (HT Day 2, p. 169.) The ALJ found Employer did not offer sufficient evidence to dispute this finding. (Decision, p. 27.) The ALJ found Employer was not entitled to a downward adjustment for either citation for Size.

a. Citation 2

Citation 2 was an Accident-Related Serious violation. When a citation is characterized as Accident-Related Serious the only permissible adjustment is for Size. (§ 336, subds.(c)(2), (d)(7), (e)(3)(D).) We affirm the ALJ's finding of no adjustment for Size for Citation 2.

As no other adjustments are allowed (§ 336, subds.(c)(2), (d)(7), (e)(3)(D)), the final penalty for Citation 2 is \$18,000.

a. Citation 3

As discussed above, the ALJ found that Employer was not entitled to a downward adjustment for Size, and we affirm this finding for Citation 3, maintaining the Gravity-Based penalty for Citation 3 at \$9,000. However, the Gravity-Based penalty in most cases is subject to further adjustment for Good Faith, and History, resulting in the "Adjusted Penalty." (§ 335, subd. (b), (c), and (d); § 336, subd. (d).)

Good Faith:

Section 335, subdivision (c), provides:

(c) The 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 for a Good Faith rating of “GOOD,” the Gravity-Based penalty is reduced by 30%; for a Good Faith rating of “FAIR,” the Gravity-Based penalty is reduced by 15%; and for a Good Faith rating of “POOR,” no adjustment is made.

The Division rated Good Faith for Citation 3 as Fair. (Exhibit 2.) Davenport testified that he set Good Faith as Fair because Employer had a safety program in place but failed to effectively implement it. (HT Day 2, p. 170.)

The ALJ found that the Division did not establish a violation of section 3203, subdivision (a), alleged in Citation 1, Item 1. The ALJ concluded, “[T]here is no finding that Employer’s IIPP was not effectively implemented.” (Decision, p. 26.) The ALJ therefore rated Good Faith as Good for both citations.

The Division argues that there is sufficient evidence of Employer’s failures to implement its IIPP to support the Fair rating. The Division correctly points out that Employer failed to implement its own safety program regarding fall protection for employees working in the attic spaces, as alleged in Citation 1, Item 2, a citation which the ALJ affirmed. In addition, the Division argues, Employer failed to issue Cervantes a written rather than verbal warning for violating ladder safety rules, again in contravention of its IIPP. (Division’s Petition, p. 21.)

Based upon this evidence, we adjust the Citation 3 penalty back down from the ALJ’s assessment of Good to reflect a Fair rating for Good Faith. This means the Good Faith credit modifies the penalty by a downward adjustment of 15% of the Gravity-Based penalty, or \$1,350 (§336, subd. (d)(2)), resulting in an Adjusted penalty of \$7,650.

History:

Section 335, subdivision (d), and section 336, subdivision (d)(3), provide for penalty modifications based upon the employer’s history of compliance, determined by examining and evaluating the employer’s records in the Division’s files. Depending on such records, the History of Previous Violations is rated as:

GOOD-- Within the last three years, no Serious, Repeat, or Willful violations and less than one General or Regulatory violation per 100 employees at the establishment.

FAIR-- Within the last three years, no Serious, Repeat, or Willful violations and less than 20 General or Regulatory violations per 100 employees at the establishment.

POOR-- Within the last three years, a Serious, Repeat, or Willful violation or more than 20 General or Regulatory violations per 100 employees at the establishment.

Section 336, subdivision (d)(3), provides that for a rating of “GOOD,” 10 percent of the Gravity-based penalty shall be subtracted; for a rating of “FAIR,” 5 percent of the Gravity-based penalty shall be subtracted; and for a rating of “POOR,” no adjustment shall be made.

The Division rated History as Fair for Citation 3. (Exhibit 2.) Davenport testified this was because Employer received a Serious citation from the Division in 2014, which became final on October 20, 2017, approximately a year before the start of the Division’s investigation in the instant matter on October 22, 2018. (HT Day 2, p. 171; Exhibit 13.)

The ALJ accurately pointed out, however, that the Fed/OSHA website and the Settlement Order in that previous case reflect that the citation was reduced to General as part of a 2017 settlement. (Decision, p. 28; Exhibit 13.) The ALJ therefore rated History as Good for Citation 3, and we affirm this finding.

Applying the maximum credit for History reduces the penalty for Citation 3 by 10% of the Gravity-Based penalty, which is \$900, bringing the Adjusted Penalty down to \$6,750.

Abatement:

Section 336, subdivision (e)(2), provides for a 50% reduction of the Adjusted Penalty if an employer abates an alleged violation within specified time parameters. The citation issued to Employer contains the statement “Corrected During Inspection.”

Both the Division and the ALJ applied a 50% abatement credit. We affirm this holding and also apply the 50% abatement credit to the Adjusted penalty amount of \$6,750, bringing the final Adjusted penalty for Citation 3 down to \$3,375.

