BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1371294**
KPRS CONSTRUCTION SERVICES, INC. **2850 SATURN STREET** **BREA, CA 92821** **Employer**	**DECISION**

Statement of the Case

KPRS Construction, Inc., (Employer) is a general contractor that builds commercial warehouses. Beginning August 15, 2018, the Division of Occupational Safety and Health (the Division), through Lex Eaton (Eaton), Compliance Safety and Health Officer, conducted an inspection of the mechanical building next to a cold storage warehouse being built, at 343 Lena Road, in San Bernardino, California (the site).

On February 4, 2019, the Division issued two citations to Employer for alleged violations of sections of the California Code of Regulations, title 8.[1] Citation 1, Item 1, alleges that Employer failed to identify, evaluate, and correct a fall hazard of an unprotected opening in the rooftop of the mechanical room. Citation 2, Item 1, alleges that Employer failed to protect all workers on the jobsite from an unprotected opening on the rooftop of the mechanical room.[2] Employer filed a timely appeal of the citations, contesting the existence of the violations, the classification of the citations, and the reasonableness of the proposed penalties. Employer also raised a series of affirmative defenses.[3]

This matter was heard by Leslie E. Murad, II, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (Appeals Board, or Board). On January 24 and 25, 2023, and September 27 and 28, 2023, ALJ Murad conducted the video hearing from Los Angeles and San Bernardino Counties with all participants appearing remotely via the Zoom video platform. Attorney Perry Poff of Donnell, Melgoza & Scates, LLP. represented Employer.

[1] Unless otherwise specified, all references are to California Code of Regulations, title 8.
[2] The Division amended Citation 2, Item 1, by motion amending the citation from section 1632 subdivision (h), to section 1632, subdivision (b)(1), and requested to change one word in the Alleged Violation Description (AVD), replacing the word "unprotected" with "unguarded." Employer filed opposition and after further briefing and oral argument, with good cause found, the motion to amend was granted on September 23, 2022.
[3] Except where discussed in the Decision, Employer did not present evidence in support of its affirmative defenses, and said defenses are therefore deemed waived. (*RNR Construction, Inc.,* Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017).)

Lisa Wong, Staff Counsel, represented the Division.

The matter was submitted on December 16, 2023.

Issues

1. Did Employer fail to establish, implement and maintain an effective Injury and Illness Prevention Program, (IIPP) in accordance with section 3203 of the General Industry Safety Orders?

2. Did Employer fail to protect employees from fall hazards resulting from an unguarded opening in the rooftop steel decking where a roof hatchway was to be installed?

3. Did Employer establish the Due Diligence defense?

Findings of Fact

1. Employer was the general contractor building a refrigerated warehouse with an adjacent mechanical building at the site. Employer contracted with A.G. Construction (A.G.) as a sub-contractor, to do concrete work. Angle Iron Works (Angle) was the structural steel subcontractor. Angle thereafter contracted with G. B. Metals (G.B.) to cut openings for Angle.

2. Employer provided all subcontractors with copies of the structural plans for the mechanical building.

3. The plans called for no openings greater than six inches to be cut in the roof of the mechanical building until the cement roof on the mechanical building was poured.

4. Employer did not know Angle had contracted with G.B. to do any work on the site.

5. G.B. employees wore Angle uniforms.

6. Employer's actual practices at the site included taking responsibility for the safety of the various contractors and trades present.

7. Employer conducted and documented daily and weekly site inspections with all employees and contracted subcontractors that included safety-related elements, and instructions to correct unsafe conditions.

8. Before the cement roof was poured, G.B., cut a two and one half foot wide by three foot long roof hatch oprning on the roof deck of the mechanical building.

9. Employer was not told that the opening had been cut.

10. The Divsion was told by G.B. that the roof hatch opening was cut, and secured with a cover, on July 27, 2018.

11. The evidence presented was that C & L Refrigeration (C&L) later removed the hatch cover while conducting its work and did not mark the cover with a written warning nor secure the cover back.

12. On August 7, 2018, Jorge Chavez (Chavez) an employee of A.G. was working on the roof of the mechanical building, clearing debris and preparing the roof deck for the pouring of concrete.

