

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

In the Matter of the Appeal of:

**SHEEHAN CONSTRUCTION, INC.
477 DEVLIN ROAD, SUITE 108
NAPA, CA 94558**

Employer

Inspection No.

1321130

DECISION

Statement of the Case

Sheehan Construction, Inc., (Employer) is a construction contracting company that specializes in wood framing. On June 5, 2018, the Division of Occupational Safety and Health (the Division), through Senior Safety Engineer Denis McComb, commenced an accident investigation at 1950 Addison Street, in Berkeley, California (jobsite) where Employer was working on constructing a multi-story building alongside other contractors.

On November 29, 2018, the Division issued two citations to Employer. The citations allege: (1) Employer failed to ensure a pneumatically-driven nailer was operated and maintained in accordance with the manufacturer's operating and safety instructions; and (2) Employer failed to implement safeguards against falling objects where there was employee exposure below an elevated work area.

Employer filed a timely appeal of each citation. Employer's grounds for appeal for each citation contest the existence of the violations, the classifications of the citations, the reasonableness of abatement, and the reasonableness of the proposed penalties. Employer also asserted numerous affirmative defenses.¹

Although Employer's appeals contest the reasonableness of abatement, it is noted that the parties did not address the issue of abatement in briefing. Denis McComb (McComb) testified at hearing that he received abatement information from Steve Young, the superintendent for the general contractor at the jobsite, Michael Roberts Construction. Additionally, Robert Schlosser,

¹ Except where discussed in this Decision, Employer did not present evidence in support of other affirmative defenses, and said defenses are therefore deemed waived. (*RNR Construction, Inc.*, Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017).)

Employer's safety director, testified regarding abatement measures implemented for Citation 2. As such, the issue of abatement is considered resolved and is not discussed further herein.

This matter was heard by Christopher Jessup, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (the Appeals Board). ALJ Jessup conducted the hearing from Sacramento, California, on November 16 and 18, 2022, February 16 and 17, 2023, June 13, 14, 15, and 16, 2023, November 28, 29, and 30, 2023, April 30, 2024, May 1 and 2, 2024, and June 20, 2024, with the parties and witnesses appearing remotely via the Zoom video platform. Alka Ramchandani-Raj, attorney with Littler Mendelson, P.C., represented Employer. Deborah Bialosky, Staff Counsel, Denise Cardoso, Assistant Chief Counsel, and Jennifer Martin, Staff Counsel, represented the Division. This matter was submitted for Decision on July 2, 2025.

Issues

1. Did Employer fail to ensure pneumatically-driven nailers were operated and maintained in accordance with the manufacturer's operating and safety instructions?
2. Did Employer fail to implement safeguards against falling objects where there was employee exposure below an elevated work area?
3. Does the logical time defense apply to installing toeboards on the sixth floor?
4. Did the Division establish that Citation 2 was properly classified as Serious?
5. Did Employer rebut the presumption that the violation alleged in Citation 2 was Serious by demonstrating that it did not know, and could not, with the exercise of reasonable diligence, have known of the existence of the violation?
6. Did the Division establish that Citation 2 was properly characterized as Accident-Related?
7. Is the proposed penalty for Citation 2 reasonable?

Findings of Fact

1. On June 5, 2018, Employer's employee, Jose Olivares (Olivares), was installing joists for the sixth floor, adjacent to a stair shaft, using a pneumatically-driven nailer (nailer) that belonged to Employer.

2. Olivares hung the nailer from a guardrail at the top of the stair shaft so that it was hanging inside the stair shaft.
3. After the nailer was hung from the guardrail, it fell into the stair shaft and struck an employee of Nueva Castilla Iron Works, Inc. (Nueva Castilla), Francisco Torres Silva (Silva), who was working in the stair shaft between the first and second floors.
4. As a result of being struck by the nailer, Silva was injured and fell from where he was standing in the stair shaft onto the concrete floor below and was injured further.
5. Silva died on June 11, 2018, from the blunt force trauma to his head and neck.
6. The manufacturer's instructions for the nailer set forth numerous conditions under which the nailer should be disconnected from an air hose.
7. Silva's coworkers, Allan Silva and Angel Medina, were working in the same area of the stair shaft as Silva, between the first and second floor, at the time of the accident.
8. Employer had employees working on the fifth and sixth floors around the stair shaft on the day of the accident and for several days prior to the accident.
9. Employer's employees working on the fifth and sixth floors had, and were using, tools, equipment, and construction materials.
10. At the time of the accident, Employer did not have in place toeboards, screens, or guardrail systems around the stair shaft to safeguard against falling objects. Employer did not use a canopy structure to safeguard against falling objects, and Employer did not prevent access to the stair shaft by means of a fence or barricade.
11. The Nueva Castilla employees were working more than six feet below Employer's employees.
12. Henry Ramirez, Employer's job safety manager, placed tape across the entrance to the stair shaft prior to the accident.

13. No spotters were present at the entrance to the stair shaft where tape was placed.
14. Falling objects can cause crushing injuries, fractures, lacerations to body parts, concussions, bleeding, and death.
15. Employer was aware of the hazard of falling objects at the jobsite.
16. There were at least two stair shafts at the jobsite and multiple other elevated locations.
17. Employer had more than 100 employees.

