

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

EKEDAL CONCRETE, INC.
220 Newport Center Drive, #11-288
Newport Beach, CA 92660

Employer
Employer

DOCKETS 13-R3D1-0131
through 0133

DECISION

STATEMENT OF THE CASE

On July 17, 2012, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer (ASE) Brandon Hart (Hart) conducted an accident inspection at a place of employment maintained by Employer at 6400 Ocean Front, Newport Beach, California (the site). On December 26, 2012, the Division cited Employer for the following alleged violations of the occupational safety and health standards and orders found in Title 8, California Code of Regulations¹: Citation 1, Item 1, for failure to report a serious injury that occurred to one of Employer's employees; Citation 1, Item 2, for failure to implement and maintain a written Injury and Illness Prevention Program; Citation 1, Item 3, for failure to ensure oxygen cylinders in storage were separated from fuel gas cylinders; Citation 2, Item 1, for willful failure to ensure that employees working at grade or at the same surfaces exposed to protruding steel anchor bolts were protected against the hazard of impalement; and Citation 3, Item 1, for willful failure to ensure that portable step ladders were not used as single ladders or in a partially closed position.

The Employer filed an appeal contesting the violation of the safety orders and the classification and the reasonableness of the proposed penalties. Employer plead affirmative defenses as indicated in Employer's Appeal filed with the Occupational Safety and Health Appeals Board (See Exhibit 1)

¹ Unless otherwise specified, all references are to Sections of Title 8, California Code of Regulations.

The matter came on regularly for hearing before Clara Hill-Williams, administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at West Covina, California on January 22, 2014 and January 23, 2014. Employer was represented by Attorney Kevin McCann. The Division was represented by District Manager, Richard Fazlollahi. The parties presented oral and documentary evidence which is listed in the certification of the record². The ALJ extended the submission date to March 31, 2015.

ISSUES

1. Did the Employer fail to report a serious injury that occurred on June 27, 2012 to the nearest Division Office or was Employer's call on June 29, 2012 a late report?
2. Did Employer fail to implement and maintain a written Injury and Illness Prevention Program by not following Employer's written procedures for conducting an accident investigation when an employee sustained a serious injury?
3. Whether Employer failed to ensure oxygen cylinders in storage were separated from fuel gas cylinders by a minimum 20 feet or by a non-combustible barrier at least five feet high on and prior to July 17, 2012?
4. On July 17, 2012, did Employer willfully fail to ensure employees working at grade or at the same surface as exposed protruding steel anchor bolts located less than six feet above the working surface were protected against the hazard of impalement?
5. Did Employer repeat an earlier affirmed violation that occurred on June 15, 2010, in failing to ensure employees working at grade or at the same surface as exposed protruding steel anchor bolts located less than six feet above the working surface were protected against the hazard of impalement?
6. On June 27, 2012, did Employer willfully fail to ensure portable step ladders were not used as single ladders in a partially closed position?

FINDINGS OF FACT

1. Employee, Ascension Castro (Castro) fractured his left femur, left ankle and sustained injuries to his lower back when he fell off an "A-frame" portable step ladder at the work site on June 27, 2012.
2. Castro was hospitalized for five days as a result of the injuries he sustained on June 27, 2012.
3. Pete Ekedal, Employer's superintendent was present when Castro fell off the ladder on June 27, 2012 and was aware of Castro's serious injuries on June 27, 2012 but did not report Castro's serious injuries to the Division until June 29, 2012³.

³ The Parties stipulated that June 29, 2012 was Employer's first call to the Division to report Castro's serious injuries.

4. The Division received Employer's Injury Illness Prevention Plan which contained its accident investigation procedures but the Division did not receive an accident investigation report form from Employer; instead the Division received hand written notes and a written statement from the injured employee explaining how the accident occurred.
5. On July 17, 2012⁴, Hart observed oxygen cylinders stored together with gas cylinders at the work site.
6. On July 17, 2012, Hart observed protruding steel rebar and anchor bolts at the work site.
7. On May 31, 2011, Administrative Law Judge Dale A. Raymond issued an Order and Summary Table that affirmed Employer's violation of section 1712 subdivision (c)(1) on June 15, 2010.

ANALYSIS

1. Employer failed to timely report a serious injury that occurred to Employee, Ascensio Castro, on June 27, 2012, to the nearest Division Office within eight hours but made a late report on June 29, 2012.

Employer was required to immediately report a serious injury that occurred at Employer's work site. Section 342(a) provides:

Every employer shall report immediately by telephone or telegraph to the nearest District Office of the Division of Occupational Safety and Health any serious injury or illness, or death, of an employee occurring in a place of employment or in connection with any employment.

