

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

MF MILLER COATINGS, INC
257 Cheyenne Lane
Auburn, CA 95603

Employer

DOCKETS 12-R2D1-3488
and 3489

DECISION

Statement of the Case

MF Miller Coatings, Inc (Employer) is a painting contractor. Beginning May 27, 2012, the Division of Occupational Safety and Health (the Division), through Safety Engineer Technician Leah Reed, conducted a safety inspection at a place of employment maintained by Employer at 1957 Rockwood Drive, Sacramento, California. On November 2, 2012, the Division cited Employer for violations of Title 8, California Code of Regulations, §3276(e)(15)(E)¹, failure to ensure that employee not stand on the step below the topcap of a step ladder; and § 1670(a), failure to ensure the use of personal fall arrest, personal fall restraint, or positioning system.²

Employer filed timely appeals of the citations, contesting the existence of the violations, the classifications of the violations, and the reasonableness of the proposed penalties. Employer also asserted the affirmative defense of independent employee action on both citations.

This matter was heard by Kevin J. Reedy, Administrative Law Judge for the California Occupational Safety and Health Appeals Board, at Sacramento, California on February 10, 2014. Mark Kasel, safety consultant, represented Employer. Jon Weiss, District Manager, represented the Division. Marc G Marcus, Attorney at Law, represented injured worker Kert Lackey. The parties presented oral and documentary evidence. The matter was submitted for decision on February 10, 2014. The submission date was extended to June 30, 2014 by the Administrative Law Judge.

¹ At the commencement of the hearing the Division moved to amend Citation 1, Item 1, from a violation of §3276(e)(15)(A) to a violation of §3276(e)(15)(E), to correct a clerical error. Without objection, good cause was found, and the citation was so amended.

² Unless otherwise specified, all references are to Sections of Title 8, California Code of Regulations.

The parties, in relevant parts, provided the following factual stipulations (Exhibit 3):

- 1) An accident took place on May 4, 2012.
- 2) MF Miller Coatings, Inc was the employer of the injured employee at the time of the accident.
- 3) The accident site was located at 1957 Rockwood Drive in Sacramento, California.
- 4) Kert Lackey (Lackey), the injured employee, sustained a serious injury as defined by §330(h) and Labor Code §6432(e) as a result of the accident.
- 5) Lackey's position at the time of the accident was that of a painter.
- 6) The penalties associated with Citation 1, Item 1, and Citation 2, Item 1, were calculated in accordance with the Division's policies and procedures.

Issues

1. Did Employer fail to ensure that its employee did not stand on the step below the topcap of a step ladder?
2. Did Employer fail to ensure that its employee used fall protection when working at a height in excess of seven and one-half feet?
3. Did Employer provide evidence sufficient to establish the Independent Employee Action Defense (IEAD) in either citation?
4. Was there a realistic possibility that a serious injury could occur as a result of Employer's failure to ensure that its employee used fall protection when working at a height in excess of seven and one-half feet?
5. Did the Division provide sufficient evidence to prove the accident-related characterization of the alleged violation in Citation 2?
6. Is the proposed penalty for Citation 2 reasonable?

Findings of Fact

1. Employer failed to ensure that its employee did not stand on the step below the topcap of a step ladder.
2. Employer failed to ensure that its employee used fall protection when working at a height in excess of seven and one-half feet, thus exposing its employee to the hazard of falling.
3. Employer failed to provide evidence sufficient to establish the IEAD in either citation.

4. There was a realistic possibility that a serious injury could occur as a result of Employer's failure to ensure the use of fall protection by its employee when working at a height in excess of seven and one-half feet.
5. The Division failed to establish a nexus between the violation alleged in Citation 2 and the injury sustained by the employee. Therefore, the accident-related characterization of the violation cannot be sustained and the penalty must be recalculated.

Analysis

1. Employer failed to ensure that its employee did not use the step below the topcap of the ladder to access the top of the shade structure. The violation of §3672(e)(15)(E) is established.

Section 3672(e)(15)(E), under "Portable Ladders," provides the following:

Employees shall not sit, kneel, step or stand on the pail shelf, topcap or the step below the topcap of a step ladder.

In the citation, the Division alleges the following:

On May 4, 2012 an employee of MF Miller Coatings, Inc working at a jobsite located at 1957 Rockwood Dr. in Sacramento was utilizing a step ladder to access a shade structure approximately 9' high. In order to reach the structure, the employee needed to use the step just below the topcap of the ladder.

