BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of: **KPRS CONSTRUCTION SERVICES, INC.** **2850 Saturn Street** **Brea, CA 92821** **Employer**	Inspection No. **1371294** **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 in the above-entitled matter.

JURISDICTION

KPRS Construction, Inc. (Employer or KPRS) is a general contractor for commercial construction projects. KPRS was building an approximately 500,000 square foot refrigerated warehouse with an adjacent 25,000 to 30,000 square foot mechanical building for Trader Joe's in San Bernardino, California. KPRS, as the general contractor, engaged multiple subcontractors on the project, including A.G. Construction (AG), a cement contractor. On August 7, 2018, Jorge Antonio Chavez Soto (Chavez), an AG employee, fell through an unmarked opening in the mechanical building's metal roof decking to the concrete floor 27 feet below and suffered serious injuries.

Following an inspection by Lex Eaton (Eaton), the District Manager for the High Hazard Unit, the Division of Occupational Safety and Health (Division) issued two Serious, Accident-Related citations to KPRS. Citation 1, Item 1 alleged a violation of section 1509, subdivision (a).[1] Section 1509(a) is a Construction Safety Order (CSO) that requires an employer to "establish, implement and maintain an effective Injury and Illness Prevention Program (IIPP) in accordance with section 3203 of the General Industry Safety Orders." The Division alleges that KPRS failed to meet the requirements of section 3203, subdivision (a), paragraphs (4) and (6). The Division's Alleged Violation Description (AVD) with respect to section 3203, subdivision (a)(4), states that KPRS failed to identify and evaluate the fall hazard of falling through an unprotected opening. With respect to the violation of section 3203, subdivision (a)(6), the AVD states that KPRS failed to correct the unsafe work condition, the fall hazard, posed by the unprotected rooftop opening. Citation 2, Item 1, alleged a violation of section 1632, subdivision (b)(1), which provides: "Floor, roof and skylight openings shall be guarded by either temporary railings and toeboards or covers." The proposed penalties total $22,500.

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

KPRS appealed the citations. This matter was heard by Leslie E. Murad, II, Administrative Law Judge (ALJ) for the Board. ALJ Murad conducted the hearing from West Covina, California, on January 24 and 25, 2023, and September 27 and 28, 2023, with the parties and witnesses appearing remotely via the Zoom video platform. Attorney Perry P. Poff of Donnell, Melgoza & Scates, LLP represented Employer. Lisa Wong, Staff Counsel, represented the Division.

On January 12, 2024, the ALJ issued a Decision, vacating Citation 1 on multiple grounds and holding as to Citation 2 that KPRS had established the due diligence defense. The Division filed a timely Petition for Reconsideration (Petition) challenging the Decision.

All arguments not raised in the Petition are deemed waived. (Lab. Code, § 6618.)

In making this decision, the Board has 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. Was the Decision's analysis of the violation alleged in Citation 1 correct?

2. Did the Division prove that KPRS failed to establish, implement, and maintain an effective IIPP in accordance with section 3203, subdivision (a)(4)?

3. Did the Division prove that KPRS failed to establish, implement, and maintain an effective IIPP in accordance with section 3203, subdivision (a)(6)?

4. Did KPRS establish the due diligence defense regarding the alleged violation of section 1632, subdivision (b)(1)?

5. Were the penalties appropriately calculated?

FINDINGS OF FACT

1. KPRS was the general contractor and the controlling and correcting employer constructing an approximately 500,000 square foot refrigerated warehouse with an adjacent 25,000 square foot mechanical building for Trader Joe's.
2. KPRS did not itself perform the construction work. KPRS contracted with AG to do concrete work, Angle Iron Works (Angle Iron) to do structural iron work, and C & L Refrigeration (C&L) to do heating, ventilation and air conditioning (HVAC) work. Angle Iron sub-contracted with G. B. Metal Fabricators (GB Metals) to do welding and cut openings on the roof of the mechanical building for Angle Iron.
3. KPRS was unaware Angle Iron had contracted with GB Metals to do any work on the site.
4. KPRS utilized a site-specific safety plan and conducted a site-specific safety orientation with all subcontractors before permitting them to start work.

5. KPRS conducted weekly meetings with the foremen of its direct subcontractors to discuss schedule issues and safety topics. That information was to be the subject of mandatory weekly "toolbox talks" conducted by the foremen with the subcontractors' employees. KPRS required verification that these "toolbox talks" occurred.
6. KPRS conducted and documented daily and weekly site inspections of the jobsite, looking for safety-related problems and issuing instructions to correct unsafe conditions, except that from July 26, 2018, to August 7, 2018, KPRS did not in any way inspect or monitor the crews working on the approximately 25,000 square foot mechanical building roof.
7. KPRS provided all subcontractors with copies of the structural plans for the mechanical building.
8. The mechanical building roof was separate from the warehouse and there was no ladder access to the roof of the mechanical building from either the warehouse roof or from below.
9. Prior to the August 7, 2018, accident, the only way workers could access the roof of the mechanical building was by being lifted to the roof either on the scissor lift provided by AG or on the boom lift provided by C&L.
10. The structural plans called for no openings greater than six inches to be cut in the metal roof of the mechanical building until the cement roof on the mechanical building had been poured and cured.
11. GB Metals told the Division investigator that on July 27, 2018, before the cement was poured, GB Metals employees cut a two-and-one-half-foot wide by three-foot long roof hatch opening in the metal roof deck of the mechanical building. The GB Metals superintendent told the Division investigator that GB Metals employees secured the hatch opening with a cover.
12. KPRS did not know that a two-and-one-half foot wide by three-foot-long hatch opening had been cut in the mechanical building roof until Chavez fell through it on August 7, 2018.
13. The Division investigator was informed that sometime after the hatch opening was cut, C&L employees took the secured plywood cover off the opening and did not re-secure the plywood cover.
14. No employee of KPRS went on or inspected the mechanical building roof deck prior to the accident. At the time of, and prior to the accident, no employees of KPRS went inside the mechanical building more than a few feet from the door to inspect, due to equipment stored in the mechanical building and electrical and plumbing work that was in progress. From that location near the door, KPRS employees did not have an unimpeded view of underside of the roof.
15. On August 7, 2018, Chavez, an employee of AG, the exposing employer, was working on the roof of the mechanical building, clearing debris and preparing the roof deck for the installation of rebar and block-outs before the concrete pour.
16. Chavez may have had his back turned to the opening when he either picked up the unmarked and unsecured plywood cover of the hatch opening, or he may have stepped onto the unsecured plywood cover of the hatch opening. Either way, he fell approximately 27 feet to the cement floor below suffering serious injuries.

17. The roof opening Chavez fell through was not covered or guarded in a manner that would prevent a person, equipment, or material from falling through it, and lacked a written warning.
18. KPRS investigated the accident to identify the root cause. The investigation included interviewing subcontractor employees, making recommendations, and noting post-accident corrective actions taken.