Immediately means as soon as practically possible but not longer than 8 hours after the employer knows or with diligent inquiry would have known of the death or serious injury or illness. If the employer can demonstrate that exigent circumstances exist, the time frame for the report may be made no longer than 24 hours after the incident.

A serious injury or illness is defined in subsection (h) of section 330, which states in pertinent part, that a serious illness "occurring in a place of employment or in connection with any employment which requires inpatient hospitalization for a period in excess of 24 hours for other than medical observation[.]"

⁴ July 17, 2012 was the day Associate Safety Engineer began his investigation regarding the serious injury that occurred at Employer's work site on June 27, 2012.

In citing Employer, the Division specifically alleged: “The employer failed to report the serious injury that occurred to one of their employees on June 27, 2012, to the nearest Office of the Division of Occupational Safety and Health. The superintendent learned of the hospitalization on June 27, 2012 and never reported it to the Division.”

In *Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (April 24, 2003), the Appeals Board stated the purpose of the reporting requirement is to allow the Division to quickly respond to injuries or illnesses occurring on the job. The Board has long noted that the purpose of requiring a rapid response is necessary to inspect potentially dangerous conditions close to the time of the accident or illness and to examine any equipment that may have caused an injury or illness. (*Alpha Beta Company*, Cal/OSHA App. 77-853, Decision After Reconsideration (Nov. 2, 1979).) Employer had actual knowledge of Castro’s accident because Pete Ekedal, Castro’s superintendent directed another employee to pass tools to Castro who was on a ladder in a trench. Since Ekedal was at the accident scene, he was aware that Castro possibly sustained serious injuries from falling off the ladder, and was required to report the injury to the Division within eight hours and no more than 24 hours.

An accident occurred at Employer’s place of business on June 27, 2012. The Newport Beach Fire Department reported the accident to the Division on June 27th at 6:08 p.m. The accident should have been reported by Employer within eight hours after Castro’s accident resulted in a serious injury or within 24 hours if there were exigent circumstances. Once Castro was hospitalized on June 27, 2012, Employer had a duty to inquire regarding the nature of his treatment and whether the hospitalization was related to the fall Castro sustained at the work site. Castro remained hospitalized for a total of five days. Employer did not report the serious injury to the Division until June 29th at 10:40 a.m. At the Hearing Employer did not present any reason why a report was not filed with the Division until June 29, 2012, more than eight hours after Employer knew of the serious injury and after Castro was admitted into the hospital.

ASE Hart testified that Employer was cited for failing to report the serious injury to the Division. He asserted that the Division called Employer upon receipt of the report from the Fire Department and thereafter Employer returned the call. However, there is no documentation as to when the Division made the call to Employer, whether it was before or after Employer called. Thus, Employer’s call to the Division on June 29th is a late report, not a failure to report violation.

The Board’s recent holding regarding late reporting is applicable to modify the penalty for Employer’s late report. In *Central Valley Engineering & Asphalt*, Cal/OSHA App. 08-5001, Decision After Reconsideration (Dec. 4,

2012) and *SDUSD-Patrick Henry High School*, Cal/OSHA App. 11-1196, Decision After Reconsideration (Dec. 4, 2012) the Board determined that Labor Code section 6409.1(b) allows for modification to the proposed \$5,000 gravity based penalty, for factors of size, history and good faith in a case of late reporting.

Here, Hart completed a penalty work sheet (See Exhibit 11) according to the Division's policies and procedures and Title 8 regulations. Pursuant to *Central Valley Engineering & Asphalt, supra*, Hart's initial calculation of the penalties showed Employer did not have a prior history of citations. The amended "repeat classification" revealed Employer had a prior violation less than three years before the present violation (See Exhibit 4). However the 2010 violation was sustained as a general violation, which does not reduce Employer's credit history resulting in a 10 percent history credit. Employer was given a size credit of 30 percent. Hart rated the good faith of this Employer at 15 percent. Calculating the history, size and good faith credits allows a 55 percent (\$2,750) deduction from the gravity based penalty of \$5,000, resulting in a penalty assessment of \$2,250 for Citation 1, Item 1.

In conclusion, Employer did not timely report Castro's serious injuries on June 27, 2012. Employer's late report on July 19, 2012, results in an assessed penalty of \$2,250.

2. The Division failed to establish that Employer did not have a written procedure and failed to follow its procedures for conducting an accident investigation when Employer's employee sustained a serious injury.

