BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1377488**
MOWERY THOMASON, INC. **1225 REDGUM STREET** **ANAHEIM, CA 92806** **Employer**	**DECISION**

Statement of the Case

Mowery Thomason, Inc. (Employer), performs drywall installation and metal framing. On January 22, 2019, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Christian Nguyen (Nguyen), commenced an investigation of a project located at 2777 North Ontario Street in Burbank, California (the job site), in response to an injury report.

On May 14, 2019, the Division issued one citation to Employer, alleging a failure to wear fall protection equipment. Employer timely appealed the citation, contesting the existence of the violation, the classification of the violation, and the reasonableness of the proposed penalty. Additionally, Employer asserted various affirmative defenses.[1]

This matter was heard by Mario L. Grimm, Administrative Law Judge (ALJ) for the Occupational Safety and Health Appeals Board, in West Covina, California, on March 10, 2021, and August 18, 2021, with the parties appearing remotely via the Zoom video platform. Kevin D. Bland, Attorney, of Ogletree, Deakins, Nash, Smoak & Stewart, P.C., represented Employer. Victor Copelan, District Manager, represented the Division. The matter was submitted on January 19, 2022.

Issues

1. Did employees wear fall protection equipment while exposed to falling in excess of 7-1/2 feet through shaftways and openings?

2. Did Employer establish the Independent Employee Action Defense?

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

3. Did the failure to wear fall protection equipment create a realistic possibility of serious physical harm?

4. Did Employer know of the presence of the violation?

5. Was the violation a cause of the serious injury?

6. Was the proposed penalty reasonable?

Findings of Fact

1. On December 17, 2018, Jorge Ruiz (Ruiz) and two other apprentices were working on top of a scaffold deck. Journeyman Agustin Ponce (Chico) was also working atop the scaffold deck. The four employees were not wearing fall protection equipment.

2. The scaffold deck was approximately 25 feet above the floor. The deck consisted of pieces of plywood fit together.

3. William Perez (Perez) was a foreman on the job. He instructed Ruiz and the other two apprentices to follow the direction of Chico.

4. Chico instructed Ruiz and the other two apprentices to create an opening in the deck by removing a piece of plywood from it.

5. The three apprentices created an opening in the deck by removing a piece of plywood. Ruiz fell through the opening. He fell approximately 25 feet to the floor.

6. The parties stipulated that Ruiz suffered a serious injury, as defined in section 330, subdivision (h).

7. The failure to wear fall protection equipment was a cause of Ruiz's injury.

8. The proposed penalty was calculated in accordance with the penalty-setting regulations.

Issues

1. **Did employees wear fall protection equipment while exposed to falling in excess of 7-1/2 feet through shaftways and openings?**

California Code of Regulations, title 8, section 1670, subdivision (a),[2] provides:

> 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.

Citation 1, Item 1, alleges:

> Prior to and during the course of the investigation, including but not limited to December 17, 2018, employees were not wearing approved personal fall arrest, personal fall restraint or positioning systems while they were exposed to a fall of more than 7.5 feet from the unprotected edge of a scaffold deck opening. As a result, on or about December 17, 2018, an employee suffered a serious injury when he fell through the deck opening.

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

On December 17, 2018, Employer was installing drywall and metal stud framing in the construction of a movie theater. Employer utilized a scaffold deck that was approximately 30 feet wide, 40 feet long, and 25 feet above the floor. The deck consisted of pieces of plywood fit together. The deck had a guardrail along its perimeter.

Three apprentices and one journeyman were working atop the scaffold deck on the morning of the accident. The three apprentices were Ruiz, Thomas Montano (Montano), and an individual named Joel. Chico was the journeyman working with the apprentices. The four employees were not wearing fall protection equipment, although Employer had fall protection equipment at the job site.

Ruiz, Montano, and Joel, were looking for a location to create an opening in the scaffold deck by removing a piece of plywood. The opening was for the purpose of moving materials between the floor and the scaffold deck. Ruiz and Montano lifted a piece of plywood to create an opening in the deck. As they lifted the plywood, Ruiz fell through the opening. He fell 25 feet to the floor.

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

The parties do not dispute that the four employees were not wearing fall protection equipment and that Ruiz fell more than 7-1/2 feet through the opening to the floor. Accordingly, Employer violated section 1670.