Analysis

1. Did Employer fail to ensure pneumatically-driven nailers were operated and maintained in accordance with the manufacturer’s operating and safety instructions?

In Citation 1, Employer was cited for an alleged violation of California Code of Regulations, title 8,² section 1704, subdivision (b)(2). Section 1704, subdivision (b)(2), provides: “All pneumatically-driven nailers and staplers shall be operated and maintained in accordance with the manufacturer’s operating and safety instructions.”

The Alleged Violation Description (AVD) of Citation 1 provides:

Prior to and during the course of the investigation, including, but not limited to June 5, 2018, the employer failed to ensure that their employee operated a nail gun in accordance with the manufacturers [*sic*] operating and safety instructions. The employer failed to follow the operating manual where it requires the nail gun user to disconnect the air hose from the nail gun when the nail gun is either not in use or the user is leaving the work area.

The Division has the burden of proving a violation by a preponderance of the evidence. (*Wal-Mart Stores, Inc. Store # 1692*, Cal/OSHA App. 1195264, Decision After Reconsideration (Nov. 4, 2019).) “‘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.” (*Sacramento County Water*

² All references are to California Code of Regulations, title 8, unless otherwise indicated.

Agency Department of Water Resources, Cal/OSHA App. 1237932, Decision After Reconsideration (May 21, 2020).) Full consideration is to be given to the negative and affirmative inferences to be drawn from all the evidence. (*Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 483.)

Section 1704, subdivision (b)(2), requires that employers ensure that pneumatically-driven nailers are operated and maintained in accordance with the manufacturer's operating and safety instructions. Here, as discussed in more detail below, a nailer fell from the sixth floor and struck a worker below. The Division alleged that Employer failed to comply with the manufacturer's operating and safety instructions to disconnect the nailer from the air hose when the nailer was not in use and/or when leaving the work area.

Exhibit 26 is a copy of the manual for the nailer that was retrieved from the scene of the accident. The manual for the nailer provides that it should be disconnected from an air hose when: (1) "doing maintenance and inspection"; (2) "clearing a jam"; (3) "it is not in use"; (4) "leaving work area"; (5) "moving it to another location"; and (6) "handing it to another person." (Exh. 26.) The manufacturer's instructions add "The Nailer should never be left unattended since people who are not familiar with the Nailer might handle it and injure themselves." (*Id.*)

The preliminary issue is whether the Division met its burden of proof to establish that Employer failed to ensure that the nailer was disconnected from the air hose. On June 5, 2018, Employer's employee, Olivares, was installing joists for the sixth floor, adjacent to a stair shaft, using a nailer that belonged to Employer. It is uncontested that Olivares hung the nailer from the guardrail at the top of the stair shaft so that it was hanging inside the stair shaft. After the nailer was hung from the guardrail, it fell into the stair shaft and struck Silva, an employee of Nueva Castilla, who was working in the stair shaft between the first and second floors.

The record is not clear as to whether the nailer was left connected to an air hose prior to the fall. The parties did not offer the testimony of a percipient witness that observed the condition of the nailer before it fell and whether it was still connected to the air hose. McComb testified that he was told by Olivares, the employee whose nailer fell, that he did not disconnect the nailer from the air hose prior to its fall. Employer objected to this testimony as hearsay and no exception or exclusion from the hearsay rules was established for this testimony. This hearsay testimony, alone, cannot be relied upon to establish that the nailer was left connected to the air hose, as it does not supplement or explain other non-hearsay evidence. (§ 376.2.) The record is not sufficient to establish that Employer failed to ensure that an employee operated a nailer in accordance with the manufacturer's operating and safety instructions.

Accordingly, the Division has not met its burden of proof to establish a violation of section 1704, subdivision (b)(2), and Citation 1 is dismissed.

2. Did Employer fail to implement safeguards against falling objects where there was employee exposure below an elevated work area?

Section 3273, subdivision (e)(1), provides:

(1) Where there is employee exposure below an elevated work area, one or more of the following safeguards shall be implemented:

(A) Provide toeboards, screens, or guardrail systems in accordance with Article 2 of these Orders to prevent objects from falling from higher levels; or,

(B) Provide a canopy structure to protect employees from falling objects; or,

(C) Provide a physical barrier such as, but not limited to, fencing, barricades or other equivalent means or methods, to prevent entry into the area to which objects could fall.

The AVD for Citation 2 provides:

Prior to and during the course of the investigation, including, but not limited to June 5, 2018, the creating, controlling, and/or correcting employer, Sheehan Construction, Inc. failed to ensure effective safeguards were in place where there is employee exposure below an elevated work area. Screens, a canopy structure, or other physical barriers were not in place to protect employees working below from falling objects. As a result, an employee of Nueva Castilla was struck on the head from a nail gun that was dropped from the fifth floor where employees of Sheehan Construction, Inc. were working with no effective safeguards to protect the employee below. The employee of Nueva Castilla succumbed to his head injuries on June 11, 2018.