Employer was cited for failure to implement and maintain a written Injury and Illness Prevention program and for not having a procedure to investigate an occupational injury or illness.

Section 1509, Injury and Illness Prevention Program provides:

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

Section 3203 Injury and Illness Prevention provides:

- (a) Every employer shall establish, implement and maintain an effective injury and Illness Prevention Program. The Program shall be in writing and, shall, at a minimum:

(5) Include a procedure to investigate occupational injury or occupational illness.

The Division alleged:

The employer failed to implement and maintain its written Injury and Illness Prevention Program, in that, they failed to follow their own written procedures for conducting accident investigations when a serious injury occurred to one of their employee's on June 27, 2012.

The Division has the burden of proving a violation, including the applicability of the safety order, by a preponderance of the evidence. (*Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).) "Preponderance of the evidence" is usually defined in terms of probability of truth, or of evidence that when weighted 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. (*Lone Pine Nurseries*, Cal/OSHA App. 00-2817, Decision After Reconsideration (Oct. 30, 2001), citing *Leslie G. v. Perry & Associates* (1996) 43 Clap. 4th 472, 483, review denied.)

To establish an IIPP violation, the Division must prove that flaws in the Employer's written IIPP amounted to a failure to "establish" or "implement" or "maintain" an "effective" program. A single, isolated failure to "implement" a detail within an otherwise effective program does not necessarily establish a violation for failing to maintain an effective program where that failure is the sole imperfection. (See *GTE California*, Cal/OSHA App. 91-107, Decision After Reconsideration (Dec. 16, 1991); *David Fischer, dba Fischer Transport, A Sole Proprietorship*, Cal/OSHA App. 90-762, Decision After Reconsideration (Oct. 16, 1991).)

ASE, Hart testified that he gave Employer a "Document Request" form (See Exhibit 10) during his work site inspection, requesting a copy of Employer's accident investigation report. Employer failed to provide an accident report form. According to Hart, Employer should have documented the steps it took to investigate after Castro's accident. At the Hearing, Hart acknowledged receiving handwritten notes, and a written statement from Castro but Hart concluded these documents were not sufficient to constitute an accident report, as required by Employer's IIPP (See Exhibit 21⁵). Hart explained that a written accident report procedure would have allowed Employer to fully investigate defects at the work site, witness interviews, and explain the details of the ladder accident to help bring awareness to other employees and prevent future accidents.

⁵ Exhibit 21, Employer's IIPP, p. 40-41 "IPP Form 4 and Form 4A"

In *Sentinal Insulation Inc.*, Cal/OSHA App. 92-030 Decision After Reconsideration (July 22, 1993) the Board held the Division was correct in its belief that a more comprehensive IIPP would have included step-by-step guidance to supervisory personnel in accident investigation techniques, as well as incorporated accident investigation report forms for witness statements. However, the Board found that the employer's safety program met at least the minimum requirement in Section 3203(a)(5) for including a procedure to investigate occupational injury or occupational illness. The Board further notes that Employer had made corrections and improvements to its safety program over the years in an effort to comply with changes in legal requirements.

Upon review, in response to Hart's Document Request, Employer complied by providing Employer's written IIPP procedures outlining its procedures for investigating injuries and illnesses that included detailed procedures for injury reporting, a workers' Compensation accident/incident report and an accident/incident witness report (See Exhibit 21). Employer also provided handwritten notes and the written statement from Castro. Employer met the Board's minimum requirement of section 3203(a)(5) outlined by the Board in *Sentinal, supra*,... since Employer's investigation included a procedure to investigate occupational injury or occupational illnesses (See Exhibit 21) and handwritten notes and a written statement from Castro indicating how the accident occurred.

Thus, the Division failed to establish that Employer did not implement and maintain a written Injury and Illness Prevention Program. Nor did the Division establish that Employer's accident investigation did not meet the minimum requirements of subsection (a)(5) of section 3203.

Employer's appeal to the Division's citation for failure to implement and maintain a written Injury and Illness Prevention Program by not following Employer's written procedures for conducting an accident investigation when Employer's employee sustained a serious injury is granted.

3. Employer failed to ensure oxygen cylinders in storage were separated from fuel gas cylinders by a minimum 20 feet or by a non-combustible barrier at least five feet high on and prior to July 17, 2012.