2. Did Employer establish the Independent Employee Action Defense?

Employer raises the Independent Employee Action Defense (IEAD) to the violation. The IEAD relieves an employer of responsibility for a violation. There are five elements to this affirmative defense, all of which must be proved by an employer in order for the defense to succeed: 1) the employee was experienced in the job being performed; 2) the employer has a well-devised safety program that includes training 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 which it enforces against those employees who violate its safety program; and 5) the employee caused a safety infraction which he knew was contra to the employer's safety requirements. (*Timberworks Construction, Inc.*, Cal/OSHA App. 1097751, Decision After Reconsideration (Mar. 12, 2019).)

Perez was a foreman at the job site. On the morning of the accident, Perez held a meeting that was attended by the three apprentices involved in the accident. Perez testified that he assigned the apprentices to remove debris from the scaffold deck, and instructed them to lower the debris over the side of the deck.

Perez testified that Chico was not a foreman at the job site. However, Perez acknowledged that he told the Division's inspector that Chico was his "partner" in supervising the crew on the day of the accident.

Perez further testified that he conducted Employer's investigation of the accident. Perez concluded that the three apprentices determined on their own to create an opening in the scaffold deck. Perez further concluded that Chico did not direct the apprentices to create the opening and was not involved in removing the piece of plywood. Perez testified that Chico was disciplined with a five-day suspension as a result of the accident. Perez explained that his supervisor suspended Chico, and Perez does not know why Chico was suspended.

Chico testified that he was on top of the scaffold deck at the time of the accident and that he did not observe the apprentices attempting to create an opening. According to Chico, he was near the perimeter of the deck looking for a way to raise material up to the deck.

Ruiz testified that he attended the meeting with Perez on the morning of the accident. He further testified that Perez directed the apprentices to follow Chico's directions and that Perez did not provide specific details of their assignment. Ruiz further testified that Chico directed the

apprentices to remove a piece of plywood to create an opening through which the employees could raise material to the scaffold deck. According to Ruiz, Chico was one or two few feet away while the apprentices removed the plywood to create the opening in the deck.

Montano testified that he attended the meeting with Perez on the morning of the accident. He further testified that Perez directed the apprentices to follow Chico's directions and that Perez did not provide specific details of their assignment. Montano testified that Chico instructed the apprentices to remove trash from the scaffold deck but did not provide specific instructions on how to do so. Montano estimated that Chico was five to eight feet away while the apprentices removed the plywood to create the opening in the deck.

The weight of the evidence supports a finding that Perez directed the apprentices to follow Chico's instructions, and that Perez did not instruct the apprentices to remove debris from the scaffold deck. Ruiz was the most credible witness. His testimony was plain and direct. He was forthcoming in answering the questions posed to him. In contrast, Montano's testimony was often vague, inconsistent, and evasive when examined by the Division.

Additionally, other evidence corroborated Ruiz's testimony in key respects. Perez's supervisor suspended Chico for five days despite Perez's conclusion that Chico was not involved in the accident. This information supports an inference that Perez's supervisor determined that Chico was involved in the accident. With respect to the testimony of Montano, it confirmed that Ruiz merely directed the apprentices to follow Chico's instructions, and that Chico did, in fact, provide at least some instructions to the apprentices. For his part, Chico confirmed that he was assigned to raise material to the scaffold deck as opposed to removing material from the scaffold deck. This explains why the apprentices were attempting to create an opening in the deck rather than remove material over the side in their usual manner. Moreover, Ruiz himself confirmed that he told the Division's investigator that Chico was his partner in supervising the crew. This information supports an inference that Chico was viewed and treated as a supervisor.

Since Ruiz's testimony was the most credible, it is found that Chico instructed the apprentices to create the opening in the scaffold deck while they were not wearing fall protection equipment. Therefore, the apprentices were following the directions given to them and were not the cause of a safety infraction.

Finally, there is no evidence that the third apprentice involved, Joel, was experienced in the job being performed, or that he knew he was causing a safety infraction that was contra to the employer's safety requirements. Accordingly, Employer did not establish the IEAD.