13. Chavez picked up the plywood cover of the roof hatch opening that was not properly covered or guarded and stepped into the opening and fell approximately 27 feet to the cement floor below suffering serious injuries.[4]

14. Following the accident, Employer conducted an investigation, which included interviewing subcontractor employees, identifying the root cause of the accident, and recommending and recording the post-accident corrective actions taken.

15. The roof hatch opening was not to have been cut until after the cement roof had been poured.

16. Access to the mechanical building roof at the time of the accident was limited. The workers accessing the roof utilized mechanical lifts. No employees of Employer had been on the roof decking prior to the accident.

17. Employer did not discover the roof hatch opening until Chavez fell.

18. The roof opening that 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.

[4] The parties stipulated that the injured person, Chavez suffered a serious injury as defined in California Code of Regulation title 8 and the California Labor Code..

19. There was no need for an inspection by Employer of the roof of the mechanical building for an opening the size of the roof hatch from July 27, 2018, to August 7, 2018, since no opening larger than six inches was to be cut prior to the roof deck being poured.

20. Employer conducted periodic inspections of the site, implemented an effective system of promptly correcting hazards, enforced subcontractor's compliance with safety and health requirements, researched the safety history of its subcontractors and the hazard of the roof hatch opening was latent and not forseeable.

Analysis

1. Did Employer fail to establish, implement and maintain an effective Injury and Illness Prevention Program (IIPP) in accordance with section 3203 of the General Industry Safety Orders?

Section 1509, subdivision (a), provides:

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

Section 1509, subdivision (a) requires employers to establish, maintain and implement an effective written Injury and Illness Prevention Program (IIPP) that meets the minimum requirement set forth in Section 3203. Citation 1, alleges two instances of a violation of section 1509, subdivision (a), by reference to section 3203, subdivisions (a)(4) and (a)(6).

Section 3203, subdivisions (a)(4) and (a)(6), provide respectively:

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

(4) Include procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices. Inspections shall be made to identify and evaluate hazards:

(A)When the Program is first established; [...]
(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.

(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.

In Citation 1, 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 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 rooftop 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 CCR3203(a)(4)]

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)]

The Division has the burden of proving a violation by a preponderance of the evidence. (*Papich Construction Company, Inc.,* Cal/OSHA App. 1236440, Decision After Reconsideration (Mar. 26, 2021).) " 'Preponderance of the evidence' is usually defined in terms of probability of truth, or of evidence that, when weighed with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence." (*Nolte Sheet Metal, Inc.*, Cal/OSHA App. 14-2777, Decision After Reconsideration (Oct. 7, 2016).)

While an employer may have 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); *Contra Costa Electric, Inc.,* Cal/OSHA App. 09-3271, Decision After Reconsideration (May 13, 2014).) Proof of implementation requires evidence of actual responses to known or reported hazards. (*National Distribution Center, LP / Tri-State Staffing,* Cal/OSHA App. 12-0391, Decision After Reconsideration (Oct. 5, 2015).) Here the Division alleges that Employer failed to implement

its IIPP, rather than alleging deficiences in the written IIPP. (See *Western States Construction, Inc.*, Cal/OSHA App.Bd. 86-0096, DAR (March 18,1988).)

To establish a violation of section 3203, subdivision (a)(4), the Division must demonstrate that the employer failed to effectively implement its duty to inspect, identify, and evaluate workplace hazards when (1) the program was first established, (2) new substances, processes, procedures, or equipment were introduced, or (3) the employer was made aware of a new or previously unrecognized hazard. (Section 3203, subds, (a)(4)(A)-(C); *Hansford Industries, Inc. dba Viking Steel,* Cal/OSHA App.1133550, Decision After Reconsideration (Aug. 13, 2021).)

Section 3203, subdivision (a)(6) requires Employer to implement its IIPP to identify evaluate and correct known workplace hazards in a timely manner. The Division alleges that Employer did not identify, evaluate, and correct the known hazard of the roof access hatch cut in the roof of the mechanical building on July 27, 2018. The facts presented show Employer had no knowledge of this opening being cut, and that cutting such an opening was not authorized to take place before the roof cement had been poured.

Cases involving section 1509 fall into two categories: 1) whether there is an IIPP that complies with section 3203 of the general safety orders; and 2) whether the IIPP has been effectively implemented and maintained. The second category applies in this matter, (*See Western States Construction, Inc.,* Cal/OSHA App. Bd., 86-0096, *DAR* (March 18, 1988).)