The Division cited Employer for a violation of section 4650. Storage, Handling, and Use of Cylinders. Sub-section (d) of section 4650 provides:

Oxygen cylinders in storage shall be separated from fuel gas cylinders or combustible materials (especially oil or grease) a minimum distance of 20 feet or by a non-combustible barrier at least 5 feet high, or a minimum of

18 inches (46 centimeters) above the tallest cylinder and having a fire-resistance rating of at least one hour.

The Division alleged:

“On and prior to July 17, 2012, the employer failed to ensure oxygen cylinders in storage were separated from fuel gas cylinders by a minimum 20 feet or by a non-combustible barrier at least 5 feet high.”

Section 4650(d) requires oxygen cylinders (1) in storage separated from fuel gas cylinders or combustible materials (oil or grease) a minimum distance of 20 feet or by a non-combustible barrier at least 5 feet high separated a minimum of 18 inches (46 centimeters) above the tallest cylinder, and (2) have a fire resistance rating of at least one hour.

Hart testified that he observed two oxygen cylinders in plain view at the entrance of the work site chained directly next to three gas cylinders. Hart submitted photo Exhibits 12 and 13 which show the two oxygen cylinders are encircled with a chain without any space between them and are separated by less than 20 feet. Hart further testified that the cylinders were not in use and were securely chained together with caps over the nozzles. Hart’s testimony was not refuted by Employer.

Employer’s supervisor, Mark Arcaris (Arcaris) testified that the “tanks”, referring to the cylinders were placed at the work site when Hart visited the work site on July 17, 2012. Arcaris stated the tanks are regularly stored at Employer’s plant when they are not in use at a work site. In *Steve P. Rados, Inc.*, Cal/OSHA Appeals Board 80-809 Decision After Reconsideration (February 26, 1981), the Board established that two acetylene cylinders and one oxygen cylinder were stored adjacent to each other in an area where employees worked. The cylinders were capped and did not have hoses or gauges attached to them. The employer in *Rados* contended that some uses, as little as three or four times a day, might occur which would make the cylinders last for three weeks. However, the Board held that even if the usage was less than three or four times a day, the fact that there were two acetylene cylinders, when only one is needed, shows a storage use. The Board further held that if only one acetylene cylinder and one oxygen cylinder are in an area where employees work, is not a reason why an employer during time of minimal use, could not store the cylinders twenty feet apart as required by the safety order⁶. Thus in the instant case, the storage of the two oxygen cylinders and three gas cylinders chained together, when only one is needed shows a storage use as the Board held in *Rados Inc.*, *supra*.

⁶ Section 1740(a) states all gas cylinders shall be protected against the undue absorption of heat.

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 (Dec. 11, 1998).) Under section 334(b), a general violation is a violation which is not of a serious nature, but has a relationship to occupational safety and health of employees. A general violation is established based upon uncontroverted evidence. Hart testified that he classified the violation as general despite the gas and oxygen cylinders being stored less than 20 feet apart because the cylinders were capped and covered.

Hart calculated the penalties pursuant to the Division's policies and procedures and the California Code of Regulations as indicated on the Penalty Worksheet (See Exhibit 11). Severity of a general violation is based upon the degree of discomfort, temporary disability and time loss from normal activity (including work) which an employee is likely to suffer as a result of occupational illness or disease which could result from the violation. When the safety order violated does not pertain to employee illness or disease, severity shall be based upon the amount of medical treatment likely to be required or which would be appropriate for the type of injury that would most likely result from the violation. Hart calculated severity as medium because the cylinders were capped, so it would be less likely for an employee to suffer an injury.

The base penalty for a general violation is then subject to an adjustment for "extent", when the safety order violated pertains to employee injury, illness or disease, extent is based upon the number of employees exposed. Hart classified extent as high because of the close proximity of the stored oxygen, which is an accelerant, and gas cylinders in an area where employees were working.

"Likelihood" is the probability that injury, illness or disease will occur as a result of the violation and is based on the number of employees exposed to the hazard created by the violation and the extent to which the violation has in the past resulted in injury, illness or disease to employees. Hart classified likelihood as medium because with the tanks capped it was less likely that an injury would occur, which does not require any adjustment.

Employer is given 10 percent history, 30 percent credit for size and 15 percent good faith credit, giving a total adjustment factor of 55 percent and 50 percent abatement, resulting in an assessed penalty of \$420.

Thus, Employer failed to ensure the oxygen cylinders in storage were separated from fuel gas cylinders by a minimum 20 feet or by a non-combustible barrier at least five feet high on July 17, 2012.

4. The Division established that Employer willfully violated subsection (c)(1) of section 1712 on July 17, 2012, however a repeat violation was not established. The Division established that Employer failed to ensure employees working at grade or at the same surface as exposed protruding steel anchor bolts located less than six feet above the working surface were protected against the hazard of impalement.

