BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No.
S. C. ANDERSON, INC. **11109 RIVER RUN BLVD, STE. 210** **BAKERSFIELD, CA 93311** **Employer**	**1405107** **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code issues the following Decision After Reconsideration in the above-entitled matter.

JURISDICTION

S. C. Anderson, Inc. (Employer), is a general contracting company which also provides construction management services to owner-builders. Beginning on June 3, 2019, the Division of Occupational Safety and Health (Division) initiated an accident investigation of Employer's worksite at 7301 Old River Road in Bakersfield, California.

On November 25, 2019, the Division issued Employer one citation alleging a Serious, Accident-Related violation of California Code of Regulations, title 8 (the Citation).[1]

Employer timely appealed the Citation, contesting both the existence of the violation, its classification, and the reasonableness of the proposed penalty. Employer also asserted various affirmative defenses.

Employer's appeal was the subject of a contested evidentiary hearing before an Administrative Law Judge (ALJ) of the Board over three days. The hearing was held using the Zoom video platform on January 26 and 27, 2022, and February 16, 2022. Thereafter, both parties submitted post-hearing briefs.

On January 26, 2023, the ALJ issued a decision (Decision) affirming the Citation.

Employer timely filed a petition for reconsideration (Petition) with the Board. The Board took the Petition under submission. The Division filed an answer to the Petition.

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

The Board has reviewed the entire record, including the arguments of the parties. We have taken no new evidence.

ISSUES[2]

1. Did the Division establish, by a preponderance of the evidence, that Employer was a "controlling employer" as that term is defined in section 336.10, subdivision (c)?

2. Did Employer fail to guard a roof opening as required by section 1632, subdivision (b)?

3. Did the ALJ err in refusing to admit evidence of the injured employee's intoxication?

FINDINGS OF FACT

The ALJ's Decision listed several findings of fact. The ALJ's findings, which we concur with, are copied below. (See Decision, pp. 2, 3.)

1. The Kern High School District (the District) hired Employer to serve as the construction manager for the construction of a building called the Career Technical Education Center (CTEC) and an Aquatics Center at Independence High School, located at the site.

2. Employer's contract with the District required Employer to provide "business administration and management services to ensure the timely and satisfactory completion of the Project."

3. Employer's contractual obligations included assigning responsibilities for safety precautions and verifying that the requirements and assignment of responsibilities were included in the final contracts with the various contractors. In addition, Employer was required to advise each of the contractors that they must have an operative safety program.

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

5. Employer conducted and documented weekly site inspections that included safety-related elements, and instructed contractors to correct unsafe conditions.

6. Employer held meetings with various contractors where safety was discussed.

7. 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.

8. Israel Comparan (Comparan), an employee of a subcontractor named Garcia Roofing, was working on the roof of the CTEC building that was under construction at the site.

[2] Issues not raised in a petition for reconsideration are waived. (Lab. Code § 6618.)

9. Comparan fell through a roof opening on the CTEC building and landed on the concrete 31 feet below.

10. The roof opening that Comparan 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.

11. As a result of the accident, Comparan required hospitalization for more than 24 hours.

12. Falling 31 feet onto concrete is likely to cause serious physical harm or death.

13. Comparan's injuries occurred because the roof opening he fell through was not adequately guarded or securely covered.

14. The Division proposed a reasonable penalty for Citation 1.

The Board makes these additional findings of fact:

15. The employee injured in the accident suffered a serious injury, as defined in Labor Code section 6432, subdivision (e).

16. The worksite was a "multi-employer" worksite.

17. By virtue of its actual practices at the worksite, Employer was a controlling employer on the project.

DISCUSSION

Background.

The worksite involved here was at Independence High School in Bakersfield, California. The Kern High School District (District), owner of the site, engaged Employer as the construction manager for the construction of buildings at the high school, including a "Career Technical Education Center" (CTEC). Various contractors were engaged to perform aspects of the work, including, as pertinent here, a roofing contractor, and a heating, ventilation and air conditioning (HVAC) contractor. Because employees of more than one employer were working at the site, it was a multi-employer worksite.