The Division has the burden of proving a violation, including the applicability of the safety order and employee exposure to the violative condition, by a preponderance of the evidence. (*Lone Pine Nurseries*, Cal/OSHA App. 00-2817, DAR (Oct. 30, 2001).) Preponderance of the evidence is defined "in terms of probability of truth, or of evidence that when weighed with that opposed to it, has more convincing force and greater probability of truth." (*Timberworks Construction, Inc.*, Cal/OSHA App. 1097751, Decision After Reconsideration (Mar. 12, 2019).)

The Division argues that, by Employer's own admission, no one from Employer was on the roof between July 27, 2018, when the opening was cut, and August 7, 2018, when Chavez fell through the opening. The Division asserts that Employer's inspection records confirm that Employer failed to identify the floor opening until the accident occurred. However, the Division did not put on any evidence which showed Employer failed to effectively implement its IIPP.

As a prerequisite to bringing such a citation, the Division must first establish what the Employer's IIPP procedures were. Eaton testified that he presumed, from his past history with Employer, that Employer had a current and valid IIPP at the time of his inspection. Indeed, Eaton testified that he specifically told Employer, "I don't need your IIPP. I know that you guys already have an IIPP in place." (HT Day 3, pp. 236-237.) Employer's Director of Safety Eric DeLapina

(DeLapina) testified Eaton never asked him to provide a copy of Employer's IIPP during the inspection of this citation (HT Day 4, pp. 238- 239). The Division thus never established that Employer had a valid IIPP to implement.

The Division's presumption that there is a valid IIPP is not sufficient evidence to maintain this citation. The Division cannot presume that there is a valid IIPP in existence. The Division therefore failed to present sufficient evidence to evaluate any aspect of Employer's IIPP. The Division has not established that Employer failed to implement the required procedures to identify and evaluate hazards, or that Employer failed to implement the required procedures for correcting unsafe conditions.

In *California Erectors, Bay Area, Inc.,* Cal/OSHA App. 93-503, Decision After Reconsideration (July 31, 1998), it provides that: "[P]ursuant to Labor Code 6314.5, the Division is directed to request copies of employers' IIPPs in all inspections." Labor Code section 6314.5, subdivision (a), in turn, states, "Every inspection conducted by the division shall include an evaluation of the employer's injury prevention program established pursuant to Section 6401.7." That did not happen in this case. The Division's inquiry was incomplete.

The Division has failed to prove the alleged violation. Citation 1, Item 1, is dismissed for lack of evidence.

2. Did Employer fail to protect employees from fall hazards resulting from an unguarded opening in the rooftop steel decking where a roof hatchway was to be installed?

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 evidence presented shows that Employer was the general contractor and controlling employer, building a refrigerated warehouse (also known as the Trader Joe warehouse) with an adjacent mechanical building at the site. Section 336.10, subdivision (c), defines a "controlling employer" as, "The employer who was responsible, by contract or through actual practice, for safety and health conditions on the worksite; i.e., the employer who had the authority for ensuring that the hazardous condition is corrected[.]" Labor Code section 6400, subdivision (b)(3), also defines a "controlling employer" as, "The employer who was responsible, by contract or through actual practice, for safety and health conditions on the worksite, which is the employer who had the authority for ensuring that the hazardous condition is corrected[.]"

Employer contracted with A.G. Construction, as a sub-contractor, to do concrete work. The evidence presented at the hearing provided that Angle was the structural steel subcontractor, and that Angle thereafter contracted with G.B. to cut openings for Angle.

Eaton testified that Employer had at least three management officials on the work site daily. On the day of the accident in the KPRS Investigation Report (Exhibit 10), it is disclosed that Employer had a meeting with Angle and others and discussed three roof openings to be cut (not yet to have been cut) on the roof of the mechanical building. The fact that G.B. had already cut an opening was never disclosed to Employer. A drawing was provided to Angle that confirmed the roof hatch location to be cut after the cement deck roof had been poured.

All subcontractors were provided with a copy of the structural plans for the mechanical building by Employer. The plans called for no openings to be cut in the roof of the mechanical building greater than six inches until the cement roof on the mechanical building was poured. Three openings would eventually be cut. One of those openings was to be the subject roof hatch.