REASONS FOR DECISION AFTER RECONSIDERATION

1. Was the Decision's analysis of the violation alleged in Citation 1 correct?

In Citation 1, Item 1, the Division cited KPRS for failing to meet the IIPP requirements of section 1509, specifically by violating section 3203, subdivision (a), paragraphs (4) and (6). As the Decision correctly noted, violations of section 1509 fall into two categories: (1) whether there is an IIPP that complies with section 3203, and (2) whether the IIPP was effectively implemented and maintained. Those two categories constitute separate violations.

The Decision also correctly concluded that the second category is what was charged here. The AVD in the citation clearly states that the violation did not arise from an inadequate IIPP but from KPRS's failure to implement its satisfactory IIPP by failing to identify, evaluate, and correct hazards. Over a decade of Board precedent makes it clear that an employer may have a satisfactory IIPP and still be cited for a failure to effectively implement and maintain that IIPP. "While an employer may have a comprehensive IIPP, the Division may still demonstrate an IIPP violation by showing that the employer failed to implement that plan. To prove a violation of section 3203, subdivision (a)(4), based upon a failure of implementation, the Division must establish that the employer failed to effectively implement its duty to inspect, identify, and evaluate the hazard. (*OC Communications, Inc*., Cal/OSHA App. 14-0120, Decision After Reconsideration (Mar. 28, 2016).)" (*DPR Construction, Inc., et al. dba DPR Construction*, Cal/OSHA App. 1206788, Decision After Reconsideration (Feb. 19, 2021).)

However, after correctly recognizing that the Division charged KPRS with a failure of implementation, the Decision finds that a failure of implementation cannot be established unless the Division first establishes certain prerequisites. The Decision asserts that, "[a]s a prerequisite to bringing such a citation, the Division must first establish what the KPRS's IIPP procedures were." The Decision held that, because Division inspector Eaton did not ask for a copy of KPRS's IIPP during the investigation, "the Division thus never established that Employer had a valid IIPP to implement."

The Decision also appears to suggest that the Division cannot establish a failure to implement claim unless it conducts an adequate investigation of Employer's IIPP, per Labor Code section 6314.5. That section requires every Division investigation to "include an evaluation of the employer's injury prevention program." The Decision essentially asserts that the Division's failure to comply with Labor Code section 6314.5 constitutes an affirmative defense.

In summary, the Decision holds that a failure to implement claim cannot be established unless two prerequisites occur: (1) the Division must conduct an evaluation of an employer's IIPP pursuant to Labor Code section 6314.5.; and (2) the Division must introduce the terms of the employer's IIPP into evidence. The Decision concluded that neither element was established here and, therefore, vacated the citation. However, we disagree with the ALJ's analysis.

To begin with, we address the Decision's assertion that a failure to implement claim cannot be established where the Division fails to comply with the investigatory requirements of Labor Code 6314.5. We disagree. While the Division has a statutory obligation to conduct an evaluation of an employer's IIPP, the failure to comply with that requirement does not *per se* defeat an IIPP citation that is otherwise established, nor does it create an affirmative defense. There are no Board cases stating or indicating that the Labor Code section 6314.5 requirement creates an affirmative defense based on an alleged violation of that section, and we decline to recognize such a defense. Further, even if we were to assume, *arguendo*, that the violation of Labor Code section 6314.5 constitutes an affirmative defense, the defense was not raised in KPRS's appeal forms or at any other time, and in doing so, such a defense is deemed waived. (*RNR Construction, Inc.* Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017).

Moreover, it is clear that the Division conducted an evaluation of KPRS's injury prevention program. Eaton testified that during the same three-year period as his investigation, KPRS had been the subject of other Division investigations in which it had been determined that KPRS's 2018 IIPP was satisfactory. Eaton's uncontradicted testimony established that the Division did evaluate KPRS's 2018 IIPP and, relying on the Division's institutional knowledge, Eaton did not request a copy of KPRS's IIPP in this particular case. (HT, Day 3 pp. 77-79, Day 4, 238-239.) Knowing the Division already had copies of KPRS's satisfactory 2018 IIPP and seeing no reason to request an additional copy, Eaton testified, "[t]he IIPP, I'm sure that it has all the correct elements in there." Delapinia, KPRS's Corporate Safety Director, testified that KPRS updated their IIPPs at least once a year in consultation with Cal/OSHA.

During the hearing, the ALJ questioned Eaton on whether he had documented in his notes that he did not need the IIPP due to the Division's concurrent investigations of KPRS. Eaton testified he had not documented his determination, but that he normally always requested a copy of the employer's IIPP ("checked off the IIPP") when giving an employer a document request sheet. He testified that he knew KPRS had a satisfactory IIPP in place when he handed KPRS personnel the document request sheet and told them that he didn't need another copy. There is no language in the Decision indicating the ALJ had any reason to discredit Eaton's testimony or reliability, and yet during the hearing the ALJ stated he "has a problem" with Eaton's reliance on the Division's institutional knowledge regarding KPRS's satisfactory IIPP because Eaton failed to write down and thus create documentation in the file saying he was relying on institutional knowledge. However, we see no reason to discredit Eaton on this point.

We next turn to the Decision's assertion that a failure to implement IIPP violation cannot be established unless the Division introduces the terms of the IIPP. Even if we were assume, *arguendo*, that the evidence must establish the terms of an employer's IIPP as a prerequisite to

bringing a failure to implement claim—a conclusion that we find unnecessary to reach—we disagree with the Decision's conclusion that the evidence must come from solely from the Division. It was established by Eaton's testimony that the Division evaluated KPRS's 2018 IIPP, and we find that a violation of the requirements of Labor Code 6314.5 does not create an affirmative defense.

Here, while the Division did not introduce KPRS's IIPP into evidence, it was nonetheless introduced into evidence. ALJ Murad inadvertently left Exhibit A off the list in the Decision's Appendix A, which is the Summary of Evidentiary Record and Certification of Recording. The omitted Exhibit A was KPRS's IIPP in effect in 2018 at the time of Chavez's fall (2018 IIPP), admitted into evidence on the fourth day of the hearing. (HT, Day 4, p. 229). Delapinia testified to the authenticity of Exhibit A and read portions of it into the record.[1] The language in KPRS's 2018 IIPP mirrored the language of section 3203, subdivision (a), paragraphs (4) and (6), and this was made clear by Delapinia's testimony.

The fact that the IIPP was introduced by the KPRS, rather than the Division, does not mean it can be ignored. Here, the Decision failed to reflect the totality of the evidence due to the ALJ inadvertently overlooking both KPRS's 2018 IIPP, admitted as Exhibit A, and Delapinia's testimony quoting sections of KPRS's 2018 IIPP that established KPRS's 2018 IIPP met the requirements of section 3203, subdivision (a), paragraphs (4) and (6). While the ALJ was correct in noting the Division had not been the party that proved KPRS's IIPP was satisfactory, it does not matter which party establishes a fact at hearing, what matters is that the fact is established. At the hearing KPRS's 2018 IIPP was established to be satisfactory as written, and the parts of the Decision that hold otherwise are reversed.