On May 28, 2019, Israel Comparan (Comparan), an employee of Garcia Roofing, Inc., fell through an opening on the roof of the CTEC building, landed on a concrete surface about 31 feet below, and suffered serious injuries as a result. The opening was one of six which had been made in the roof of the CTEC building by SIMCO, the subcontractor providing HVAC work. SIMCO covered the opening through which Comparan fell with a piece of thin sheet metal and a piece of corrugated sheet metal above the flat sheet.

1. Did the Division establish, by a preponderance of evidence, that Employer was a controlling employer at the project?

A multi-employer worksite is a place of employment maintained by at least two employers. (See *Behring-Hofmann Educational Institute, Inc., dba Blackhawk Museum*, Cal/OSHA App. 1115442, Decision After Reconsideration (June 8, 2018).) The construction project where Comparan's accident occurred fell within that definition.

At multi-employer worksites, at least four categories of employers may be cited for violating safety and health requirements, the pertinent category here being that of a "controlling employer."

Section 336.10 states:

> On multi-employer worksites, both construction and non-construction, citations may be issued only to the following categories of employers when the Division has evidence that an employee was exposed to a hazard in violation of any requirement enforceable by the Division:
>
> [¶]
>
> (c) The employer who was responsible, by contract or through actual practice, for safety and health conditions at the worksite, i.e., the employer who had the authority for ensuring that the hazardous condition is corrected (the controlling employer)[.]

Thus, Employer was a controlling employer at the subject worksite if by contract or by actual practice it was responsible for project safety. The Decision found that Employer was not by contract the controlling employer. We need not affirm nor disturb that finding, as it is unnecessary to reach it in this decision.

Instead, we will address whether Employer, by actual practice, was responsible for safety and health conditions, that is, whether it had the authority to see that the hazard was corrected. (§ 336, subd. (c); *McCarthy Building Companies, Inc*., Cal/OSHA App. 11-1706, Decision After Reconsideration (Jan. 11, 2016).) We note that a controlling employer may be cited for a violation even if its own employees were not exposed to the hazard. (§ 336.10; *McCarthy, supra*, Cal/OSHA App. 11-1706.)

The Decision concludes that by actual practice Employer was a controlling employer at the site (pp. 5-9) and provides a detailed analysis of the evidence adduced at hearing concerning Employer's safety authority and practices at the worksite. After our independent review of the record we agree with the ALJ. Among the items of evidence we found particularly persuasive were evidence that: Employer ordered work on the roof to stop after Comparan's accident; investigated the cause of the accident; issued a report and required corrective action; Employer held weekly safety meetings with contractors, including Garcia Roofing and SIMCO; Employer made weekly site inspections; testimony that other contractors would communicate their safety concerns to Employer; testimony that the roof openings had been made weeks before the accident and had

been inspected by Employer; and Employer's representatives' admissions that Employer had safety responsibility and the authority to stop work.

Accordingly, the Board affirms the ALJ's holding that Employer was a "controlling employer" at the worksite.

2. Did Employer fail to guard a roof opening as required by section 1632, subdivision (b)?

The Division cited Employer for violating section 1632, subdivision (b)(3), which provides:

> (b)(1) Floor, roof and skylight openings shall be guarded by either temporary railings and toeboards or by covers. [. . .]
>
> (3) Covers shall be capable of safely supporting the greater of 400 pounds or twice the weight of the employees, equipment and materials that may be imposed on any one square foot area of the cover at any time. Covers shall be secured in place to prevent accidental removal or displacement, and shall bear a pressure sensitized, painted, or stenciled sign with legible letters not less than one inch high, stating: "Opening--Do Not Remove." Markings of chalk or keel shall not be used.