Employer did not know Angle had contracted with G.B. to do any work on the site. Any sub-contractor hired by a sub-contractor was called by Employer a "second -tier" sub-contractor. G.B. was a second-tier subcontractor, according to testimony from Employer's General Superintendent, John Rawlings (Rawlings). Rawlings further testified that it was never disclosed to Employer that a roof access hatch opening had been cut in the roof deck of the mechanical building at any time before the accident. Further, Employer considered G.B. to be Angle employees in that G.B. employees wore Angle uniforms.

Rawlings further testified that the structural drawings for the mechanical building provided that no openings were to be cut until after concrete was poured on the roof deck and was cured. (*See* Exhibit T.) Employer also did not go on the roof of the mechanical building because there was no access. Employer did not direct G.B. to cut a roof access hatch opening in the roof deck of the mechanical building.

Rawlings also testified that Employer's actual practices at the site included taking responsibility for the safety of the various contractors and trades present. Employer conducted and documented daily and weekly site inspections with all employees and contracted subcontractors that included safety-related elements, and instructions to correct unsafe conditions.

Eaton testified that he was told by G.B. that the opening was cut, and secured with a cover, on July 27, 2018, before the cement roof was poured. Eaton further testified that he was told that C & L Refrigeration (C&L) removed the hatch cover while conducting its work and did not mark the cover with a written warning nor secure the cover back.

Jorge Chavez (Chavez), the injured employee of A.G., testified that on August 7, 2018, he was working on the roof of the mechanical building clearing debris and preparing the roof deck for the pouring of concrete. Chavez picked up the plywood cover of the roof hatch access opening that was not properly covered or guarded and stepped into the opening and fell some 27 feet to the cement floor below suffering serious injuries. He was hospitalized for broken bones that required surgery.

Rawlings testified that access to the mechanical building roof at the time of the accident was limited. The only people who accessed the roof had to use mechanical scissor lifts to do so. Also, the roof was surrounded by a 6-foot parapet wall. Employer was not able to go on this roof decking on the date of the accident due to the lack of access, and no one from Employer had been on the roof decking prior. Even accessing the inside of the mechanical building was difficult because there was too much work and equipment in the room. DeLapinia had to inspect the interior of the mechanical building from a safe distance because of all the overhead work being conducted. The day after the accident an exterior stair tower was installed to have access to the roof.

Eaton testified that the roof access opening that was at one time covered and secured was uncovered and not secured and not guarded at the time of Chavez's fall. A violation of section 1632, subdivision (b)(1) is founded, but not as to this Employer due to a valid defense as is explained below.

3. Did Employer establish the Due Diligence defense?

Employer raises the defense of lack of employer knowledge of the violation, despite the proper exercise of due diligence on its part. The burden of proof shifts to Employer to demonstrate that it is relieved of liability, under this defense.

In *United Association Local Union 246, AFL-CIO v. California Occupational Safety and Health Appeals Bd.* (2011) 199 Cal.App.4th 273, the Court of Appeal required the Board to recognize a "due diligence" defense for controlling employers. Employer is a controlling employer.

Under this defense, "A controlling employer must be granted the opportunity to prove it acted with due diligence under the circumstances in failing to correct a hazard created by a subcontractor on a multi-employer worksite." (*Harris Construction Company, Inc.,* Cal/OSHA App. 03-3914, Decision After Reconsideration (Feb. 26, 2015) (Harris).)

A number of factors are considered in evaluating whether a controlling employer acted with due diligence, including, but not limited to: (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 employers 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. (*Lennar Corporation,* Cal/OSHA App. 1340561, Decision After Reconsideration (Sep. 26, 2023; *McCarthy Building Companies, Inc.,* Cal/OSHA App. 11-1706, Decision After Reconsideration (Jan. 11, 2016) (McCarthy); *Harris, supra*, Cal/OSHA App. 03-3914; *Hanover RS Construction, LLC.,* Cal/OSHA App. 1205077, Decision After Reconsideration (May 26, 2011) (Hanover).)