Based on the foregoing, we conclude that there is no factual or legal prohibition preventing reconsideration of the "failure to implement the IIPP claims" on the merits. We must evaluate whether it was established that KPRS violated section 3203, either subdivision (a)(4) or subdivision (a)(6), or both.

2. Did the Division prove that KPRS failed to establish, implement, and maintain an effective IIPP in accordance with section 3203, subdivision (a)(4)?

Section 3203, subdivision (a)(4), requires an employer to establish, implement, and maintain an IIPP, which includes the following requirements:

> (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:
>
> (A) When the Program is first established; […]

[1] Delapinia's testimony established that Employer's IIPP called for "inspections of jobsites . . .to identify unsafe conditions and work practices" which must be completed "daily by the superintendent, monthly by the superintendent and project manager, and periodic/monthly by the safety officer." Delapinia read into the record KPRS's IIPP requirements to conduct an inspection "[w]henever new substances, processes, procedures or equipment are introduced to the workplace[,]" and to "[c]onduct hazard assessments when employees are assigned to processes, operations, or tasks, for which a hazard assessment has not been previously conducted." [Day 4, HT, pp. 229, 231, 233-235, 237)

(B) Whenever new substances, processes, procedures, or equipment are introduced to the workplace that represent a new occupational safety and health hazard; and

(C) Whenever the employer is made aware of a new or previously unrecognized hazard.

The Division's Alleged Violation Description (AVD) for the violation of section 3203, subdivision (a)(4), alleges that:

> [. . . Employer] failed to identify and evaluate the fall hazard of an unprotected opening in the rooftop steel decking, measuring approximately 3 feet long by 2 feet 6 inches wide, at a location where a roof hatchway was to be installed and where employees [. . .] were performing required tasks.
>
> [. . .]
>
> [This citation is being issued in accordance with T8CCR 336.10-Multi-Employer Work site.]

"Section 3203, subdivision (a)(4), contains no requirement for an employer to have a written procedure for each hazardous operation it undertakes. What is required is for Employer to have procedures in place for identifying and evaluating workplace hazards, and these procedures are to include 'scheduled periodic inspections.' (Section 3203 (a)(4).)" (*Brunton Enterprises, Inc.,* Cal/OSHA App. 08-3445, Decision After Reconsideration (Oct. 11, 2013).) Even if an employer has a comprehensive written IIPP, the Division may still establish a violation by demonstrating the employer failed to effectively implement its IIPP. (*OC Communications, Inc*., Cal/OSHA App. 14-0120, Decision After Reconsideration (Mar. 28, 2016), Cal/OSHA App. 14-0120, *Contra Costa Electric, Inc*., Cal/OSHA App. 09-3271 Decision After Reconsideration (May 13, 2014).) Citation 1, Instance 1, correctly alleged such a failure of implementation.

To establish a failure of implementation that violates section 3203, subdivision (a)(4), the Division must demonstrate: (1) new substances, processes, procedures, or equipment were introduced; and (2) Employer failed to implement its duty to inspect and identify the unsafe condition and/or work practice. Here, both elements are satisfied. The hazard that caused Chavez's fall was an unsecured and unlabeled opening in the mechanical building's metal roof deck. The opening in the roof deck was a new hazard which went completely unidentified as a hazard for 11 days.

On July 26, 2018, AG Construction crews began loading a metal roof deck onto the structural steel of the mechanical building, which had six-to-eight-foot parapets around it.[2] On July 27, 2018, a GB Metals employee cut a two-and-one-half-foot wide by three-foot long roof hatch

[2] Rawlings testified that the roof "had six-to-eight foot parapets around it. It was – you know, it would of – it's kind of like being in a baby carriage." (Day 4, HT, p. 198.) Chavez testified regarding getting to the roof on the scissors lift on the day of the accident, saying: "[t]he building had a small wall made of like blocks all around it and we went in through a side of that from the elevator lift." (Day 1, HT p. 58.)

opening in the metal roof deck of the mechanical building. The GB Metals superintendent told Eaton they had covered the opening with a plywood cover which was secured by C&L Refrigeration. Eaton was also told during his investigation that at some point C&L Refrigeration took off the secured plywood cover and did not re-secure the cover over the opening. Before the accident, none of KPRS's personnel tasked in the IIPP with inspecting the jobsite asked to be brought up to the roof deck on either AG's scissors lift or C&L's boom lift, despite knowing employees of multiple contractors and subcontractors were working on the roof. KPRS's project manager, superintendent, and safety personnel also failed to inspect the mechanical building roof from the underside, due to the hazards created by equipment being parked and stored in the mechanical building and the plumbing and electrical work underway. The few steps taken inside the mechanical building by KPRS's Corporate Safety Director were insufficient to visually inspect the entire ceiling of the mechanical building.

KPRS argues in part that it had no obligation to inspect the mechanical building roof because access to the roof was limited. Work crews and any inspectors would need to be brought up to the mechanical building roof by either the scissor or boom lift. However, after July 26, 2018, at a minimum, employees of C&L, AG, Angle Iron, and GB Metals were all working on the mechanical building roof. That ongoing work triggered KPRS's obligation to inspect the roof, since KPRS's IIPP requires the entire site be inspected daily. KPRS's IIPP states: "KPRS Construction Services, Inc. shall follow procedures for identifying and evaluating workplace hazards including scheduled periodic inspections to identify unsafe conditions and work practices." KPRS's IIPP required both the Project Manager, Tom Adamson, and the Corporate Safety Director, Eric Delapinia, to conduct periodic jobsite inspections and required the Superintendent/Safety Officer/Site Safety Officer (Superintendent), John Rawlings, to "[c]onduct and record *daily* safety inspections of the work area." (Exhibit A, at pages 7-8 (emphasis added).)

KPRS also argues it did not have to inspect the mechanical building roof because the structural plans did not call for any openings larger than six inches to be cut prior to the concrete being poured and cured, and the plans were shared with all contractors and subcontractors. What is written in the structural plans, however, cannot insulate KPRS from its obligation to inspect the jobsite. The jobsite encompassed the warehouse building and the mechanical building, and once the mechanical building's metal roof deck became a location where multiple crews were working, it was part of the jobsite that required safety inspections. The hazard created by the two-and-one-half-foot wide by three-foot long hatch opening in the metal roof deck being cut earlier than called-for in the structural plans went unnoticed by KPRS for 11 days. The fact that the hatch opening in the metal roof deck was cut earlier than called-for in the structural plans cannot, in and of itself, relieve KPRS of its responsibility, as general contractor, for the safety of the workers on the roof of the mechanical building.