The elements of the violation are: (1) an employee stepped on (2) the step below the topcap of a ladder.

All the relevant events involved the painting of a "shade structure" adjacent to a home.³ The structure consisted of three support columns, two support beams, and approximately 20 rafters set approximately one foot apart, with open areas between them, with approximately 20 end caps affixed to the outside of the outer support beam. It was approximately nine and one-half feet high, ten feet wide, and 25 feet long (Exhibit 4). Kert Lackey (Lackey), the injured employee, testified that he used an eight foot ladder to get to the top of the shade structure, so that he could paint portions of it. Lackey positioned the ladder at one end of the shade structure before climbing the ladder (Exhibit 4, item X). During the climb, Lackey stood on the step below the topcap of the ladder to gain access to the top of that structure (Exhibit 4, item Y). Employer offered no evidence to rebut this. There was sufficient evidence to demonstrate

³ A shade structure, by design, provides some shelter from direct sunlight, for the purpose of creating a cool living space under the structure, and if attached to a building, may also provide additional insulation from the effects of direct sunlight upon that building.

that Lackey did stand on the step just below the topcap of the ladder. Therefore, the Division established a violation of §3276(e)(15)(E) by a preponderance of the evidence.

Employer contested the general classification of the violation. In order to establish a general violation, the Division need only show that the safety order was violated and that the violation has a relationship to occupational safety and health of employees. (*California Dairies, Inc.*, Cal/OSHA App. 07-2080, Denial of Decision After Reconsideration (June 25, 2009), citing *A. Teichert & Sons, Inc.*, Cal/OSHA App. 97-2733, Decision After Reconsideration (Dec. 11, 1998). The improper use of a ladder, as is the case here, has a direct relationship to employee safety. The parties stipulated that the penalty was calculated in accordance with the Division's policies and procedures. The \$260 penalty is therefore sustained.

2. Employer failed to ensure that its employee used fall protection when working at a height in excess of seven and one-half feet, thus exposing its employee to the hazard of falling. The violation of §1670(a) is established.

Section 1670(a), under "Personal Fall Arrest Systems, Personal Fall Restraint Systems and Positioning Devices," provides the following:

Approved personal fall arrest, personal fall restraint or positioning systems shall be worn by those employees whose work exposes them to falling in excess of 7 1/2 feet from the perimeter of a structure, unprotected sides and edges, leading edges,

In the citation, the Division alleges the following:

On May 4, 2012, an employee of MF Miller Coatings, Inc working at a jobsite located at 1957 Rockwood Dr in Sacramento was exposed to a height in excess of 7 1/2 feet from the perimeter of a structure, unprotected sides and edges, and/or leading edges and was not wearing approved fall arrest, personal fall restraint or positioning systems, resulting in an accident-related serious injury.

The elements of the violation are: (1) an employee was working in a location at the perimeter or unprotected side or edge of a structure (2) in that position he was exposed to a fall of more than 7 1/2 feet and (3) the employee was not wearing fall arrest or fall restraint or a positioning system.

This citation involves Lackey's activities after he gained access to the top of the shade structure. Lackey testified that for some period of time after lunch, he was on top of the shade structure while painting it, that he was in conversation with Mark Miller (Miller), his employer, the entire time he was on top of the structure, and that Miller was aware of his presence on the top of the structure. Lackey testified that he was not instructed by Employer to not paint

from the top of the structure. Lackey testified that he needed to be on top of the shade structure in order to see on top of the structure, and that it was necessary to work from the top of the structure to paint areas which were not accessible from under the structure. Lackey testified that he was “cutting in”⁴ near the edge of the top of the structure with his knees perched on a cross beam. Lackey testified that he was working near the perimeter of the top of the shade structure while wearing no personal fall protection equipment. There were no guard rails provided by Employer on the top edges of the structure. Lackey was not aware of any safety equipment available to him. Miller testified that there was no fall protection available at the job site. Lackey testified that he painted the top of the shade structure, in the same manner as he had already painted a different shade structure on the same property.

Miller and Lackey gave inconsistent testimony about which of the two men carried out the different painting tasks on the top of the structure: the rafters were to be painted by roller and, in addition, by brush, in a “cutting in” process to cover areas not easily reached by a roller. It is not necessary to consider that inconsistent evidence in detail, as Miller did not deny that for some period of time during the afternoon, Lackey was painting while kneeling and moving along the rafters.