[This citation is being issued in accordance with Section 336.10 Multi-Employer Worksites]

In order to establish a violation of section 3273, subdivision (e)(1), the Division must demonstrate that there was employee exposure below an elevated work area and the employer did not provide protection from falling objects using any of the following safeguards: (1) toeboards, screens, or guardrail systems; (2) a canopy structure; and/or (3) a physical barrier such

as, but not limited to, fencing, barricades, or other equivalent means or methods, to prevent entry into the area to which objects could fall.

a) Was Employer responsible for the safety of the Nueva Castilla employees?

While Employer did not employ Allan Silva, Angel Medina, or Silva, Employer was cited in accordance with section 336.10. Section 336.10 provides: “The employers listed in subsections (b) through (d) may be cited regardless of whether their own employees were exposed to the hazard.” Further, section 336.10, subdivision (b), defines the “creating employer” as the employer who actually created the hazard.

As discussed below, Employer created the hazard of falling objects by having its employees work on the fifth and sixth floor around the stair shaft while using tools, equipment, and materials. Therefore, Employer is properly identified as a creating employer under section 336.10 and was responsible for ensuring the safety of the Nueva Castilla employees working in the stair shaft.

b) Was there employee exposure to falling objects below an elevated work area?

The next issue is whether there was employee exposure below an elevated work area. As noted above, the accident that gave rise to the citations in this matter was the result of a nailer falling down a stair shaft. The accident took place on June 5, 2018, and resulted in an injury to, and ultimately the death of, Silva, an employee of Nueva Castilla. (Exh. 22.) The parties stipulated that Silva died from blunt force trauma to his head and neck on June 11, 2018. Allan Silva, decedent’s brother and coworker, testified he was present and working with Silva in the stair shaft between the first and second floor at the time of the accident. Allan Silva also testified that Angel Medina was working with them in the same area. Allan Silva further testified that, on the day of the accident, he was able to hear people working above him.

Based on the testimony of Robert Schlosser (Schlosser), Employer’s safety director, Henry Ramirez (Ramirez), Employer’s job safety manager, and Arturo Vazquez (Vazquez), Employer’s foreman, Employer’s employees were working on the fifth and sixth floor around the stair shaft where the accident took place. Additionally, Ramirez and Vazquez testified that Employer’s employees had been working on various parts of the fifth and sixth floors for several days prior to the accident. Further, based on the testimony, it is established that Olivares had tools and equipment, such as the nailer, air hose, and compressor, and materials, such as wood building materials. The foregoing establishes that the fifth and sixth floor constituted an elevated work area and that the Nueva Castilla employees working in the stair shaft below were exposed to the hazard of falling objects.

c) Did Employer implement one or more of the required safeguards against falling objects?

Having determined that there was employee exposure below an elevated work area, it is next necessary to examine whether Employer implemented one or more of the required safeguards against falling objects.

1) Did Employer provide toeboards, screens, or guardrail systems in accordance with Article 2 of the General Industry Safety Orders to prevent objects from falling from higher levels?

The first question is whether employer provided toeboards, screens, or guardrail systems, that were in accordance with Article 2 of the General Industry Safety Orders, to prevent objects from falling from higher levels.

Turning first to toeboards, Ramirez testified that there had been toeboards around the stair shaft, but they were removed at some point prior to the accident. McComb testified that he did not see toeboards in place around the stair shaft during his inspection of the jobsite, which occurred shortly after the accident. Exhibit 71 is a photograph of the area around the stair shaft. There are no toeboards present in the photograph, and Schlosser testified to the same. Further, Exhibit 31 is a photograph of a side of the building and includes a view of the fifth floor and the area where the sixth floor is being built. Toeboards are notably absent from many areas in the picture including the fifth floor. As such, it is determined that Employer did not provide toeboards as a means to prevent objects from falling from higher levels on the day of the accident around the stair shaft on the fifth and sixth floor.

As to screens, McComb testified that he did not observe any screens near the shaft during his inspection on the day of the accident. Pictures of the jobsite show that screens were not used by Employer on the day of the accident. (Exh. 31, 48, 60, 62, 67, 68, 69, 71, 74, 75, and 82.) Therefore, the evidence adduced at hearing supports the conclusion that Employer did not use screens to prevent objects from falling from higher levels on the day of the accident.

Finally, a number of guardrails were present at the jobsite and are depicted in many of the photographs. (Exh. 31, 48, 60, 62, 67, 69, 71, 74, and 75.) However, section 3273, subdivision (e)(1)(A), requires more than guardrails alone. The regulation requires guardrail systems that are in accordance with Article 2 of the General Industry Safety Orders. Therefore, it is necessary to examine what comprises a guardrail system as contemplated by the regulation.

Section 3210, subdivision (a), which is contained within Article 2 of the General Industry Safety Orders, provides:

Buildings. Guardrails shall be provided on all open sides of unenclosed elevated work locations, such as: roof openings, open and glazed sides of landings, balconies or porches, platforms, runways, ramps, or working levels more than 30 inches above the floor, ground, or other working areas of a building as defined in Section 3207 of the General Industry Safety Orders. Where overhead clearance prohibits installation of a 42-inch guardrail, a lower rail or rails shall be installed. The railing shall be provided with a toeboard where the platform, runway, or ramp is 6 feet or more above places where employees normally work or pass and the lack of a toeboard could create a hazard from falling tools, material, or equipment.