KPRS's position that it had no obligation to inspect the roof of the mechanical building is inconsistent with the plain text and intent of the cited regulation, which requires periodic inspection to identify and evaluate new hazards that arise in the workplace. KPRS's position is also inconsistent with its own IIPP that requires "daily safety inspections of the work area." Finally, KPRS's position that it had no obligation to inspect the mechanical building roof prior to the

accident must be viewed as inconsistent with Labor Code section 3203 and the California Supreme Court's admonition that safety orders "be given a liberal interpretation for the purpose of achieving a safe working environment." (*Carmona v Division of Industrial Safety*, (1975) 13 Cal.3d at 312-313; Lab. Code, §§ 3203 and 6300 *et seq*.).

KPRS had an obligation to inspect the mechanical building roof to identify and correct any new hazards. Between July 27, 2018, and August 7, 2018, KPRS failed to inspect either the rooftop or the underside of the mechanical room's metal roof deck. While work at height is inherently hazardous, once a two-and-one-half-foot wide by three-foot long hatch opening was cut, that created a significant new hazard on the roof deck that KPRS failed to timely identify and evaluate. It was established at the hearing through testimony, reports, and Eaton's field documentation notes that KPRS had no knowledge of the opening cut in the mechanical building roof until Chavez fell through the opening to the concrete floor below. That fact itself establishes that KPRS did not adequately perform its duty to identify and evaluate hazards on the mechanical building roof.

We find that it was established at hearing that KPRS violated section 3203, subdivision (a)(4), by failing to effectively implement its IIPP procedures to identify and evaluate the new hazard created by the unlabeled and unsecured hatch opening on the mechanical building roof deck.

3. Did the Division prove that KPRS failed to establish, implement, and maintain an effective IIPP in accordance with section 3203, subdivision (a)(6)?

Section 3203, subdivision (a), requires an employer to establish, implement, and maintain an IIPP, which includes the following requirements:

> (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:
>
> > (A) When observed or discovered; and,
> >
> > (B) When an imminent hazard exists which cannot be immediately abated without endangering employee(s) and/or property, remove all exposed personnel from the area except those necessary to correct the existing condition. Employees necessary to correct the hazardous condition shall be provided the necessary safeguards.

The Division's AVD with respect to the violation of section 3203, subdivision (a)(6) states that:

> KPRS Construction Services, Inc. (Controlling, Correcting Employer) failed to correct the unsafe work condition of an unprotected opening in the rooftop steel decking, measuring approximately 3 feet long by 2 feet 6 inches wide, at a location where a roof hatchway was to be installed and where employees of exposing employers, including, but not limited to AG Construction (Exposing Employer) employees were performing required tasks. [T8 CCR(a)(6)]

[This citation is being issued in accordance with T8CCR 336.10-Multi-Employer Work site.]

When determining whether there is a section 3203, subdivision (a)(6) violation, the issue is generally not that the employer's IIPP is flawed, but whether the employer has failed to implement that IIPP, by failing to correct a hazard at the workplace. (*Contra Costa Electric, Inc.,* Cal/OSHA App. 09-3271, Decision After Reconsideration (May 13, 2014) (*Contra Costa*).) "Employers are given wide latitude in how they choose to correct hazards, and presumably, creation of a new written procedure may not always be necessary. [¶] The question for the ALJ, and now the Board, is this: did the Employer fail to implement its IIPP, by failing to identify and correct a hazard?" (*MCM Construction, Inc.,* Cal/OSHA App. 13-3851, Decision After Reconsideration (Feb. 22, 2016).) We have previously held that an employer's unawareness of the hazard does not necessarily insulate it from a claim that they failed to implement their IIPP by correcting the hazard, particularly where the employer does not conduct adequate inspections to identify and evaluate hazards.

In *Contra Costa, supra,* Cal/OSHA App. 09-3271, the employer was cited for failing to identify and correct the hazard that became apparent when an employee in the basket of an aerial lift being moved along a Bay Area Rapid Transit (BART) platform was injured. As the lift was moved along the platform, the basket was suspended over live train tracks and the employee in the aerial lift's basket was struck by a BART car travelling on the track. In upholding the ALJ's determination that the employer had violated section 3203, subdivision (a)(6), the Board noted that, "[t]he ALJ's finding, that "the absence of a traffic control system for the lifts was certainly known, or knowable, to employer," fits squarely within the factual allegation described in the original citation." (*Contra Costa Electric, Inc., supra,* Cal/OSHA App. 09-3271.) In *Contra Costa* we found that the violation of section 3203(a)(6) was established because the employer neither enforced its own rule about not driving lifts on the "live side" of the platform nor took any further steps per the IIPP to evaluate and address the hazards of moving equipment. Like here, the employer in *Contra Costa* asserted that since it was unaware of the hazard, it could not be cited for failing to implement its IIPP and correct the hazard. KPRS's lack of knowledge of the considerable hazard of the unsecured and unlabeled hatch opening arose from its failure to conduct adequate inspections of the mechanical room roof. Allowing KPRS's lack of awareness to insulate it from liability would incentivize employers to conduct inadequate inspections.

In *Bigge Crane & Rigging, Co. (Bigge),* Cal/OSHA App. 1380273, Decision After Reconsideration (April 7, 2023), the employer was cited for failing to identify and correct an unexpected hazard that arose from an employee moving a construction personnel hoist (CPH) without looking up or otherwise inspecting the hoist way for obstructions before taking the CPH to the top of the building. On the way up, the CPH struck another employee (named Sanders) who was standing on a scissor lift in the hoist way to access the exterior wall of the building, and the struck employee was crushed between the CPH and the building. As we explained in upholding the violation of section 3203, subdivision (a)(6): "Correcting the hazard would require first observing that Sanders was working in the hoist way, and then waiting to move the CPH until the hoist way was clear of obstruction." The failure of the employer in *Bigge* to realize the considerable hazard of not having a safety practice that required the CPH operator to look up or otherwise inspect the

hoist way for obstructions could not be condoned by the Board. KPRS's lack of awareness regarding the prematurely-cut hatch opening hazard arose from the considerable hazard of KPRS not inspecting the mechanical room roof's work area for 11 days and cannot be condoned by the Board.

To correct the hazard created by the hatch opening in the mechanical building roof, KPRS needed to discover the hatch opening cut into the roof and correct it by properly securing the opening. Due to its failure to inspect, KPRS discovered the hazard of the hatch opening only after Chavez fell through it. KPRS failed to implement and maintain its IIPP by not inspecting the mechanical building's metal roof deck and not correcting the hazard of the prematurely cut, unsecured hatch opening. The Division established that KPRS failed to implement its IIPP when it failed to correct the hazard of the unmarked and unsecured hatch opening in the mechanical building roof.