The evidence is sufficient to show that Lackey was, at some point, on top of the structure cutting in. Additionally, as already established in Citation 1, Item 1, Lackey stepped onto the roof from a ladder, placing him at a height of nine and one half feet. As a result, Employer exposed Lackey to the hazard of falling from a height in excess of seven and one-half feet.

The Division presented sufficient evidence to demonstrate, as the citation alleged, that Lackey had been working on top of the shade structure at a height in excess of seven and one-half feet, while using no personal fall protection, and without the benefit of protected edges. Employer did not rebut this evidence. Therefore, the Division established a violation of § 1670(a) by a preponderance of the evidence.

3. Employer failed to provide evidence sufficient to establish the IEAD in either citation.

The Independent Employee Action Defense has five elements, which if proved by an employer, excuses the violation and results in employer’s appeal being granted. (Mercury Service, Inc., Cal/OSHA App. 77-1133, Decision After Reconsideration, (October 16, 1980)) Employer must prove: (1) that the employee who caused the violation was experienced in the job being performed; (2) that the employer had a well-devised safety program which includes training employees in matters of safety respective to their job assignments; (3) that the employer effectively enforces the safety program; (4) that the employer has a policy of sanctions against employees who violate the safety program; and (5)

⁴ “Cutting in” refers to using a paint brush to paint areas that are too tight for rollers.

that the employee caused a safety infraction which he or she knew was contrary to employer's safety requirements.

The evidence shows that Lackey has been painting houses for Employer for 10 years, and it therefore supports a finding for Employer on the first element of the defense.

The second element of the IEAD is that the employer had a well-devised safety program which includes training employees in matters of safety respective to their job assignments. Employer provided no evidence regarding its safety program, nor did it produce any documentation of training provided to Lackey. Employer, therefore, failed to prove the second element of the IEAD.

Detailed analyses of elements three, four, and five are not required as it has already been demonstrated that Employer did not prove element two which is necessary to meet its burden of proof to establish an Independent Employee Action Defense. (Mercury Service, Inc., supra.) Therefore, Employer may not avail itself of this affirmative defense in either citation.

4. There was a realistic possibility that a serious injury could occur as a result of Employer's failure to ensure the use of fall protection by its employee when working at a height in excess of seven and one-half feet.

The Division presented sufficient evidence to prove the Serious classification of the violation. The legal standard is expressed in Labor Code §6432, subdivision (a) which 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 measurement from the top of the shade structure to the patio below was nine and one-half feet. As previously indicated, the record supports a finding that Lackey had been on top of the structure without fall protection, and without the benefit of guarded edges. Miller testified that Lackey fell from a ladder. Lackey testified that he fell from the top of the structure, although he does not remember falling. Lackey testified that he was on top of the structure, kneeling on a cross beam near the edge, with his left hand on an end cap (Exhibit 5, item X), while painting with his right hand, and with a can of paint resting on the cross beam. Lackey has no memory of the end cap breaking off, and no memory of the fall.

Weiss testified that even a five foot fall to a hard surface could result in a serious injury. Employer offered no evidence to the contrary. The parties stipulated that Lackey sustained a serious injury pursuant to §330(h). A fall from the top of the shade structure would have been from a height of nine and

one-half feet. Wherever Lackey was standing, he was painting at or near the top of the structure. Even if Lackey fell from a height lower than the top of the shade structure the Division nevertheless demonstrated a realistic possibility of serious injury as the result of the fall that Lackey took.

The Serious classification of the citation is established.

5. The Division failed to establish a nexus between the violation and injury sustained by the employee in Citation 2, and therefore, the accident-related characterization of the violation cannot be sustained.

"To establish the characterization of the violation as accident-related, the Division must show by a preponderance of the evidence a causal nexus between the violation and the serious injury." (*Pierce Enterprises*, Cal/OSHA App. 00-1951, Decision After Reconsideration (Mar. 20, 2002) citing to *Obayashi Corporation*, Cal/OSHA App. 98-3674, Decision After Reconsideration (June 5, 2001). In order for the penalty reduction limitations of Labor Code §6319(d) to apply to the civil penalty as proposed, the Division must prove that a serious violation caused a serious injury. (*Southwest Engineering, Inc.*, Cal/OSHA App. 91-1366, Decision After Reconsideration (July 6, 1993).)