Section 3210, subdivision (a), requires that guardrails include a toeboard where the platform, runway, or ramp is six feet or more above a place where employees normally work or pass and the lack of a toeboard could create a hazard from falling tools, material, or equipment. In the instant matter, the Nueva Castilla employees were working between the first and second floors in the stair shaft and Employer's employees were working on the fifth and sixth floors, a distance that was greater than six feet. Additionally, given the nature of the work, involving tools, equipment, and materials, and the accident itself, resulting in Silva's injury, it is concluded there was a hazard from falling objects. As section 3273, subdivision (e)(1)(A), requires "guardrail systems," rather than merely "guardrails," it is a necessary conclusion that "guardrail systems" includes toeboards in the circumstances of the present case. Therefore, because the guardrails did not include toeboards, Employer did not provide "guardrail systems" as contemplated by the regulation.

Accordingly, Employer did not provide toeboards, screens, or guardrail systems in accordance with Article 2 of the General Industry Safety Orders to prevent objects from falling from higher levels.

2) Did Employer provide a canopy structure to protect employees from falling objects?

Having determined that Employer did not implement the safeguards contemplated by section 3273, subdivision (e)(1)(A), it is next necessary to consider whether Employer provided a canopy structure to protect employees from falling objects. It is undisputed that Employer did not place a canopy structure in the stair shaft. Schlosser testified that Employer typically installed platforms in similar situations but not install a platform above the stair shaft prior to the accident. Ramirez testified that Employer was not permitted to install a platform in the stair shaft by the general contractor, Michael Roberts Construction. Further, the testimony of Schlosser and Vazquez supported the conclusion that no canopy or platforms were placed in the stair shaft prior

to the accident. Accordingly, Employer did not provide a canopy structure to protect employees from falling objects.

- 3) Did Employer provide a physical barrier such as, but not limited to, fencing, barricades, or other equivalent means or methods, to prevent entry into the area to which objects could fall?

Having determined that Employer did not implement safeguards contemplated by section 3273, subdivisions (e)(1)(A) and (e)(1)(B), it is next necessary to consider whether Employer provided a physical barrier, such as fencing, barricades, or other equivalent means or methods, to prevent entry into the area to which objects could fall. There is no evidence that fencing or barricades were used by Employer. Instead, Ramirez testified that he placed tape across the entrance to the stair shaft prior to the accident. (Exh. QQQ and 41.) Employer argues that the tape was a sufficient physical barrier in accordance with the regulation.

Section 3273, subdivision (e)(1)(C), considers the following as a safeguard against falling objects: “Provide a physical barrier such as, but not limited to, fencing, barricades or other equivalent means or methods, to prevent entry into the area to which objects could fall.” Because barrier tape is not specifically identified in the regulation, the meaning of “other equivalent means or methods” within the context of a “physical barrier” must be examined to determine whether it includes tape as used by Employer.

Section 3273, subdivision (f)(2), also refers to physical barriers, and it states:

(2) When controlled lowering is not practical, or would subject employees to a greater risk of injury, protection from falling objects shall be provided by the use of effective physical barriers, such as but not limited to canopies, fencing, barricades, or barrier tape when the barrier tape is attended by a spotter who is authorized to effectively restrict entry into the area and who is on the same level as the area of the exposure, or other equivalent means or methods.

A general rule of statutory and regulatory construction is that there is a “presumption that identical words used in different parts of the same act are intended to have the same meaning.” (*Gen. Dynamics Land Sys. v. Cline* (2004) 540 U.S. 581, 595, citing *Atlantic Cleaners & Dyers, Inc. v. United States* (1932) 286 U.S. 427, 433.) However, “the presumption is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent.” (*Ibid.*) Further, “[i]t is a settled rule of statutory construction that where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to

show that a different legislative intent existed with reference to the different statutes.” (*Los Angeles County Metropolitan Transp. Authority v. Alameda Produce Market, LLC* (2011) 52 Cal.4th 1100, 1108, citing *In re Jennings* (2004) 34 Cal.4th 254, 273.) Considering the foregoing, the language of section 3273, subdivisions (e) and (f), require additional consideration.

Section 3273, subdivision (f)(2), is written in the context of intentionally lowering objects in an uncontrolled manner. In that context, it requires “effective physical barriers.” “Effective physical barriers” includes canopies, fencing, barricades, barrier tape under specific circumstances, or other equivalent means or methods. The barrier tape is only permissible when it is attended by a spotter who is authorized to effectively restrict entry into the area and who is on the same level as the area of the exposure. This restriction is explained further in the regulatory history of section 3273.

Section 3273 was modified in 2003 to include the current versions of subdivisions (e) and (f). During the amendment process, the Occupational Safety and Health Standards Board (Standards Board) considered the implications of barrier tape as a physical barrier. The Final Statement of Reasons for Protection from Falling Objects, Section 3273 (FSOR), discusses the considerations regarding spotters. The Standards Board included a response to comments that gives important context to the type of physical barrier that barrier tape provides:

Comment #4:

Mr. Johnson commented that 3273(f)(2) will require a spotter during the entire roof tear-off operation and that since most employers work on a close profit margin, this would be a costly burden.