Eaton's testimony at the hearing made it clear that when he drafted the citations, he erroneously believed KPRS knew of the hatch opening and had told AG about it at an unofficial coordination meeting on the morning of the accident.[3] Chavez stepped through the hatch opening in the afternoon around 3:45 p.m., so Eaton believed KPRS had knowingly failed to investigate and begin any methods or procedures to correct the unsafe condition created by a hatch opening KPRS knew about. However, as discussed above, Board precedent makes clear that even if KPRS did not know of the hazard of the newly-cut hatch opening in the roof deck until after the accident occurred, KPRS may be charged with failing to implement its IIPP by failing to correct the hazard.

KPRS cites two decisions (*GTE California,* Cal/OSHA App. 91-107, Decision After Reconsideration (Dec. 16, 1991); *David Fischer, DBA Fischer Transport, A Sole Proprietor,* Cal/OSHA App. 90-762, Decision After Reconsideration (Oct. 16, 1991) for the proposition that a violation for failing to implement or maintain an IIPP cannot be based on an isolated or single flaw in an otherwise effective program. That proposition has been expressly disapproved recently in *Arana Residential and Commercial Painting, Inc.,* Cal/OSHA App. 1568252, Decision After Reconsideration (October 18, 2024), where we stated: "To the contrary, the Board has held that a single deficiency regarding an essential element of an IIPP or its implementation may support a violation. (See, e.g., *OC Communications, Inc.*, Cal/OSHA App. 14-0120, Decision After

[3] Eaton testified he believed Employer knew about the opening because: 1) Eaton thought Employer hired GB Metals for the cutting work and, due to Employer's requirement that all workers sign-in to enter the job site and write down who was their employer, believed Employer knew GB Metals employees were on the jobsite to cut the opening on July 27, 2018 (HT, Day 3, pp. 21-22, 31, 252, 274-277); 2) Eaton misread the KPRS Accident Report to indicate Employer had known of the hatch opening and told AG Construction of it on the morning of the accident (HT, Day 3, p. 32, 38, 46-48 65-66); and 3) Eaton incorrectly believed that the KPRS's Superintendents Daily Safety Checklist, produced in response to the Division's request for the inspection records, established that Employer had been conducting daily inspections of the mechanical building roof (HT, Day 3, pp. 32-33 37-39). However, these beliefs were contradicted by evidence established at hearing there was no direct contract between Employer and GB Metals, that on July 27, 2018, the GB Metals workers who came to the jobsite wore Angle Iron uniforms and wrote on the sign-in sheet that they worked for Angle Iron, and that Employer did not conduct any inspections of the mechanical building roof until after the accident.

Reconsideration (Mar. 28, 2016); *Mountain Cascade, Inc.*, Cal/OSHA App. 01-3561, Decision After Reconsideration (Oct. 17, 2003).)" (*Id.*)

We find that it was established at hearing that KPRS violated section 3203, subdivision (a)(6), by failing to effectively implement its IIPP procedures to correct the hazard created by the unlabeled and unsecured hatch opening on the mechanical building roof deck.

We need only to find a violation of either section 3203, subdivision (a), paragraph (4) or paragraph (6) to uphold the violation alleged in citation 1. Here, we find violations of both subdivision (a)(4) and (6), and therefore, affirm the violations asserted in citation 1.

4. Did KPRS establish the due diligence defense regarding the alleged violation of section 1632, subdivision (b)(1)?

Section 1632, subdivision (b)(1), provides:

> Floor, roof and skylight openings shall be guarded by either temporary railings and toeboards or covers.

In Citation 2, Item 1, the Division alleges:

> Prior to and during the course of the investigation, including but not limited to, on August 15, 2018, KPRS Construction Services, Inc. (Controlling, Correcting Employer) failed to protect employees of exposing employers, including, but not limited to AG Construction, to the fall hazards of an unguarded opening in the rooftop steel decking where a roof hatchway was to be installed. As a result, on or about August 7, 2018, an employee of AG Construction, (Exposing Employer) walking on the steel decking fell approximately 27 feet to the concrete floor below after stepping into the unprotected opening measuring approximately 3 feet long by 2 feet 6 inches wide, causing him serious injuries.

The Decision held: "[a] violation of section 1632, subdivision (b)(1) is founded, but not as to this Employer due to a valid defense[,]" and determined that KPRS had established the due diligence defense.

The Board has recognized a due diligence defense for controlling employers, as defined in section 336.10, subdivision (c). (*Harris Construction Company, Inc.*, Cal/OSHA App. 03-3914, Decision After Reconsideration (Feb. 26, 2015) (*Harris*).) Where the controlling employer establishes that it exercised due diligence, it is relieved from liability for a violation of a safety order by another employer on a multi-employer worksite. (*Id.*) The due diligence defense recognizes that "[t]he general contractor is not normally required to inspect for hazards as frequently or to have the same level of expertise and knowledge of applicable standards as the subcontractor it hired." (*Id.*)

The totality of the circumstances, along with other factors that may be relevant, must be considered when determining whether a controlling employer acted with due diligence. (*McCarthy Building Companies, Inc.*, Cal/OSHA App. 11-1706, Decision After Reconsideration (Jan. 11, 2016) (*McCarthy*).) In *McCarthy*, the Board examined three different sets of factors that may be considered, including the factors set out in *Harris*, *supra,* Cal/OSHA App. 03-3914, factors considered by the Secretary of Labor to determine if the controlling employer acted with reasonable care (federal authority), and factors considered by the state of Washington's Department of Labor and Industries. After noting that any of the factors discussed could be useful to consider where appropriate, the *McCarthy* decision reached its determination of whether the employer has established the due diligence defense by considering: (a) whether the controlling employer conducted periodic inspections of appropriate frequency; (b) whether the controlling employer implemented an effective system for promptly correcting hazards; (c) whether the controlling employer enforced the other employer's compliance with safety and health requirements with an effective, graduated system of enforcement and follow-up inspections; (d) whether the controlling employer researched the safety history of the subcontractor; and (e) whether the hazard was latent and unforeseeable. [Fn. omitted.] (*Ibid*; see also *Hanover RS Construction, LLC.*, Cal/OSHA App. 1205077, Decision After Reconsideration (May 26, 2021) (*Hanover*).)

The foregoing factors "cannot be applied mechanically. Rather, the respective weight assigned to each factor, or combination thereof, will properly depend on the circumstances of each case, including the type and severity of the hazard presented." (*McCarthy*, *supra*, Cal/OSHA App. 11-1706.) '"A controlling employer must exercise reasonable care to prevent and detect violations on the site' but the extent of measures required 'is less than what is required of an employer with respect to protecting its own employees.'" (*Id.*, quoting OSHA Directive Number CPL 02-00-124 [2-0.124], effective December 10, 1999.)

The Decision held that KPRS had established all five of the *McCarthy* factors of the due diligence defense. We do not agree with the ALJ's findings as to the first, fourth, and fifth factors.

a. Did the controlling employer conduct periodic inspections of appropriate frequency?