Lackey testified that he fell from the top of the structure, although he does not remember falling. Lackey testified that he was on top of the structure, kneeling on a cross beam near the edge, with his left hand on an end cap (Exhibit 5, item X), while painting with his right hand, and with a can of paint resting on the cross beam. Lackey has no memory of the end cap breaking off, and no memory of the fall.

Miller testified that, at the time of the fall, Lackey was painting while standing three or four rungs up on the eight foot ladder, with a brush in one hand and a can of paint in the other hand. Miller was facing away from Lackey when he heard a scuffle, a ladder falling, and paint hitting the concrete. He turned around and first saw paint on the concrete, and then saw Lackey and the ladder on the ground, as later staged in Exhibit C. The "X" on Exhibit C depicts the position of Lackey after the fall.

Lackey testified that he climbed a ladder to the top of the structure at the left end of the structure, at a position marked as item X on Exhibit 4, in order to gain access to the top of the structure, where he could begin painting. Employer did not rebut this testimony. Lackey testified that the ladder was still at position "X" at the time of his fall. The position of the ladder before the fall, according to Lackey, and the position of the ladder after the fall, according to Miller, cannot be reconciled. The only testimony presented regarding the position of the ladder after the fall is that of Miller, who placed the fallen ladder under the shade structure, next to an unconscious Lackey, several feet from the location where Lackey placed the ladder at the time of the fall (Exhibit 4, item X).

The parties agree that Lackey fell from a position somewhere in close proximity to the end cap that broke off. Exhibit E (a photograph taken from beneath the outer support beam of the shade structure) depicts six end caps. In that exhibit, Miller's hand is resting on the fifth end cap from the right on the structure. That end cap, according to Lackey, appears to have been repaired, using caulk and paint, although Lackey could not be certain that the fifth end cap is the one which broke off during his fall. Lackey testified that he was on top of the structure at a point identified as item "Z" on Exhibit 4, near the perimeter of the top of the structure, at the time he fell. Miller maintained that Lackey fell from a ladder near the fifth end cap, in that same general area. Falling from either the position marked "Z" in Exhibit 4, or from a place near the fifth end cap, would have placed Lackey at the right end of the shade structure, far away from the position where Lackey's testimony placed the ladder at the time of the fall.

Employer's version of the fall, when considering all the evidence, is more plausible. A preponderance of the evidence establishes that Lackey was working on the ladder, and not the top of the shade structure, when he fell. About one minute prior to the fall, Miller saw Lackey painting while standing on the third or fourth rung of the ladder. Miller heard sounds associated with Lackey's fall, and immediately after the fall, turned around and saw Lackey under the right end of the shade structure, near the fallen ladder.

The Division failed to demonstrate that Lackey fell from a height in excess of seven and one-half feet, and therefore failed to establish a causal nexus between the violation and Lackey's injuries, and as such, the Division failed to prove that the violation of §1670(a) was the cause of Lackey's serious injuries.

6. Because the Division failed to establish that the injury sustained by employee in Citation 2 was accident-related, the penalty must be recalculated pursuant to regulation section 336.

Removal of the accident-related characterization allows for a reduction of the proposed penalty. All Serious violations begin with a proposed penalty of \$18,000. (§336(c)(1)) The Division did not provide testimony regarding extent and likelihood (§336(c)(1), and as such, a 25% reduction for extent, and a 25% reduction for likelihood shall be included in the calculation, which affords Employer the maximum downward adjustment allowable. When the Division presents no evidence to prove a disputed penalty, Employer is entitled to maximum credits and adjustments under DOSH's penalty setting regulations. *Puritan Ice Company*, Cal/OSHA App. 01-3893, DAR (Dec. 4, 2003), citing *RII Plastering, Inc.*, Cal/OSHA App. 00-4250, DAR (Oct. 21, 2003). The gravity-based penalty is established at \$9,000.