Response:

The original proposal only required a spotter when barrier tape was used to prevent access to the drop zone since the advisory committee was concerned that barrier tape alone would not be an effective barrier. The Board proposes to modify this subsection to clarify additional alternative means and methods available to secure the drop zone, including passive methods such as fencing and barricades. Spotters will only be required when barrier tape is used in general industry to demarcate the drop zone. Roofing contractors are regulated by the Construction Safety Orders and Section 1513(g) which has been removed from this rulemaking.

(*Id.* at p. 6.) This comment importantly identifies that barrier tape is considered by the Standards Board to be distinct from fencing and barricades. The Standards Board distinguishes fencing and barricades from barrier tape and characterizes the fencing and barricades as passive methods of

securing an area. A further comment from the Standards Board at the May 22, 2003, Business Meeting provides:

Comment #1:

Board Member Murray questions the 15-Day Notice of Proposed Modification which proposed deletion of references to barrier tape in Section 3273(f)(2). He had concerns about the effectiveness of barrier tape as a physical barrier unless a spotter is in attendance with its use. Board Member Arioto shared his concern and they directed staff to address the acceptable use of barrier tape as an effective physical barrier.

Response:

A second 15-Day Notice of Proposed Modification was prepared which clarifies that barrier tape, when “attended by a spotter who is authorized to effectively restrict entry into the area and who is on the same level as the area of the exposure” will be considered a method or means of providing an effective physical barrier. A spotter will only be required when barrier tape is used to restrict access. Other substantial passive means of restricting access, such as fencing and barricades, will be considered effective physical barriers without the necessity for attendance by a spotter. Staff is of the opinion that the modifications will address the cost concerns by providing means or methods that do not require an attendant, while addressing safety concerns about the use of barrier tape.

(*Id.* at p. 8.) In the foregoing comment and response, the Standards Board made it clear that fencing and barricades are effective physical barriers without a spotter, but barrier tape is only considered an effective physical barrier when attended by a spotter with the ability to restrict access to the area.

It is important to note that the context of section 3273, subdivision (e)(1)(C), is distinct from the *intentional* lowering of objects in an uncontrolled manner contemplated by subdivision (f)(2). Rather, section 3273, subdivision (e)(1)(C), applies to the hazard of *unintended* falling objects and requires “physical barriers.” This distinction continues as “physical barriers” in section 3273, subdivision (e)(1)(C), does not explicitly include barrier tape, unlike subdivision (f)(2). Given that section 3273, subdivisions (e) and (f), were amended at the same time in 2003 in the same regulatory package, the lack of similar language is important. The FSOR, at page 2, explains that public comment resulted in modification of subdivision (e) to include further clarification through subdivisions (e)(1)(A), (e)(1)(B), and (e)(1)(C). The FSOR states plainly that the purpose of the modification is “to clarify the means/methods available for protecting employees exposed to the hazards of falling objects.” (FSOR at p. 2.) Therefore, where the Standards Board took efforts in section 3273, subdivision (e)(1)(C), to clarify the means and

methods available for protecting employees, the omission of barrier tape from the regulatory language is significant.

It is apparent from the foregoing that “effective physical barriers,” does not have an identical meaning to “physical barriers” and that “physical barriers,” in section 3273, subdivision (e)(1)(C), does not include “barrier tape” as part of its definition. An “effective physical barrier” under section 3273, subdivision (f)(2), may be accomplished by passive means, such as fencing or barricade, or active means, such as barrier tape with a spotter, because it addresses the hazards associated with planned lowering of objects. However, a “physical barrier” under section 3273, subdivision (e)(1)(C), is required for the unplanned falling object hazard at a jobsite and only allows for “passive” means of control because of the unknown timing and persistent hazard of unplanned falling objects. Because of the persistent and unpredictable nature of the hazard contemplated by section 3273, subdivision (e)(1)(C), the Standards Board requires more physically restrictive means for preventing access to the dangerous area. The language of the regulation, along with the regulatory history, shows that barrier tape is not an equivalent means or method to prevent employee exposure to the hazard of falling objects. Therefore, Employer’s use of barrier tape alone was not in compliance with the regulation.

Even if barrier tape were permissible as “other equivalent means or methods,” it would be illogical to conclude that unattended barrier tape would be sufficient. As discussed above, the regulatory history and language of the regulation make it clear that barrier tape, alone, is not an effective barrier, and a spotter is required. The use of barrier tape for intended lowering carries with it the additional requirement of an attendant spotter. To accept barrier tape as permissible safeguard for unintended falling objects would require the added component of a spotter to address the concerns the Standards Board identified in the regulatory history.