It was not disputed that the roof opening through which Comparan feel was an opening as defined in section 1504, and, therefore regulated by section 1632. Nor was it disputed that there was employee exposure to the violative condition; Comparan's accident showed there was exposure to the hazard. (See *Home Depot USA, Inc.* Cal/OSHA App. # 1011071, Decision After Reconsideration (May 16, 2017).)

The safety order requires that an opening be guarded by either temporary railings and toeboards, or by covers. (§1632, subdivision (b).)

Here, the evidence demonstrated that the opening was not guarded by temporary railings and toeboards. Evidence produced at the hearing showed that there were no railing around the openings. Although there was a curb around them, section 1632, subdivision (b)(1) requires " . . . railings *and* toeboards . . ." be provided. (Emphasis added.) This means that the only remaining guarding method available to Employer was a cover compliant with the requirements of section 1632, subdivision (b)(3).

Section 1632, subdivision (b)(3) mandates that covers over an opening such as the one at issue (1) have the specified minimum strength, (2) be secured against accidental removal or displacement, and (3) be marked as required. (*Lennar Corporation*, Cal/OSHA App. # 1340561, Decision After Reconsideration (Sep. 26, 2023).) The evidence established that the two sheets of metal which had covered the opening were not secured in place as required. And even assuming there were adequately secured, the collapse of the metal sheets under Comparan is *prima facie* evidence that they were not capable of supporting his weight, let alone twice his weight. Further, the evidence established that the cover over the opening was not properly marked. The pieces of

metal which had been covering the opening and which landed on the concrete surface onto which Comparan fell bore no markings required by section 1632, subdivision (b)(3). The violation was proved.

The record shows that both Jordan Anspach, Employer's safety director, and Greg Owens, its on-site superintendent, regularly conducted inspections of the worksite. The record also establishes that the roof openings in the CTEC building, including the one involved in Comparan's fall, were created two weeks or longer before the accident. Since the openings patently did not have the required railings and labels, Employer had, at the least, constructive knowledge that they were in violation of section 1632, subdivision (b)(3). Likewise, the failure of Employer apparently to notice the violative condition of the openings for a period of two weeks or more leads to the conclusion it did not exercise the due diligence required of a controlling employer. (See *Signal Energy, LLC*, Cal/OSHA App. # 1155042, Decision After Reconsideration (Aug. 19, 2022).)

3. Did the ALJ err in refusing to admit evidence of the injured employee's intoxication?

Employer's petition for reconsideration contends that the ALJ erred in excluding evidence of Comparan's alleged intoxication at the time of the accident. We hold that no reversible error was made. Section 1632, subdivision (b)(3) requires, among other aspects, that covers over openings be "[C]apable of safely supporting the greater of 400 pounds or twice the weight of the employees, equipment and materials that may be imposed on any one square foot area of the cover at any time."[3]

We construe that strength requirement to be intended to protect against both intentional and unintentional loading of such covers. Thus, with respect to safely supporting workers, an opening's cover must support at least twice the weight of employees who may intentionally stand or walk across them. And, equally, the safety order is intended to protect workers who might unintentionally stumble or fall onto a cover. To hold that the safety order does not apply should an (allegedly) intoxicated employee fall or step onto a cover would violate the California Supreme Court's ruling that safety orders are to be construed to be protective of workers (*Carmona v. Division of Industrial Safety* (1975) 13 Cal. 3d 303, 313 [terms given liberal interpretation to promote worker safety]). It would also read an exception into its language, which we may not do. (*SSA Terminals (Oakland), LLC*, Cal/OSHA App. 1303461, Decision After Reconsideration (Sep. 14, 2023).) Thus, the ALJ did not commit reversible error in excluding such evidence.

DECISION

For the reasons stated above, the ALJ's Decision is affirmed.

[3] Although not implicated by Employer's argument here, we point out again that the cover over the opening was not labeled as required, and thus the violation of section 1632, subdivision (b)(3) was established independent of Comparan's (alleged) intoxication.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

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

FILED ON: 01/30/2024