"The Board does not consider or apply the foregoing factors mechanically." (*Hanover*, *supra*, Cal/OSHA App. 1205077; *McCarthy*, *supra*, Cal/OSHA App. 11-1706.) "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." (*Ibid*.) 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.'" (*McCarthy*, *supra*, Cal/OSHA App. 11-1706, citing OSHA Directive Number CPL 02-00-124 [2-0.124], effective 12/10/99.)

Here, Employer was cited under section 1632(b)(1), for failing to guard or cover a floor opening. The Board has previously addressed the due diligence defense with regard to the same safety order in several Decisions After Reconsideration. These are *Lennar Corporation*, *supra*, Cal/OSHA App. 1340561; *McCarthy, supra*, Cal/OSHA App. 11-1706; and *Hanover, supra*, Cal/OSHA App. 1205077. These particular appeals will provide pertinent guidance as to whether Employer established the due diligence defense, despite its admitted lack of knowledge of the floor opening at issue.

Even if a controlling employer was unaware of a cited hazard, as was the case here, it may be relieved of liability under the due diligence defense. The factors which will likely receive the most weight in this matter relate to the controlling employer's practices for inspection and oversight to identify and correct hazards (the main factors overlap on this point, underscoring its importance), and the latency or foreseeability of the hazard.

a. Did Employer conduct periodic inspections of appropriate frequency?

This factor will be significant in the instant appeal. What constitutes adequate, appropriate inspection includes 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.)

Examples of adequate, appropriate inspections and oversight are found in the following cases:

McCarthy, *supra,* Cal/OSHA App. 11-1706: The worksite was the construction of a high school, covering approximately 10 acres, and involving approximately 20 subcontractors and a total of approximately 150 employees. As controlling employer, McCarthy utilized a full-time Safety Coordinator at the site who was trained in safety and spent over 70% of each day in the field--often as much as six hours per day. McCarthy also "utilized additional personnel to supervise the worksite, including "several superintendents at the site, who ... were required to check specific areas and ensure the safety and quality of work. The Board determined, based on this evidence, that Employer engaged in multiple efforts to provide appropriate supervision and oversight at the site, and, Employers inspections were of appropriate frequency."

Hanover, *supra,* Cal/OSHA App. 1205077: As the controlling employer on the construction of a multi-level parking garage, Hanover maintained "three full time employees at the project that spent approximately sixty to seventy percent of their time in the field ... overseeing the work for multiple hours each work day." These efforts were documented in a site specific safety plan. The Board concluded that Hanover "demonstrated it engaged in multiple efforts to provide appropriate supervision and oversight at the site." In addition, "Hanover conducted weekly dedicated safety inspections, using occupational safety and health software designed by Predictive Solutions," and prepared safety reports based on these inspections. The Board therefore found that Hanover engaged in "appropriate efforts to identify and correct hazards at the worksite."

The record here supports the first element of the defense in that Employer did conduct periodic inspections, for the following reasons:

> The worksite, known as the WCD Trader Joe's project or the WCD project, was the construction of a Trader Joe's cold storage warehouse. The project included a main building, of approximately 500,000 square feet, and a connected mechanical building of approximately 25,000 square feet. (Exhibit P.) The mechanical building was the area where the accident occurred. On August 7, 2018, the day of the accident, there were an estimated seven or eight subcontractors and a total of 60 to 70 subcontractors'

employees at the site.

Rawlings, general superintendent on the project, testified that Employer employed three full-time superintendents on the project, each of whom spent approximately 80% to 90% of their time in the field. All three had OSHA-30 certification. (HT Day 4, pp. 24-26; Exhibit M.) The superintendents conducted daily safety inspections of the entire site, using a checklist generated with software designed by Procore. (Exhibits G, G2, G3; HT Day 4, pp. 29-30, 149.) In addition to these daily inspections, Delapinia, Employer's director of safety, also conducted personal safety audits of the site at least once a month. (HT Day 4, pp. 71-72, 143-144, 234-235; Exhibit A.)