Here, Employer did not have a spotter. Both Ramirez and Vazquez testified that they were unaware that Nueva Castilla was operating in the stair shaft on the day of the accident prior to the accident. Additionally, the record has no indication that Employer had a spotter present at the entrance to the taped off areas. As such, an inference is drawn that no spotter was present at the area that was taped off. Employer presented no evidence to establish otherwise. Therefore, even assuming Employer is correct that the tape used at the entrance to the stair shaft should be considered “other equivalent means or methods” for protecting against the hazard of falling objects, Employer would still not have been in compliance with the safety order because the regulatory history shows barrier tape is only sufficiently similar to barricades and fences when attended by a spotter with the ability to prevent access to the area.

The facts indicate that barrier tape was used, but it was unattended, and that no other method was employed to ensure workers did not access the stair shaft. As such, Employer did not employ any of the methods contemplated by section 3273, subdivision (e). Accordingly, the

Division met its burden of proof to establish a violation of section 3273, subdivision (e), and Citation 2 is affirmed.

3. Does the logical time defense apply to installing toeboards on the sixth floor?

In a footnote on page 15 of Employer's post-hearing brief, Employer argues that the logical time defense applies in this matter "with respect to installation of toeboards on the sixth floor." Employer asserts that "it was infeasible and impossible to install toeboards on a floor that did not exist because it had not been built yet." (Employer's Post Hearing Brief, p. 15.) However, Employer does not explain the implications of the logical time defense with regard to the other safeguards within section 3273, subdivision (e).

In *Acco Engineered Systems, Inc.*, Cal/OSHA App. 1195414, Decision After Reconsideration (Oct. 11, 2019), the Appeals Board explained that the logical time defense is an affirmative defense created by the Appeals Board where the employer bears the burden of proof and that it may be used to temporarily delay or suspend the requirements of a safety order. The Appeals Board set forth that, at minimum, an employer must establish:

- (1) compliance with the cited safety order during the cited time period will expose the employee to greater danger, or a more hazardous situation, than non-compliance; and, (2) compliance with the safety order will occur at the earliest appropriate and logical time once the greater danger has passed.

(*Acco Engineered Systems, Inc.*, *supra*, Cal/OSHA App. 1195414.)

In the instant matter, there was no showing that placing toeboards with guardrails around the stair shaft on the sixth floor would have posed a greater danger to employees. Further, toeboards were not present on the fifth floor around the stair shaft and there was no demonstration that compliance with the regulation would have exposed employees to greater danger. Even assuming that Employer met its burden to show that installing toeboards would somehow expose employees to a greater danger, section 3273, subdivision (e), is written in the disjunctive. Because of the disjunctive language, compliance with the safety order need not be accomplished through toeboards alone. Rather, an employer can comply with the safety order by using any of the methods provided in the regulation.

Therefore, to establish that the logical time defense would apply, Employer must show that each of the safeguards in the safety order would expose an employee to a greater danger than non-compliance. As discussed above, Employer did not use any of the methods referenced in section 3273, subdivision (e), at the time of the accident. Additionally, Employer did not present

evidence showing planned compliance with the safety order and how that plan was tied to the earliest appropriate and logical time after the hypothetical greater danger had passed.

Based on the foregoing, Employer failed to establish the logical time defense.

4. Did the Division establish that Citation 2 was properly classified as Serious?

Labor Code section 6432, subdivision (a),³ in relevant part states:

There shall be a rebuttable presumption that a “serious violation” exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation. The demonstration of a violation by the division is not sufficient by itself to establish that the violation is serious. The actual hazard may consist of, among other things:

[...]

- (2) The existence in the place of employment of one or more unsafe or unhealthful practices that have been adopted or are in use.

“Serious physical harm” is defined as an injury or illness occurring in the place of employment or in connection with any 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).)

³ Labor Code section 6432 was amended effective January 1, 2021. The portions discussed herein reflect the version of Labor Code section 6432 as it was in effect at the time of issuance of the citation.

The Appeals Board has defined the term “realistic possibility” to mean a prediction that is within the bounds of human reason, not pure speculation. (*Sacramento County Water Agency Department of Water Resources, supra*, Cal/OSHA App. 1237932.)

Labor Code section 6432, subdivision (g), provides:

A division safety engineer or industrial hygienist who can demonstrate, at the time of the hearing, that his or her division-mandated training is current shall be deemed competent to offer testimony to establish each element of a serious violation, and may offer evidence on the custom and practice of injury and illness prevention in the workplace that is relevant to the issue of whether the violation is a serious violation.

In the instant matter, Silva was struck by a nailer, was injured, and fell on the concrete floor below which caused further injury. The combination of the two injuries resulted in Silva’s death. Doctor James Seward (Seward) testified as an expert for the Division regarding the types of injuries that can result from falling objects. Seward testified that falling objects can cause crushing injuries, fractures, lacerations to body parts, concussions, bleeding, and death. Seward also opined that it was very possible that a person could die from an injury resulting from being hit on the head by a nailer weighing 7.9 pounds and falling approximately 30 feet. Further, McComb, Senior Safety Engineer for the Division, testified that he was current on his Division-mandated training. He testified that serious injury and death can result from falling objects.

The facts of this case demonstrate that serious physical harm was not merely a realistic possibility, but an actuality. Further, the testimony of Seward and McComb is credited, and it is found that falling objects at the construction site, which included nailers, posed a realistic possibility of serious physical harm or death. Accordingly, the Division established a rebuttable presumption that the citation was properly classified as Serious.