Subsection (c)(1) of section 1712, Protection from Reinforcing Steel and Other Similar Projections provides:

Employees working at grade or at the same surface as exposed protruding reinforcing steel or other similar projections shall be protected against the hazard of impalement by guarding all exposed ends that extend up to six feet above grade or other work surface, with protective covers, or troughs.

The Division alleged:

“On July 17 2012, the employer willfully failed to ensure that employees working at grade or at the same surface as exposed protruding steel anchor bolts located less than 6 feet above the working surface were protected against the hazard of impalement. As a result, on July 17, 2012, the Division identified 3 steel anchor bolts protruding approximately 4 – 4 ½ inches in [legth] length above the concrete, exposing employees to impalement.”

Subsection (c)(1) of section 1712 requires that (1) employees working at grade or at the same surface as exposed protruding reinforcing steel or other similar projections and that (2) employees are protected against the hazard of impalement by guarding all exposed ends that extend up to six feet above grade or other work surface with protective covers or troughs.

The Division meets the first requirement based upon Hart’s testimony that when he inspected Employer’s work site on July 17, 2012, he observed employees working at the same grade or surface area where he observed exposed anchor bars. Secondly, Hart observed two anchor bolts that were not capped (See Photo Exhibit 9) and a third uncapped safety bolt at another location at the work site. At yet another location Hart observed some capped rebar but also observed rebar that was not capped (See Exhibit 15). Associate Safety Engineer Auston Ling (Ling) testified, establishing the second requirement of section 1712(c)(1), requiring employees protection against the hazard of impalement by guarding all exposed ends that extend up to six feet above grade surface with protective covers. Ling described anchor bolts and rebar as reinforced steel. Ling explained that an anchor bolt is a projection

that fastens. He stated that anchor bolts and rebar are used for anything residential where concrete is poured to construct a foundation.

Thus the Division established a violation of subsection (c)(1) of section 1712 by Hart's observation of employees working at the same grade or surface of the exposed anchor bolts and Ling's testimony that the employees were not guarded against the hazard of impalement.

Hart classified the violation of subsection (c)(1) of section 1712 as serious. The issue in this matter is whether there is sufficient evidence to support a "serious" classification. In determining whether the Division presented sufficient evidence to prove the "serious" classification of the violation.

The legal standard for a serious violation is expressed in Labor Code section 6432, subdivision (a) which states:

- (a) 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:
 - (1) A serious exposure exceeding an established permissible exposure limit.
 - (2) The existence in the place of employment of one or more unsafe or unhealthful practices, means, methods, operations, or processes that have been adopted or are in use.

The elements of a serious violation are: (1) rebuttable presumption, (2) a violation exists in a place of employment, (3) a demonstration of realistic possibility of death or serious injury and (4) employee exposure to an actual hazard.

The first element of a serious violation, a rebuttable presumption, refers to the "reasonable possibility" language, which had been in use by the Appeals Board. There is a presumption that the Legislature has approved the Board's definition. (See, *Moore v. California State Board of Accountancy* (1992) 2 Cal. 4th 999, 1017, 9 Cal. Rptr. 2d 358, 831 P. 2d 798). Here, Employer did not present any evidence to rebut the presumption.

The second element, must show that “a violation exists in a place of employment”, which is established by the evidence showing Hart’s observation during his July 17, 2012 inspection. Hart observed uncapped anchor bolts capable of causing impalement resulting in serious injury or death. Ling testified that he has investigated over a half dozen accidents where workers were impaled by rebar between two and six inches and has cited employers for not having caps on rebar. Ling explained that the hazard of exposed anchor bolt/rebar is being impaled and breaking ribs depending upon which part of the body comes in contact with an anchor bolt/rebar. He further explained that a hazard of impalement exists whether the anchor bolt or rebar is two inches or four inches.

The third element requires a demonstration of a “realistic possibility” of death or serious injury. A “realistic possibility” is not defined in the Labor Code or safety orders, but has previously been addressed by the Appeals Board. In *Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (Sep. 27, 2001), the Appeals Board determined that it was unnecessary for the Division to prove actual splashing of caustic chemicals but only a realistic possibility that splashing of chemicals occurred. The Appeals Board explained: “[c]onjecture as to what would happen if an accident occurred is sufficient to sustain (a violation)... if such a prediction is clearly within the bounds of human reason, not pure speculation.” Hart testified that a realistic possibility of death or serious injury could occur if an employee landed on their head on an exposed anchor bolt. He explained that there isn’t any flexibility of the steel. He further testified that when employees work at grade level with exposed anchor bolts there is a high likelihood that someone can trip and fall. Hart stated he has investigated several trip and falls and uncontrolled falls at work sites; with uncapped projections there is a realistic possibility that serious injuries could occur.