A determination of what constitutes adequate, appropriate inspection must include consideration of the scale of the project, the number of subcontractors, and the nature of the work. (*McCarthy, supra,* Cal/OSHA App. 11-1706.) This factor also considers the overall level of oversight and supervision exercised by the controlling employer. (*Id.*) However, the controlling employer is not normally required to inspect for hazards as frequently, or to have the same level of expertise and knowledge of applicable standards, as the subcontractor(s) it hired. (*Harris, supra,* Cal/OSHA App. 03-3914.)

The jobsite consisted of an approximately 500,000 square feet warehouse, and a connected mechanical building of approximately 25,000 square feet. The accident occurred on the mechanical building roof. On the day of the accident, there were an estimated seven or eight subcontractors and a total of 60 to 70 subcontractors' employees at the entire jobsite. Rawlings testified that along with himself, KPRS had three full-time superintendents on the project, Glenn Umamoto, Tom (Cameron) Adamson, and Dave LePlant, each of whom spent approximately 80% to 90% of their

time in the field. Rawlings testified that all three superintendents had OSHA-30 certification, however KPRS only produced documents at the hearing establishing certification for Rawlings, Umemoto, and Adamson.

Prior to the accident, the superintendents conducted daily safety inspections of the jobsite excluding the mechanical building's roof or the interior ceiling of the mechanical building. These daily safety inspections involved the superintendent and other safety personnel using a detailed checklist generated by a commercial computer program KPRS utilized. In addition to daily inspections, Delapinia, KPRS's director of safety, also conducted personal safety audits of the jobsite at least once a month. Delapinia's inspections of the inside of the mechanical building (and by extension, the superintendents' inspections) were limited to taking a few steps inside the mechanical building from the door. This resulted in a truncated inspection that limited what safety violations could be observed and caused KPRS' safety personnel to miss a prematurely cut two-and-one-half-foot wide by three-foot long roof hatch opening in the metal roof deck that constituted the ceiling of the mechanical building.

Except for the lack of inspection of the mechanical building's roof or interior ceiling prior to the accident, the evidence established that KPRS provided an appropriate level of supervision and inspections of appropriate frequency for the other areas of the jobsite. However, KPRS did not inspect the mechanical building roof, from above or below, for 11 days. The hazard of a two-and-one-half-foot wide by three-foot long opening in the metal roof deck is a significant hazard, and because KPRS failed to inspect the mechanical building's roof from above or below for 11 days, it is found that KPRS failed to conduct inspections with appropriate frequency.

As discussed above, we find that KPRS's failure to inspect the mechanical building roof during the 11 days prior to the accident precludes a finding that KPRS conducted periodic inspections of sufficient frequency to establish this factor.

b. Did the controlling employer implement an effective system for promptly correcting hazards?

"Under this factor, the Board considers evidence that the controlling employer had an effective system in place to identify, evaluate, and promptly correct hazards. [Citation.]" (*Signal Energy, LLC*, Cal/OSHA App. 1155042, Decision After Reconsideration (August 19, 2022), see also *Beazer Homes Holding Corp.,* Cal/OSHA App.1077503, Decision After Reconsideration (Jan. 18, 2018).) The record here indicates KPRS had an effective system for promptly correcting hazards. Rawlings testified that if a safety issue was observed in the course of the superintendents' daily inspections, it was immediately logged into the computer program KPRS used and flagged for correction. A safety violation notice would be sent to the subcontractor responsible for the area of the violation. The computer program KPRS used seems similar to the one utilized in *Hanover, supra,* Cal/OSHA App. 1205077, which the Board found sufficient to satisfy this factor. Thus, we find that KPRS's system for promptly correcting known hazards was adequate and establishes this factor.

c. Did the controlling employer enforce the other employers' compliance with safety and health requirements with an effective, graduated system of enforcement and follow-up inspections?

"Evidence of a controlling employer's system for enforcing subcontractors' compliance with safety rules is another factor for determining whether the controlling employer exercised due diligence despite failing to correct or address a hazard." (*McCarthy, supra,* Cal/OSHA App. 111706.) This factor includes consideration of the controlling employer's system of sanctions and/or discipline for subcontractors who violate safety rules. (*Id.; Hanover, supra,* Cal/OSHA App. 1205077.) It also includes consideration of the controlling employer's efforts to communicate safety rules to its subcontractors, and to ensure that subcontractors have appropriate and reasonably specific accident prevention programs. (*Hanover, supra,* Cal/OSHA App. 1205077.) While the controlling employer's system for providing safety training to subcontractors is sometimes considered as a separate factor, it may also reasonably be considered here. (*Id.*)

Overall, KPRS had a good system for encouraging subcontractors' compliance with safety rules. Subcontractors KPRS did not have direct contracts with were referred to as "sub-tier contractors." KPRS's interactions with "sub-tier" contractors' employees were limited to providing a site-specific safety orientation when the "sub-tier" contractor's employees came onto the jobsite (everyone got a safety orientation) and the interactions that might arise when KPRS's safety personnel were supervising the jobsite and spotted an unsafe condition. In those circumstances, KPRS's safety personnel would apply KPRS's progressive discipline policy. For "minor" violations, the first infraction received a verbal warning, the second a written warning, and the third resulted in removal from project and/or a fine. Rawlings testified that contractors and subcontractors were given "three strikes" for minor violations and for more serious violations, "it can go to removal from the project." Rawlings testified that during the course of this job, he kicked one contractor off the jobsite for safety violations.[4] Rawlings testified he would issue safety notices to the subcontractor in charge of a certain area, and if there are multiple subcontractors in charge, he would issue multiple safety notices.

Further, all tiers of subcontractors were required to adhere to KPRS's safety rules. KPRS held mandatory weekly foremen's meetings with all foremen of its contractors and subcontractors. Subcontractors were required to provide verification that they conducted weekly "toolbox talks" on safety subjects addressed in the foremen's meetings. KPRS had, and utilized, a system of progressive discipline for safety violations by employees of subcontractors, and KPRS's efforts are similar to others that the Board has found sufficient to satisfy this factor. Thus, we find that KPRS's system effectively enforced other employers' compliance with safety and health requirements and established this factor.

d. Did the controlling employer research the safety history of the subcontractors?

"[T]he steps a controlling employer takes in deciding which company or companies to retain as subcontractors is an element in determining whether the controlling employer acted with due

[4] This was for violating heat safety rules. The offending contractor did not provide water to their workers, only energy drinks. (Day 4, HT, pp. 34-35.)

diligence." (*Savant Construction, Inc.*, Cal/OSHA App. 14-3018, Denial of Petition for Reconsideration (October 19, 2015) (*Savant*).) This is because, "A subcontractor's safety record and experience may affect how much effort a controlling employer should devote to overseeing the subcontractor's work." (*Signal Energy LLC, supra*, Cal/OSHA App., 1155042, citing *Harris* (citations omitted).) However, the Board has also stated that "the controlling employer must keep abreast of the work being done on the job; it would not be sufficient to hire an even excellent subcontractor only to then totally ignore its work on the project. There are myriad combinations of factors such as a subcontractor's safety record and experience, the type, complexity, and specialization of any specific work, and so on, which inform the calculus of whether a controlling employer has acted with due diligence." (*Savant, supra,* Cal/OSHA 14-3018.)