Employer utilized a site-specific safety plan (Exhibits B, B2) and conducted a site-specific safety orientation with all subcontractors before permitting them to start work. (HT Day 4, pp. 239-241, 243-244; (Exhibit E).) Employer monitored the safety compliance of all tiers of subcontractors on the project. (HT Day 4, pp. 141-142.) Employer conducted weekly meetings with the foremen of all subcontractors on the project, which included safety topics. (HT Day 4, pp. 20-21, 55, 117.) The safety topics discussed in these meeting were then the subject of mandatory weekly "toolbox talks" conducted by the foremen with the subcontractors' employees. Employer required verification that these meetings occurred. (HT Day 4, pp. 55-56, 127-129, 246-247; Exhibits D, I.)

When looked in total, the evidence demonstrates that Employer provided an appropriate level of supervision and conducted inspections of appropriate frequency at the worksite. As will be discussed in greater detail regarding the latency and foreseeability of the hazard created by the roof opening through which a subcontractor's employee fell, no one from Employer was on the roof of the mechanical room between July 27 and August 7, 1998, and the opening in the roof deck went undiscovered by Employer until the accident occurred. (HT Day 4, pp. 198-199.) However, the evidence indicates that Employer had no reason to inspect the roof deck of the mechanical building during that time, as the structural plans called for no openings greater than six inches to be cut in the roof deck until concrete had been poured and cured. (Exhibit T.)

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. (*Beazer Homes Holding Corp.*, Cal/OSHA App. 1077503, Decision After Reconsideration (Jan. 18, 2018). (*Beazer Homes*).)

Examples of the controlling employer's effective system for promptly correcting hazards are found in the following cases:

McCarthy, *supra,* Cal/OSHA App. 11-1706: In addition to the inspections and oversight noted under the first factor, McCarthy engaged in additional efforts to identify and promptly correct hazards. These efforts included a Job Safety Analysis (JSA), filled out prior to starting work each day, to identify and address job site safety issues and deficiencies when discovered, which were then reviewed by the Safety Coordinator, who checked for discrepancies and ensured that hazards were timely addressed.

Hanover, supra, Cal/OSHA App. 1205077: In addition to maintaining appropriate supervision and conducting regular inspections, Hanover had a system for ensuring that hazards were promptly corrected. "If a Hanover employee observed a safety violation, it would contact the foreman of the subcontractor and require immediate correction. If, for whatever reason, it could not be immediately corrected, Hanover's Predictive Solutions software would be utilized to log the incident as an 'open' item and send daily reminders until addressed."

Beazer Homes, *supra,* Cal/OSHA App. 1077503: The multi-employer construction site at issue was a housing subdivision. The controlling employer engaged in ongoing observation and inspections of work in progress, immediately flagged unsafe conditions, halted work until any hazard was corrected, and documented such incidents.

The record here indicates that Employer 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 Procore program and flagged for correction. (HT Day 4, pp. 31-33) A safety violation notice would be sent to the subcontractor responsible for the area of the violation. (HT Day 4, pp. 33, 36-37; Exhibit J.) This system is similar to the one utilized in Hanover, which the Board found sufficient to satisfy this factor.

c. Did the controlling Employer enforce the subcontractor's 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. 11-1706.) 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*.)

Examples of effective enforcement of subcontractors' compliance with safety rules are found in the following cases:

McCarthy, supra, Cal/OSHA App. 11-1706: *McCarthy* presented evidence of its system of sanctions for safety violations, including disciplinary action up to suspension and/or termination of employees who violated safety rules. An employee who was suspended was not allowed to work on any of *McCarthy's* projects. *McCarthy* also "engaged in ongoing efforts to provide training to employees."

Hanover, supra, Cal/OSHA App. 1205077: Hanover maintained, and required its subcontractors to maintain, a site-specific safety plan. Hanover provided safety orientations to its subcontractors. In addition, Hanover enforced progressive discipline at the site for safety violations. The first violation would result in a verbal warning, the second a written warning, and the third removal from the site.

Beazer Homes, supra, Cal/OSHA App. 1077503: Beazer Homes conducted weekly and daily safety meetings with subcontractors' employees. Subcontractors who violated safety rules were not allowed to return to work until the hazard was corrected.