The fourth element, serious physical harm as used in section 6432, is serious physical harm that 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: (1) A serious exposure exceeding an established permissible exposure limit or (2) The existence in the place of employment of one or more unsafe or unhealthful practices, means, methods, operations, or processes that have been adopted or are in use.

Hart’s testimony that he observed unsafe uncapped anchor bolts in plain view at the work site on July 17, 2012 establishes that an actual hazard existed at the Employer’s work site. In one area of the work site he observed two uncapped anchor bolts (See Photo Exhibits 8, 9 and 15) and in another area at the work site he observed three more uncapped anchor bolts. Thus, the fourth element of serious physical harm is established by the existence of

unsafe uncapped anchor bolts Hart observed at Employer's work site on July 17, 2012, such that unsafe practices were in use at Employer's place of business.

In weighing the evidence, the Division has established that a serious violation occurred because all of the elements of a serious violation are present: 1) a rebuttable presumption; (2) a violation existed at Employer's work site; (3) Hart demonstrated a realistic possibility of death or serious injury; and (4) the employees' exposure to an actual hazard has been established.

In classifying Employer's violation as willful, section 334(e), states a "willful" classification may be established if the evidence shows that: (1) an employer intentionally violated a safety law; or (2) an employer had actual knowledge of an unsafe or hazardous condition, yet did not attempt to correct it. Both tests require the Division to prove that the employer had a particular state of mind. Under the first requirement, the Division must prove that the employer intentionally violated a worker safety law. (*MCM Construction, Inc.*, Cal./OSHA App. 92-436, DAR (May 23, 1995), citing *Gal Concrete Construction Co.*, Cal./OSHA App. 87-264, DAR (Apr. 7, 1993), p. 5.)

The Division asserted that Employer had actual knowledge of the unsafe condition of the anchor bolts and rebar. Ling recalled performing a previous inspection for Employer on June 15, 2010, which resulted in an Order, issued on May 31, 2011, finding Employer in violation of subsection (c)(1) of section 1712⁷. He did not recall telling Employer that projections did not need to be capped. Associated Safety Engineer, Miguel Vargas (Vargas) conducted the closing conference after the June 15, 2010 inspection. He also testified that he did not tell Employer that anchor bolts or rebar less than six inches did not have to be capped.

Edgar Bahena (Bahena), employed with Employer for the past 10 years and a supervisor for seven years, testified that he was present during the Division's 2010 inspection at Employer's work site. Bahena testified that he recalled Vargas stating that any object coming out of a surface over six inches needed to be capped and recalled that Employer was cited for a violation of section 1712. Based upon Vargas' statement Bahena did not believe Employer was required to cap the anchor bolt/rebar less than six inches, and told all of Employer's superintendents everything over six inches had to be capped. Mark Arcaris (Arcaris), employed by Employer for 30 years, testified acknowledging that after the 2010 inspection Bahena told him that any anchor bolts six inches or taller had to be capped.

⁷ See Exhibit 4 – Order and Summary Table issued by Administrative Law Judge Dale A. Raymond on May 31, 2011, affirming Employer's violation of Citation 1712(c)(1).

In weighing the evidence, the testimonies of Hart, Ling and Vargas are more convincing in light of the prior 2012 Order issued, affirming a violation of subsection (c) of section 1712, establishing Employer had actual knowledge of the unsafe condition and establishing a willful classification.

In calculating the penalties for Employer's violation of section 1712(c)(1) as a serious violation, Hart classified the severity as high, extent low and likelihood as high because of the employees exposed to the hazard that were working in the area of the uncapped anchor bolts. Hart awarded 15 percent good faith, 30 percent for size and 10 percent for history (See Exhibit 11 – Proposed Penalty Worksheet). However, since there was evidence of a violation within the past three years with the citations issued against Employer in 2010 (See Exhibit 4) the credit for history is reduced to zero percent. Abatement credit results in an assessed penalty of \$6,570. When a willful violation is established the penalty is multiplied by five resulting in a penalty of \$32,850.