5. Did Employer rebut the presumption that the violation alleged in Citation 2 was Serious by demonstrating that it did not know, and could not, with the exercise of reasonable diligence, have known of the existence of the violation?

Labor Code section 6432, subdivision (c), provides that an employer may rebut the presumption that a serious violation exists 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. In order to rebut the presumption, the employer must demonstrate both:

- (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) [; and]

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

As discussed above, Employer did not comply with section 3273, subdivision (e), through any of the various methods provided in the safety order. Further, Schlosser testified that Employer put platforms over shafts on all of Employer's other jobs but did not do so on this job. Schlosser explained that Employer did not do so at the jobsite because the general contractor did not allow it. However, Employer did not demonstrate that it attempted to comply with the regulation at the time of the accident other than through barrier tape without a spotter. Based on this testimony, it is clear that Employer was aware of the hazard of falling objects and aware of methods for compliance with the regulation. It cannot be concluded that Employer took all the steps that a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation. Employer was aware of the hazard posed by falling objects, sought to address that hazard via one method, and did not employ other effective methods to address the hazard.

It is, therefore, unnecessary to consider, here, whether Employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered. As such, Employer failed to rebut the presumption of a Serious classification, and the Serious classification is properly established.

6. Did the Division establish that Citation 2 was properly characterized as Accident-Related?

In *Sacramento County Water Agency Department of Water Resources, supra*, Cal/OSHA App. 1237932, citing *RNR Construction, Inc., supra*, Cal/OSHA App. 1092600, the Appeals Board explained:

In order for a citation to be classified as accident-related, there must be a showing by the Division of a "causal nexus between the violation and the serious injury." The violation need not be the only cause of the accident, but the Division must make a "showing [that] the violation more likely than not was a cause of the injury."

(Citations omitted.)

Labor Code section 6302, subdivision (h), provides that a “serious injury” includes, among other things, any injury or illness occurring in a place of employment or in connection with any employment which requires inpatient hospitalization for other than medical observation or diagnostic testing. Section 330, subdivision (h), has a substantially similar definition.

In the instant matter, Silva suffered a serious injury. Silva was struck by a nailer, a falling object, was injured in a manner that caused him to fall, resulting in further injury, and ultimately the combination of the two injuries resulted in his death. The lack of protection from falling objects directly lead to events that resulted in Silva’s death. That is sufficient to support the existence of a causal nexus between the violation and the serious injury. Accordingly, the citation is properly characterized as Accident-Related.

7. Is the proposed penalty for Citation 2 reasonable?

The Appeals Board addressed penalty calculations thoroughly in *Hampton Tedder Electric*, Cal/OSHA App. 1233597, Decision After Reconsideration (Oct. 30, 2024) (*Hampton Tedder Electric*). In that matter, the Appeals Board explained:

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).) However, the Board has repeatedly noted that “while there is a presumption of reasonableness to the penalties proposed by the Division in accordance with the Director’s regulations, the presumption does not immunize the Division’s proposal from effective review by the Board...” (*Plantel Nurseries*, *supra*, Cal/OSHA App. 01-2346, quoting *DPS Plastering, Inc.*, Cal/OSHA App. 00-3865, Decision After Reconsideration (Nov. 17, 2003).) The Division must still demonstrate that it, in fact, calculated penalties in accordance with the penalty-setting regulations. (*Plantel Nurseries*, *supra*, Cal/OSHA App. 01-2346, Decision After Reconsideration (Jan. 8, 2004); *RII Plastering, Inc.*, Cal/OSHA App. 00-4250, Decision After Reconsideration (Oct. 21, 2003).) The Board does not simply rubber stamp the Division’s penalty calculations. Rather we must engage in a critical review of all the relevant evidence to ensure that the Division’s actions are supported by the law. We have also held that maximum credits and the minimum penalty allowed under the regulations are to be assessed when the Division fails to demonstrate its proposed penalty is properly calculated by a preponderance of the evidence. (*Armour Steel Co.*, Cal/OSHA App. 08-2649, Decision After Reconsideration (Feb. 7, 2014); *Plantel Nurseries*, *supra*, Cal/OSHA App. 01-2346.)

(*Id.*) In *Hampton Tedder Electric*, the Appeals Board considered a record where the Division’s inspector was “the sole witness to offer testimony explaining how the Division arrived at its penalty calculations.” (*Id.*) The Appeals Board found that the inspector’s testimony did not demonstrate that the Division calculated all penalties in compliance with the penalty-setting regulations. (*Id.*) Further, the Appeals Board expressed a concern with merely accepting the inspector’s testimony and penalty calculations without engaging in meaningful analysis. (*Id.*)

In the instant matter, the Division submitted the proposed penalty worksheet, Exhibit 2, and offered the testimony of McComb in support of its penalty calculations. Therefore, to determine whether the testimony supports the penalty calculations, it is necessary to engage in analysis of the regulation in accordance with *Hampton Tedder Electric*.