The record here indicates that Employer had an effective system for ensuring subcontractors' compliance with safety rules:

As noted, Employer utilized a site-specific safety plan (Exhibits B, B2), which was provided to all subcontractors, and conducted a site-specific safety orientation with all tiers of subcontractors before permitting them to start work. (HT Day 4, pp. 50, 107-109, 125- 126, 239-241, 243-244; Exhibits C, E.) All tiers of subcontractors were required to adhere to Employer's safety rules. Employer held weekly foremen's meetings with all of its subcontractors. (HT Day 4, pp. 20-21, 55, 117.) Subcontractors were required to provide verification that they conducted weekly "toolbox talks" on safety subjects addressed in these foremen's meetings. (Exhibit D; HT Day 4, pp. 55-56, 127-129.)

Employer had, and utilized, a system of progressive discipline for safety violations by employees of subcontractors. 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. More serious violations resulted in immediate removal from the project. (HT Day 4, pp. 33-35, 65, 250; Exhibit J.)

The efforts made by Employer are substantively similar to those which the Board has found sufficient to satisfy this factor.

d. Did the controlling Employer research the safety history of the subcontractor?

The steps a controlling employer takes in deciding which subcontractor(s) to retain is an element in determining whether the controlling employer acted with due diligence. (*Harris, supra, Cal/OSHA App. 03-3914*.) A subcontractors safety record and experience may affect how much effort a controlling employer should devote to overseeing the subcontractor's work. (*Savant Construction, Inc., Cal/OSHA App. 14-3018*, Denial of Petition for Reconsideration (Oct. 19, 2015).)

Examples of effective research into a subcontractor's safety history are found in the following case:

Hanover, supra, Cal/OSHA App. 1205077: The Board noted favorably, "Hanover vetted the safety background of any subcontractors it hired, and reviewed their work. It reviewed their safety histories, their form 300s, and even went to their other job sites before hiring them."

The record here indicates that Employer effectively researched the safety history of subcontractors:

Delapinia testified that Employer engaged in extensive vetting of potential subcontractors. Employer verified the companies' license and insurance, and reviewed the companies' safety history, including their rates of workers' compensation claims, OSHA-300 injury logs, and their history of previous OSHA violations. (HT Day 4, pp. 276-278.) Delapinia explained that if a potential subcontractor had received citations for serious or willful violations, or violations involving fatalities, that company would receive extra safety oversight as a condition of hiring. (*Id*. at p. 279.)

Employer did not vet the safety background of subcontractors' own subcontractors, (sub tier contractors) however. (HT Day 4, pp. 118, 119-121, 125, 135-137.) GB the company responsible for cutting the roof deck opening, was a subcontractor (sub tier contractors) of Employer's subcontractor, Angle Iron Works (Angle). Employer did not directly contract with GB. (*Id*. at pp. 95-96.) GB employees wore Angle uniforms and PPE, and signed into safety orientations as employees of Angle. (*Id*. at pp. 132, 186-186.) Nonetheless, on balance, this factor weighs in Employer's favor, and has been met.

e. Was the hazard latent and unforeseeable?

This factor will be of particular relevance in light of the Board's recent Decision After Reconsideration in *Lennar Corporation*. There, the facts that the hazard was not latent or unforeseeable, and had gone uncorrected, were sufficient to defeat the due diligence defense, although other factors weighed in favor of the employer. The Board noted, "In previous cases considering violations of the same safety order, in which the Board upheld the due diligence defense, such as *McCarthy* and *Hanover*, the Board found it significant that the hazard was latent." (*Lennar Corporation, supra,* Cal/OSHA App. 1340561.) In *Lennar*, by contrast, the unmarked cover of the floor opening that created the hazard was in plain view, and had been present for months. Not only was the hazard in plain view, the employer failed to follow its procedures for promptly correcting hazards by leaving the unmarked cover in place for an extended time. Those are not our facts. In our case the opening was created by an unknown sub tier contractor and was cut on July 27, 2018. The fall took place eleven days later on August 7, 2018. The opening was not authorized by the plans and not known to Employer until the fall.

Examples of a latent and unforeseeable hazard are found in the following cases:

McCarthy, *supra*, Cal/OSHA App. 11-1706: The hazard at issue was two unfinished floor openings of approximately 22 by 25 inches, covered only by unmarked, unsecured plywood. 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." The Board therefore concluded the hazard was latent.