In classifying Employer's violation as a repeat violation, under subsection (d)(1) of section 334 is defined as:

“a violation where the employer has corrected, or indicated correction of an earlier violation, for which a citation was issued, and upon a later inspection is found to have committed the same violation again within a period of three years considering whether a violation is repeated, a repeat citation issued to employers having fixed establishments (e.g., factories, terminals, stores...) will be limited to the cited establishment; for employers engaged in business having no fixed establishments (e.g., construction, painting, excavation...) a repeat violation will be based on prior violations cited within the same Region of the Division.”

To establish a repeat violation the Division submitted an Order issued by ALJ Raymond affirming section 1712(c)(1) cited on July 23, 2010 by the Southern California Labor Enforcement Task Force District under Region 6. In the instant matter, the Division cited Employer for a violation of section 1712(c)(1) issued on December 26, 2012, and amended on September 13, 2013 as a “repeat” violation, was issued by the Santa Ana/Anaheim District under Region 3. Section 334(d)(1) requires that a repeat violation for a construction company must have the same citation issued within the same region. Here, Employer is a construction business not having a fixed establishment. In 2010 Employer's work site was located in Region 6. To establish a “repeat” violation the prior citation within the previous three years must be the same violation cited within Region 6. Exhibit 1 submitted by the Division for jurisdictional purposes show the recent citation for a violation of section 1712(c)(1) issued on December 26, 2012 occurred within Region 3. Thus, the recent violation of

section 1712(c)(1) cannot be classified as a repeat violation of section 1712(c)(1) issued on July 23, 2010 by Region 6.

In conclusion, the Division established a willful classification but did not establish a repeat violation of Section 1712(c)(1) on July 17, 2012. The Division established that Employer willfully failed to ensure employees working at grade or at the same surface exposed to protruding steel anchor bolts located less than six feet above the working surface were protected against the hazard of impalement. Thus the assessed penalty is \$32,850.

5. On June 27, 2012, Employer willfully failed to ensure portable step ladders were not used as a single ladder in a partially closed position.

Section 3276 addresses portable ladders. Subsection (e) addresses care, use, inspection and maintenance of ladders, while subsection (e)(16)(C) addresses prohibited uses of ladders, which states:

“Step ladders shall not be used as single ladders or in the partially closed position”.

The Division alleged:

“On June 27, 2012, the employer failed to ensure that portable step ladders were not used as a single ladder or in a partially closed position. As a result, on June 27, 2012, an employee fell and suffered a serious injury while using a portable step ladder as a single ladder and in the closed position.

A violation of section 3276 (e)(16)(C) is established if (1) a ladder is used as single ladder or (2) in a partially closed position.

Senior Safety Engineer, Ling, testified as a ladder expert with all of the required training from the Division, which included ladders and several accident investigations involving ladders. He stated that when an “A” framed ladder is leaned against a wall, a hazard exists because the ladder can tip over or the bottom can roll underneath a person’s weight (check recording) An “A” framed ladder folded closed against a wall can slip because of the uneven footing of the ladder’s feet. Ling compared a straight ladder that can be leaned against a wall. Ling stated that with the tip of a straight ladder leaned against a wall, the positions of the rungs (ladder steps) do not change.

Senior Safety Engineer, Hart, further testified that he has received training regarding ladder safety and has investigated a minimum of 50 construction accidents and approximately six accidents from the use of ladders

in a closed position within the previous two years. During Hart's investigation in this matter, Castro told him that the ladder was in a closed position when he fell off the ladder and suffered the injury, which Castro acknowledged during his testimony at the Hearing in this matter.

Castro, the employee that sustained a serious injury on June 27, 2012 at Employer's work site testified that he was working below ground level in an area that was under construction as a hallway of a building under construction. Castro stated that he used a small "A" frame ladder that was folded flat against a wall to give him more space to perform his assigned duties. Castro acknowledged that as a 16 year employee and foreman with seven years training with the carpenters' union, he knew that he did not have the right type of ladder, but decided to improvise with the shorter "A" frame ladder because a regular eight to nine foot straight ladder would not fit in the confined space where he worked on the day of the accident.

Hart further testified that Ekedal, Employer's Superintendent, whom Hart interviewed on July 17, 2012 and again subsequent to his interview with Castro on December 21, 2012, maintained that the ladder was not closed when Castro's accident occurred on June 27, 2012. Sergio Uriguidez, also a foreman, testified that he was next to Castro when the accident occurred on June 27, 2012, and observed that the ladder was open as demonstrated during Hart's July 17, 2012 inspection at the accident location (See Photo Exhibit 2). However, at the Hearing Castro stated he was facing away from the ladder that was partially closed, when he lost his balance causing him to fall and sustain serious injuries, which is consistent with his description of the placement of the ladder when he was interviewed by Hart On December 21, 2012.