Pursuant to stipulation of the parties the penalties associated with citations were calculated in accordance with the Division's policies and

procedures. As such, reductions for size (§336(d)(1), good faith (§336(d)(2), and history (§336(d)(3) will be calculated using the same percentages as were applied in Citation 1, Item 1. Therefore, the gravity-based penalty will be reduced by 40% for size, 15% for good faith, and 10% for history, resulting in an adjusted penalty of \$3,150. Regulation §336(e) creates a presumption that an employer will correct a serious or general violation by the abatement date, and therefore the penalty is reduced 50 per cent. Therefore, a penalty of \$1,575 is found reasonable and is assessed.

Conclusions

In Citation 1 the evidence supports a finding that Employer violated §3672(e)(15)(E) by failing to ensure that its employee did not stand on the step below the topcap of a step ladder, which exposed its employees to hazards §3672(e)(15)(E) was designed to address. A penalty of \$260 is assessed for Citation 1.

In Citation 2 the evidence supports a finding that Employer violated §1670(a) by failing to ensure that its employee used fall protection when working at a height in excess of seven and one-half feet. The Serious classification is supported by the evidence and is upheld. The Division was unable to establish the accident-related characterization of the violation. Accordingly, that penalty is adjusted downward and is assessed at \$1,575.

ORDER

Citation 1 is sustained and a penalty of \$260 is assessed for that violation. Citation 2 is sustained, as modified, and a penalty of \$1,575 is assessed for that violation. Therefore, total penalties of \$1,835 are assessed for the reasons described herein, and as set forth in the attached Summary Table.

Dated: July 10, 2014
KJR:kav

KEVIN J. REEDY
Administrative Law Judge

APPENDIX A

SUMMARY OF EVIDENTIARY RECORD

MF MILLER COATINGS, INC

DOCKETS 12-R2D1-3488 and 3489

Date of Hearing – February 20, 2014

Division's Exhibits – Admitted

Exhibit Number	Exhibit Description
1.	Jurisdictional documents
2.	Penalty Calculation Worksheet
3.	Stipulations of Parties
4.	Photo of shade structure
5.	Photo of shade structure end cap

Employer's Exhibits – Admitted

A.	Letter from Shannon Coy, dated May 8, 2013 ⁵
B.	Employer's Report of Occupational Injury ⁶
C.	Photo of patio surface below shade structure
D.	Photo of Mark Miller standing on ladder
E.	Photo of Mark Miller with hand on end cap

Witnesses Testifying at Hearing

1. Kert Lackey
2. Leah Reed
3. Mark Miller

⁵ Admitted into evidence over the objection (hearsay) of both the Division and Third Party; ultimately, no weight was given to the contents of this exhibit in formulating this Decision.

⁶ Admitted into evidence over the objection (hearsay, lack of foundation) of both the Division and Third Party; ultimately, no weight was given to the contents of this exhibit in formulating this Decision.

CERTIFICATION OF RECORDING

I, Kevin J. Reedy, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hearing the above-entitled matter, hereby certify the proceedings therein were electronically recorded. The recording was monitored by the undersigned and constitutes the official record of said proceedings. To the best of my knowledge the electronic recording equipment was functioning normally.

Signature

Date

SUMMARY TABLE

DECISION

<i>In the Matter of the Appeal of:</i> MF MILLER COATINGS, INC DOCKETS 12-R2D1-3488 and 3489					ABBREVIATION KEY: Reg=Regulatory G=General S=Serious ER=Employer DOSH=Division W=Willful R=Repeat 					
IMIS No. 316515162										
DOCKET NO.	CIT. NO.	ITEM NO.	SECTION NO.	TYPE	MODIFICATION OR WITHDRAWAL	A F F I R M	V A C A T E	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT HEARING	FINAL PENALTY ASSESSED BY BOARD
12-R2D1-3488	1	1	3276(e)(15)(A)	G	ALJ affirmed violation.	X		\$260	\$260	\$260
12-R2D1-3489	2	1	1670(a)	S	ALJ affirmed violation, but removed accident-related characterization.	X		\$10,800	\$1,575	\$1,575
						Sub-Total		\$11,060	\$1,835	\$1,835
						Total Due				\$1,835
NOTE: <i>Please do NOT send payments to the Appeals Board.</i> All penalty payments must be made to:						(INCLUDES APPEALD CITATIONS ONLY)				
Accounting Office (OSH) Department of Industrial Relations P.O. Box 420603 San Francisco, CA 94142						*You will owe more than this amount if you did not appeal one or more citations or items containing penalties. Please call (415) 703-4291 if you have questions				

ALJ: KR
POS: 07/10/14