Delapinia testified describing KPRS's extensive vetting process for potential direct subcontractors. KPRS verified the companies' license and insurance, reviewed the companies' safety history, which included their rates of workers' compensation claims, OSHA-300 injury logs, and any history of previous OSHA violations. Delapinia testified that if a potential subcontractor had received citations for serious or willful violations, or violations involving fatalities, that as a condition of hiring, that company would be given extra safety oversight.

Delapinia testified that he had worked on "somewhere between six and nine" projects with AG, Chavez's employer. He testified that in July and August of 2018, AG had been hiring a lot of new people. In *Savant, supra,* Cal/OSHA 14-3018, the Board noted in a footnote that "if the controlling employer is familiar with the subcontractor and knows it performs work safely, it may be appropriate to devote less time to oversight of that subcontractor than it would to a subcontractor with whom it has not worked before." Based on KPRS's history with AG, KPRS was justified in having some confidence in AG's work and safety record.

KPRS had no work history or experience with Angle Iron, KPRS's direct hire for the structural iron work.[5] KPRS'S decision to not inspect the metal roof deck of the maintenance building before the accident reflects unearned confidence in Angle Iron. This accident was caused by employees of GB Metals, a "sub-tier" contractor hired by Angle Iron. Rawlings testified KPRS did not provide "sub-tier" contractors with KPRS's safety information or building plans. KPRS relied upon its direct subcontractors to pass along that information along to any "sub-tier" contractors they hired for the job. Rawlings testified that if he found a safety violation being committed by a "sub-tier" contractor's employee, the warning would be sent to the direct subcontractor that hired the "sub-tier" contractor. When vetting the records of subcontractors, KPRS did not ask its direct subcontractors about "sub-tier" contractors hired for the job. KPRS only investigated the safety records of its direct subcontractors, not "sub-tier" subcontractors.

It was established that KPRS did not know GB Metals employees had come onto the jobsite because those employees wore Angle Iron uniforms and PPE and signed into the safety orientations as Angle Iron employees. After the accident, Delapinia testified that KPRS never found out which contractor had issued the work order for GB Metals to cut into the metal roof deck. Delapinia testified that cutting the hatch openings was outside of the scope of work in Angle Iron's contract.

[5] Delapinia testified KPRS only contracted with Angle Iron once, for this job.

He further testified that KPRS had not been able to determine which subcontractor had been contractually required to cut the hatch openings into the metal roof deck.

Our cases discussing the due diligence defense refer to "a subcontractor" and "any subcontractor." We do not make the distinction that KPRS makes between direct subcontractors and so-called "sub-tier" contractors.

We do not find the evidence supports the Decision's holding that KPRS sufficiently researched the safety records of its subcontractors.

e. Was the hazard latent and unforeseeable?

"This element of the due diligence defense considers whether a hazard was latent or unforeseeable, rather than "readily observable.'" (*Signal Energy, LLC, supra*, Cal/OSHA App. 1155042, quoting *McCarthy, supra*, Cal/OSHA App. 11-1706.) The term "latent" is defined as "present and capable of emerging or developing but not now visible, obvious, active, or symptomatic."[6] Due to the debris on the roof on the day of the accident, the hazard created by the two-and-one-half-foot wide by three-foot long opening in the mechanical building roof deck was not immediately visible to the workers on the roof. None of the AG workers on the roof on the day of the accident knew about the opening before Chavez fell through it. No one from Angle Iron or C&L mentioned the hatch opening in the roof of the mechanical building to KPRS. C&L employees knew about the hatch opening from when it was cut, as they helped the GB Metals employee who cut the opening secure the cover over it, and at some later time C&L employees were said to have unsecured the cover and not re-secured it. Both GB Metals and C&L were provided copy of the structural building plans, which clearly called for the roof hatch opening to be cut only after the concrete deck had been poured and cured.

Rawlings testified that after the accident KPRS had to charge Angle Iron for reshoring the deck after the opening in the roof deck was discovered because the opening had "screwed with the structural integrity of the deck." KPRS made clear at hearing that having the opening cut before the time it was called to be cut on the building plans was, in KPRS's mind, completely unforeseeable. However, we must evaluate whether it was reasonable for KPRS, as a controlling employer on a large jobsite, to assume that all subcontractors, including so-called "sub-tier" contractors would strictly adhere to schedule established in the building plans. It could be argued that the requirements of section 3203 subdivision (a), paragraphs (4) and (6) were imposed by the Standards Board because, in part, employees of contractors and subcontractors do not always precisely follow the plans provided to them.

In determining whether the hazard was latent and foreseeable we consider our prior precedent to determine whether or not the hatch opening could be characterized as patent or latent as well as foreseeable or unforeseeable.

[6] Merriam-Webster on-line dictionary https://www.merriam-webster.com/dictionary/latent (December 1, 2025).

In *McCarthy, supra,* Cal/OSHA App. 11-1706, the hazard was two unfinished floor openings of approximately 22 by 25 inches, covered by only an unmarked and unsecured piece of plywood. The distance from the floor openings to the ground below was approximately 16 feet. The unmarked plywood cover was behind a 21-inch curb, preventing the hazardous condition "'from being readily observable, except upon close inspection.'" The cover "had previously been secured and marked, and that the marking had been obliterated, likely due to relatively-recent work by a separate subcontractor." Because the hazard was not immediately visible and had only existed for a short timeframe, the Board concluded the hazard was latent and found the employer had established the due diligence defense. Similar to the facts in *McCarthy,* the opening here was covered by an unmarked and unsecured piece of plywood, but unlike in *McCarthy,* it was not necessarily hidden to anyone standing on the mechanical room roof deck. No evidence was provided at the hearing as to why the hatch opening went unnoticed, or at least, unreported, for 11 days before the afternoon Chavez fell through it.[7]

In *Hanover, supra,* Cal/OSHA App. 1205077, the hazard was again an unsecured plywood floor cover. The cover had been secured, but a subcontractor's employees had removed the cover to perform work on cables underneath the floor. Upon finishing the work and replacing the cover, the employees went to fetch the tools needed to secure the cover, and during that brief period of time, an employee of another subcontractor stepped on the unsecured cover and fell through the opening to the ground ten feet below, suffering serious physical harm. The Board found the hazard to be latent and unforeseeable, as the "process of stressing the cables occurred in only minutes, and the evidence indicates the cover had been replaced and left unsecured for less than a minute. As such, the Board found that Hanover did not have a reasonable opportunity to detect this particular violation[,]" and found the controlling employer had established the due diligence defense. Similar to the facts in *Hanover,* the opening here involved an opening with an unsecured cover, but unlike in *Hanover,* the hatch opening here was unsecured for 11 days, which is not so brief a time that KPRS did not have reasonable opportunity to correct the hazard.