The Base Penalty for Citation 2, as a Serious violation, is initially set at \$18,000 and thereafter adjusted based on the Extent and Likelihood. (§ 336, subd. (c).)

Turning to Extent, section 335, subdivision (a), provides in part:

[...]

(2) Extent.

[...]

ii. 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.

At hearing, McComb explained his understanding of Extent as follows: “Extent is the extent of the violation. For example, if there is ten machines, one is in violation and nine aren’t, that would be 10 percent; so you might look at that as low.” Regarding Citation 2, McComb

testified that the Extent was “one of one, which was 100 percent; so that was determined to be high.” McComb expanded on his explanation to state he meant it was “[o]ne incident of an object falling from a height. In this case there as one instance of it and there was no other instances; so it was one of one.”

Although McComb testified that there was a single instance of an object falling, McComb did not quantify the number of violations of the regulation present at the jobsite. Testimony from Schlosser and Ramirez established that there were at least two stair shafts at the jobsite. However, the record does not set forth whether there were any violations of the cited regulation at the other stair shaft in connection with Employer. Further, Exhibit 31 depicts a side view of the building and Employer was undisputedly working on the fifth and sixth floor of the jobsite. However, it is not clear whether the various locations depicted in Exhibit 31, as well as the other locations not depicted in the photograph, all represent violations of the cited regulation. Given the multiple areas at the jobsite that would appear to involve the application of the regulation and the more narrowed focus of the evidence at hearing, the evidence is not sufficient to support the conclusion that the regulation was violated at all relevant locations. It is unclear how many other locations violated section 3273, subdivision (e), other than the stair shaft that was the focus of the Division’s investigation. Therefore, the Division did not meet its burden of proof to establish that Extent was properly determined to be High.

Next, Likelihood must be considered. Section 335, subdivision (a), provides in part:

[...]
(3) Likelihood.

Likelihood is the probability that injury, illness or disease will occur as a result of the violation. Thus, Likelihood is based on (i) the number of employees exposed to the hazard created by the violation, and (ii) the extent to which the violation has in the past resulted in injury, illness or disease to the employees of the firm and/or industry in general, as shown by experience, available statistics or records. Depending on the above two criteria, Likelihood is rated as:

LOW, MODERATE OR HIGH

McComb testified that Likelihood was rated as High. McComb explained that it is a case-by-case determination and that, in this case, he determined it was High. McComb believed five employees were exposed to the hazard, but he did not provide details about the extent to which the violation has resulted in injury to the employees of Employer or the industry in general as shown by experience, available statistics, or records. As such, the Division did not present evidence as to how the number of employees exposed to the actual hazard created by the

violation affected the Likelihood in contemplation of the extent to which the violation has in the past resulted in injury, illness, or disease to employees of Employer and/or the industry in general. Accordingly, the Division did not meet its burden of proof to establish that Likelihood was properly determined to be High.

As noted above, it is necessary to award an employer the maximum credits and the minimum penalty allowed under the regulations when the Division fails to justify its proposed penalty. (*Armour Steel Co.*, *supra*, Cal/OSHA App. 08-2649; *Plantel Nurseries*, *supra*, Cal/OSHA App. 01-2346.) However, section 336, subdivisions (c)(2) and (d)(7), limits reduction of the Base Penalty in cases where the violation caused death or serious injury, illness, or exposure as defined in Labor Code section 6302. More specifically, a reduction of the Base Penalty is only permitted for Size.

Here, the Division failed to establish Extent or Likelihood were properly determined to be High. However, as discussed above, the violation in Citation 2 had a causal nexus to the death of Silva. As the Division did not demonstrate it was appropriate to increase the Base Penalty on the basis of Extent and Likelihood, the Gravity-based Penalty remains at \$18,000, but it is not reduced further because the citation was properly characterized as Accident-Related.

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

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

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

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

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

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

McComb provided un rebutted testimony that he was informed by Employer that Employer had more than 100 employees. As such, no adjustment was warranted for Size on Citation 2.

Pursuant to the foregoing, the resulting penalty for Citation 2 is \$18,000.

Conclusion

The evidence does not support a finding that Employer violated section 1704, subdivision (b)(2), by failing to ensure pneumatically-driven nailers and staplers were operated and maintained in accordance with the manufacturer's operating and safety instructions.

The evidence supports a finding that Employer violated section 3273, subdivision (e), because Employer did not implement any of the safeguards contemplated by the safety order at the stair shaft where the accident occurred. The violation was properly classified as Serious and properly characterized as Accident-Related. The penalty, as amended herein, is reasonable.

Order

It is hereby ordered that Citation 1 is dismissed, and the associated penalty is vacated.

It is hereby ordered that Citation 2 is affirmed, and the associated penalty is affirmed and assessed as set forth in the attached Summary Table.

Dated: 07/16/2025

/s/ Christopher Jessup

Christopher Jessup
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.**

If no petition is filed, the penalty amount set forth in the Summary Table is due and payable 30 days after the Order or Decision is issued. If the Appeals Board approved a payment plan, all payments are due in accordance with the dates indicated in the Summary Table. If a Petition for Reconsideration is filed, no payment should be made until the final outcome of the appeal.