3. Did the failure to wear fall protection equipment create a realistic possibility of serious physical harm?

The Division classified the citation as a "serious violation." Labor Code section 6432, subdivision (a), defines a serious violation as follows:

> There shall be a rebuttable presumption that a "serious violation" exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation.

"Serious physical harm," as used in subdivision (a), is defined as any injury or illness occurring in the place of employment that results in:

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

(Lab. Code § 6432, subd. (e).)

The parties stipulated that Ruiz's injuries constitute a "serious injury" under section 330, subdivision (h). At the time of the accident, a serious injury was defined as any injury or illness occurring in a place of employment that results in:

> (1) inpatient hospitalization for a period in excess of 24 hours for other than medical observation;
> (2) the loss of any member of the body; or
> (3) any serious degree of permanent disfigurement.

The injuries identified in the definition of "serious injury" are included as injuries in the definition of "serious physical harm." Therefore, Ruiz's serious injury establishes that the hazard created by the violation can and did result in serious physical harm. Accordingly, the Division established the rebuttable presumption that the citation was properly classified as a serious violation.

4. Did Employer know of the presence of the violation?

An employer may rebut the presumption that a violation is serious. Labor Code section 6432, subdivision (c), provides:

> 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 reference to subdivision (b), of Labor Code section 6432, incorporates the following factors: (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; and (D) Procedures for communicating to employees about the employer's health and safety rules and programs.

An employer's failure to exercise supervision adequate to ensure employee safety is equivalent to failing to exercise reasonable diligence, and will not excuse a violation on a claim of lack of employer knowledge. (*Gateway Pacific Contractors, Inc.*, Cal/OSHA App. 10-1502, Decision After Reconsideration (Oct. 4, 2016).)

Here, the parties do not dispute that Perez was a foreman and that Employer was responsible for Perez's actions. It is found that Perez instructed the apprentices to follow Chico's directions and that Perez himself did not instruct the apprentices regarding the assignment. Thus, Perez delegated responsibility to Chico for the safe work of the apprentices. As a foreman, Perez could have instructed or observed the apprentices himself. It was a risk to leave the instruction and supervision to Chico. Therefore, Employer could have known of the presence of the

violation, and Employer did not take all the steps a reasonable and responsible employer in like circumstances should be expected to take. Accordingly, Employer did not rebut the presumption that the violation is a serious violation.

5. Was the violation a cause of the serious injury?

In order to establish that the citation was properly classified as Accident-Related, the Division must show a causal nexus between the violation of the safety order and the employee's serious injury. (*MCM Construction*, Cal/OSHA App. 13-3851, Decision After Reconsideration (Feb. 22, 2016).

Here, the violation is the failure to wear fall protection equipment while creating an opening in the scaffold deck. Had Ruiz been wearing fall protection equipment, he would not have fallen through the opening and suffered a serious injury. Accordingly, the violation was a cause of the serious injury, and the violation is properly classified as Accident-Related.

6. Was the proposed penalty reasonable?

Penalties calculated in accordance with the penalty-setting regulations set forth in sections 333 through 336 are presumptively reasonable and will not be reduced absent evidence that the amount of the proposed civil penalty was miscalculated, the regulations were improperly applied, or that the totality of the circumstances warrant a reduction. (*Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).)

Here, the Division submitted its Proposed Penalty Worksheet (Exhibit 1) and established the serious accident-related classification of the citation. The evidence does not indicate that the penalty was miscalculated, the regulations were improperly applied, or that the totality of the circumstances warrant a reduction. Accordingly, the proposed penalty is affirmed.

Conclusion

The evidence supports a finding that Employer violated section 1670, subdivision (a), for failure to ensure its employees wear fall protection equipment when exposed to falls in excess of 7-1/2 feet.

Order

It is hereby ordered that Citation 1, Item 1, is affirmed and a penalty of $20,250 is sustained.

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

Dated**:** 02/10/2022

MARIO L. GRIMM
Administrative Law Judge

The attached decision was issued on the date indicated therein. If you are dissatisfied with the decision, you have thirty days from the date of service of the decision in which to petition for reconsideration. Your petition for reconsideration must fully comply with the requirements of Labor Code sections 6616, 6617, 6618 and 6619, and with California Code of Regulations, title 8, section 390.1. **For further information, call: (916) 274-5751.**