In *Lennar Corporation,* Cal/OSHA App. 1340561, Decision After Reconsideration (September 26, 2023) *(Lennar),* the hazard was a two-foot wide by three-foot-and-seven-inches long opening that had existed for several months and was covered by an improperly marked, unsecured piece of plywood within a compartment surrounded by vertical framing uprights, and at least one diagonal piece of framing. The compartment had horizontal two-by-four pieces of wood on all sides called "bottom plates," which generally secured the improperly marked unsecured plywood cover from accidental removal or displacement. The plywood cover had the word "Cuidado" scrawled in barely legible spray paint on it.[8] A subcontractor's employee who was cleaning up debris entered the compartment by stepping through the framing uprights, lifted the piece of plywood, and fell approximately 12 feet to the floor below, suffering serious physical harm. The Board agreed with the ALJ's assessment that the cover did not have the written warning

[7] Eaton interviewed three AG managers who told him that on the day Chavez fell, a "high-reach lift truck" had put a box on the roof over the top of the hatch opening, which had possibly blocked Chavez from seeing the hatch opening (HT, Day 2, pp.17-.19). Eaton's notes from one interview stated: "There was a boom lift with a basket, and the basket was on the hole that was covered by a piece of plywood. Later the basket was moved." (Exhibit 19, pp.7-8.)
[8] Cuidado is Spanish for "be careful."

required by the safety order and thus did not need to reach the question of whether the cover had been sufficiently secured. The Board found this hazard was not latent or unforeseeable and thus the employer could not establish the due diligence defense.

In *Lennar, supra,* Cal/OSHA App. 1340561, on August 7, 2018,[9] a subcontractor's employee was cleaning up debris and picked up a piece of plywood and fell through an uncovered opening. Here, Chavez and his supervisor were picking up debris on the mechanical building's metal roof deck when Chavez picked up a piece of plywood and fell through the hatch opening. In *Lennar,* the Board held that the unsecured and unmarked cover "should have been observed during the regular inspections conducted by Employer's managers" over the course of the several months it existed prior to the accident. Here, KPRS's superintendents had 11 days in which to discover the unsecured and unmarked cover on the mechanical building roof during the daily inspections called for in KPRS's 2018 IIPP.

We find the hazard of the unlabeled and unsecured hatch opening was not latent and unforeseeable, and KPRS did not establish this factor.

To establish the due diligence defense, we must weigh KPRS's actions in regard to all five factors. We did not find sufficient support in the record for the Decision's holding that factors (1), (4), and (5) were established, and thus we find that KPRS is not entitled to the protection of the due diligence defense.

As noted above, the Decision held: "[a] violation of section 1632, subdivision (b)(1) is founded, but not as to this Employer due to a valid defense." As KPRS is not entitled to the due diligence defense, we sustain the ALJ's finding that the Division established a violation of section 1631, subdivision (b)(1).

5. Were the penalties appropriately calculated?

Penalties calculated in accordance with the regulations set forth in sections 333 through 336 will be deemed presumptively reasonable. (*Plantel Nurseries*, Cal/OSHA App. 01-2346, Decision After Reconsideration (Jan. 8, 2004).) The Division introduced into evidence Cal/OSHA form C10 [Exhibit 15], the proposed penalty worksheet prepared in this appeal. Eaton testified about how he prepared the form C10. "[W]hile 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*, *supra*, Cal/OSHA App. 01-2346, quoting DPS Plastering, Inc., Cal/OSHA App. 00-3865, Decision After Reconsideration (Nov. 17, 2003).) We must review the evidence and ensure the penalties the Division sought to have assessed were correctly calculated and are supported by the law.

Eaton testified that his calculations for both Citations were identical, including his testimony on the increases and reductions, so thus, the overall penalty calculation, were the same. Eaton confirmed that his calculations had been made prior to the amendment the ALJ allowed, which modified the second citation from a violation of section 1632(b)(2) to a violation of section 1632(h).

[9] This is the same day this accident occurred. The accident in *Lennar* took place on a jobsite in Foster City.

Eaton testified that even with the amendment, his calculation of the penalty for that citation would be identical.

Base Penalty

Section 335, subdivision (a)(1) provides that where more than a 24-hour hospitalization is required, the severity of a violation is high. Section 336, subdivision (c)(1), provides that the initial base penalty of a Serious violation is $18,000. Eaton testified that both Citation 1 and 2 were classified as Serious, Accident Related, and that the Division started with a base penalty of $18,000 for Serious citations. $18,000 was entered in the severity column for both Citations. The base penalty was correctly calculated.

Extent

Eaton testified that the Division looks at the factors of severity, extent, and likelihood. The severity factor was decided in the determination of the base penalty calculation. Extent is defined in section 335, subdivision (a)(2) as:

> 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).) There were two roofs on the jobsite, one on the maintenance building and the other on the main building. The accident was the result of an unsecured opening in the maintenance building roof and there were no unsecured openings in the main building roof. The Division characterized the extent of the violation as medium, based on "50% of the units are in violation." For a Serious violation, a medium extent makes no adjustment to the base penalty amount (§ 336, subd. (c)(1)), thus a zero was placed in the extent column for both citations. The extent was correctly assessed.

Likelihood

Likelihood is defined in section 335, subdivision (a)(3) as:

> 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

Eaton testified that when he assessed the likelihood factor as high, adding $4,500 to the base penalty of $18,000 for both citations. He explained that, "[w]hen we look at likelihood we look at a couple of factors, one being likelihood of someone being seriously injured or killed as a result of the violation and also based on our experience with this type of violation." Based on his investigation of the accident, he assessed the likelihood as high. For a Serious violation, a high likelihood adds 25% of the base penalty amount (§ 336, subd. (c)(1)), thus $4,500 was placed in the likelihood column for both citations. The likelihood was correctly assessed.

Penalty Adjustments

The only deductions allowed on a Serious Accident-related violation is based on the size of the company (§ 336, subd. (d)(1)). Both Citations were Serious Accident-related. Eaton testified that KPRS had more than 100 employees, and that testimony went unrebutted. Therefore, a reduction for Size is not applicable. KPRS is also not entitled to an abatement credit due to the Citations being Accident-Related. (§ 336, subd. (e)(3)(D).)

The penalties for the two Citations were correctly calculated, resulting in a Penalty total of $45,000 for the two Serious, Accident-Related violations.

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DECISION

For the reasons stated, the Decision of the ALJ is reversed. The violations alleged in Citation 1 and Citation 2 and the proposed penalties are affirmed.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

/s/ Ed Lowry, Chair
/s/ Judith S. Freyman, Board Member
/s/ Marvin Kropke, Board Member

FILED ON: 03/12/2026