5. Are the penalties for Citations 1, Item 3, and Citations 2 and 3 duplicative?

Employer argues that Citation 1, Item 3, and Citations 2 and 3 all “stem from a single employee act – selecting the wrong ladder for the intended purpose,” all involve the same hazard of falling from a ladder, and that the “same act – retraining on ladder safety – abated both alleged violations.” (Employer’s Petition, p. 7.)

While multiple citations involving a single hazard are appropriate and typically will be upheld, the same is not true for duplicative penalties. (*West Valley Construction Co., Inc.*, Cal/OSHA App. 01-3017, Decision After Reconsideration (May 16, 2008).) Generally, only one penalty may be assessed against an employer for multiple violations concerning a single hazard. (*Strong Tie Structures*, Cal/OSHA App. 75-856, Decision After Reconsideration (Sept. 16, 1976).) It is proper to assess one penalty for multiple violations involving the same hazard, where a single means of abatement is needed. (*A & C Landscaping, Inc.*, Cal/OSHA App. 04-4795, Decision After Reconsideration (Jun. 24, 2010).) Penalties which tend to be duplicative or cumulative are inconsistent with the spirit and intent of the Act. (*Ibid.*) However, we will decline to apply a

duplicative reduction where the substance of each citation is sufficiently distinct from the others. (*Gateway Pacific Contractors*, Cal/OSHA App. 10-1502, Decision After Reconsideration (Oct. 4, 2016).)

The Division argues that each citation alleged a different safety violation. (Division's Answer, p. 13.) Each citation alleged a violation of section 1675, subdivision (b), which incorporates by reference section 3276. Section 3276 contains a number of subsections addressing separate ladder safety violations. It makes little difference if the penalties stem from different subsections of the same regulation or from a multiplicity of regulations if they are duplicative. (*Anresco, Inc.*, Cal/OSHA App. 90-855, Decision After Reconsideration (Dec. 20, 1991); *W.F. Scott & Co., Inc.*, Cal/OSHA App. 95-2623, Decision After Reconsideration (Oct. 29, 1999).)

Citation 1, Item 3, alleged Employer failed to ensure that an employee chose the appropriate ladder for the task being performed. (§ 1675, subd. (b), ref. § 3276, subd. (d)(1)(B).)

Citation 2 alleged Employer failed to ensure that a ladder's side rails extended 36 inches above the upper landing surface, or the ladder was secured at its top to a rigid support. (§ 1675, subd. (b), ref. § 3276, subd. (e)(11).)

Citation 3 alleged Employer failed to ensure that an employee did not sit, kneel, step or stand on the pail shelf, top cap or the step below the top cap of a step ladder. (§ 1675, subd. (b), ref. § 3276, subd. (e)(15)(E).)

The substance of each citation must be "sufficiently factually distinct" to justify separate penalties. (*Gateway Pacific Contractors, supra*, Cal/OSHA App. 10-1502.) Citation 1, Item 3, and Citation 2 both involve the failure to select a ladder of the proper height to access the attic space. Citation 3 involves the improper use of a ladder. Board precedent on this topic, cited above, weighs in favor of our finding that at least the two penalties regarding ladder selection are duplicative.

In *Strong Tie Structures, supra*, Cal/OSHA App. 75-856, for example, employees were observed working on a roof structure approximately 30 feet above ground level without fall protection. The Division issued four citations, alleging failure to provide scaffolding, failure to ensure use of safety belts and lifelines, failure to provide safety nets, and failure to provide perimeter railings. The Board reasoned that since any one method of abatement would have provided a safe place of employment, it was redundant to assess penalties upon the employer for four separate violations. Since in this matter there was one single hazardous situation, there was no reason to assess multiple penalties.

Here, the ladder-related violations all share the common hazard of falling from a ladder and were abated by retraining on ladder safety. Two of the citations concerned ladder selection, while a third concerned unsafe ladder use. We find Citation 1, Item 3 and Citations 2 and 3 to be duplicative.

DECISION

We affirm the ALJ's ruling dismissing Citation 1, Item 1 and vacating the penalty.

With regard to Citation 1, Item 2, we affirm the ALJ's finding of a violation of section 1670, subdivision (a), and affirm the \$600 penalty.

With regards to Citations 1, Items 2 and 3, and Citations 2 and 3, we affirm the ALJ's ruling that Employer did not establish elements two, three, and four of the IEAD, and thus the defense fails.

With regard to Citation 1, Item 3, we affirm the ALJ's finding of a violation of section 1675(B) referring to section 3276(d)(1)(B) and assessment of a \$1,200 penalty but find the violation duplicative of Citation 2 and strike the penalty.

With regard to Citations 2 and 3, the Board reverses the ALJ's re-classification of those citations as General. The penalty for Citation 2, as a Serious, Accident-related violation is modified to \$18,000. The penalty for Citation 3, as a Serious violation is modified to \$3,375. As we find all three ladder safety violations to be duplicative (Citation 1, Item 3, Citation 2, and Citation 3), we also strike the penalty for Citation 3 as duplicative.

The total penalties for the four citations is \$18,600.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

/s/ Ed Lowry, Chair

/s/ Judith S. Freyman, Board Member

/s/ Marvin P. Kropke, Board Member

FILED ON: 07/13/2026