Hanover, *supra,* Cal/OSHA App. 1205077: The hazard at issue was an unsecured plywood floor cover. The cover had been secured, but a subcontractor's employees removed to perform work on cables underneath it. In the short period of time after the employees finished the work, replaced the cover, and went to get tools to secure the cover, an employee of another subcontractor stepped on the unsecured cover and fell through the opening. The time between the creation of the hazard and the accident at issue was a span of only a few minutes. The Board found the "general contractor did not have reasonable opportunity to observe the hazard due to its brief duration and the time between the replacement of the cover and the employee displacing it. The general contractor also had no expectation that the subcontractor would leave a cover unsecured; there was no evidence of any prior unsecured cover at that site."

The record here supports that the hazard created by the opening cut in the roof deck was latent and unforeseeable:

First, the hazard was unforeseeable. Employer presented evidence that the plans for the structure specified no openings greater than six inches should be cut in the roof deck until the cement roof had been poured and cured. (HT Day 4, pp. 46-48; Exhibit T.) Rawlings and Delapinia testified that Employer did not direct the opening to be cut, was not informed by either Angle or G.B. that the opening in the roof deck had been cut, was not informed by any other subcontractor that the opening existed, and had no reason to believe a opening would be cut in the roof deck before the cement had been poured. (*See, e.g*., HT Day 4, pp. 37-38, 86-87, 102, 198, 201, 299.) Indeed, cutting the opening before the roof was poured harmed the structural integrity of the roof, and required the roof deck to be re-shored. (*Id*. at pp. 161, 177-178.) Employer does not dispute that it was unaware of the opening until after the accident occurred. Under these circumstances, however, it appears reasonable to conclude Employer could not have foreseen that the opening would be cut.

Second, the hazard was latent. Employer does not dispute that no one from Employer was on the roof deck between July 27, 2018, when the opening was cut, and August 7, 2018, when the accident occurred. (HT Day 4, pp. 179-180, 198-199.) However, the record suggests that this was primarily because of the difficulty of accessing that area. During the relevant time period, stairs to the roof deck had not yet been installed. (*Id*. at p. 88.) There was no access ladder to the roof deck. (*Id*. at pp. 294-295; HT Day 1, p. 38.) Chavez and other employees of A.G. Construction could only access the roof deck using a scissor lift rented by that subcontractor. (HT Day 4, pp. 274-275; HT Day 1, pp. 38-40.) Delapinia testified that the area of the mechanical room from which the opening would have been visible was also difficult to access, due to the presence of large equipment, construction activity, and unfinished overhead plumbing and electrical work. (HT Day 4, pp. 302-304.) As a result, Delapinia testified, inspection of that area was limited to what Employer "could see from a safe distance." (*Id*. at pp. 305-307.)

In evaluating the case looking at the totality of circumstances, Employer had no reason to expect that the roof opening would be cut at that time that it was, and because the resulting hazard was not in plain view, this was an unforeseeable and latent hazard.

Upon application of the facts of the case with all five elements of the defense raised by Employer, no liability can be attributed to Employer due to lack of Employer knowledge as to an unforeseeable and latent hazard of the roof access hatch and Employer's exercise of due diligence. As a result, Employer prevails on this citation and its appeal is sustained.

Conclusion

For Citation 1, Item 1, the Division failed to establish that Employer violated section 1509, subdivision (a). There was insufficient evidence presented.

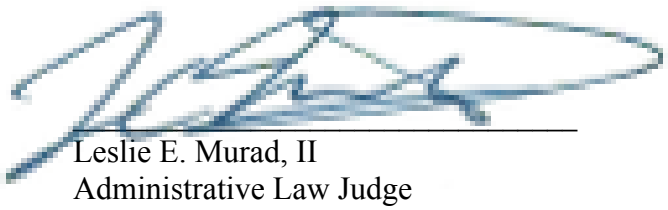
For Citation 2 , Item 1, the evidence presented does not support a finding that Employer violated section 1632, subdivision (b)(1). Employer presented evidence to the satisfaction of the ALJ of the complete defense of lack of employer's knowledge and Employer having exercised due diligence to avoid liability.

Order

It is hereby ordered that Citation 1, Item 1, is dismised and the peanlty is vacated.

It is hereby ordered that Citation 2, Item 1, is dismised and the peanlty is vacated.

It is further ordered that no penalties will be accessed and as set forth in the attached Summary Table.



Dated**:** 01/12/2024

Leslie E. Murad, II
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.**