The weight of the evidence establishes that the ladder was closed as Castro consistently stated and is more credible than the statement attributed to Ekedal and Uriguidez' s testimony at the Hearing. Castro was interviewed by phone several months after Hart's interview with Ekedal and was not present during Ekedal's re-creation of the accident on June 27, 2012. When Castro was interviewed by Hart, Castro's response was focused on describing how the accident occurred and not the placement of the ladder. Thus, Castro's testimony that the ladder was closed is more reliable and establishes that the "A" frame ladder was used as a single ladder in a closed position, establishing a violation of subsection of (e)(16)(C) of section 3276.

Hart classified the violation as serious. In establishing a serious violation as defined *supra*, the issue in this matter is whether there is sufficient evidence to support the "serious" classification.

In determining whether the Division presented sufficient evidence to prove the "serious" classification of the violation. The elements of a serious violation are as stated above. The elements of a serious violation are

established here as shown by Ekedal' s statement and Uргуidez' s testimony, Employer failing to rebut the presumption that a violation of section 3276(e)(16) (C) existed at the work site. Hart argued that there was a realistic possibility of the ladder used in a closed position based upon his half dozen ladder accident investigations which commonly resulted in broken bones, hospitalization for more than 24 hours serious injuries or death. Hart explained that an “A” framed ladder in a closed position could pivot because of its instability, which could result in an employee sustaining an injury. Here Castro was exposed to the serious injury as he was allowed to work on the ladder in a closed position. Thus, Hart established that Employer’s violation of section 3276(e)(16)(C) was serious.

Hart classified the serious violation as “accident related”. 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 to sustain the characterization. (*Sherwood Mechanical, Inc.*, Cal/OSHA App. 08-4692, Decision After Reconsideration (Jun. 28, 2012) citing *Obayashi Corp.*, Cal/OSHA App. 98-3674, Decision After Reconsideration (Jun. 5, 2001).) In other words, “where, the evidence establishes that a serious violation caused a serious injury, the violation is properly characterized as “accident-related.” (*Duke Pacific, Inc.*, Cal/OSHA App. 06-5175, Decision After Reconsideration (Mar. 14, 2012), citing *K.V. Mart Company dba Valu Plus Food Warehouse*, Cal/OSHA App. 01-638, Decision After Reconsideration (Nov. 1, 2002).) 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).)

Hart classified the violation as accident related based upon Castro’s description that he was facing away from the ladder that was partially closed, when he lost his balance and his foot slipped through a rung of the ladder causing him to fall and sustain serious injuries. Hart also related his prior investigation experience of employees facing away from a ladder can more easily lose their balance and fall off the ladder. In reviewing the evidence, there are different views regarding how Castro fell off the ladder. Ekedal and Uргуidez stated that as Castro was receiving the nail gun he tried to turn his body and lifted one of his legs off the ladder rung, which caused him to lose his balance and fall off the ladder. In reviewing both explanations for how the accident occurred, Castro could have lost his balance in facing away from an “A” framed open ladder or from a straight ladder. Likewise, if tools were being handed to Castro and he turned his body taking a foot off of a rung of a straight ladder, and “A” framed closed or open “A” framed ladder, the same result, falling off of the ladder could occur. Therefore a nexus is not established by the evidence showing Castro’s improper use of the “A” framed ladder in

violating section 3276(e)(16)(C) and the resulting serious injury to classify the violation as accident-related.

Hart further classified the violation of section 3276(3)(16)(C) as willful. In classifying Employer's violation as willful, as explained in section 334(e) *supra*, a "willful" classification is established if the evidence shows an employer intentionally violated a safety law; or an employer had actual knowledge of an unsafe or hazardous condition, yet did not attempt to correct it.

Here, the evidence shows Ekedal was present on June 27, 2012 when Castro's accident on the ladder occurred. Hart testified that during his July 17, 2012 inspection Ekedal told him he was standing above the surface, when Castro fell off the ladder. Ekedal stated that Castro was standing on an opened "A" framed ladder just before the accident occurred as assimilated for Hart in Photo Exhibits 2, 16, 17 and 18. However, when Hart later interviewed Castro, on December 21, 2012, Hart learned that the "A" framed ladder was in the closed position when the accident occurred. Castro also corroborated his December 21, 2012 interview with Hart when he testified that the ladder was closed at the Hearing. Based upon Hart's initial interview with Ekedal on July 17, 2012 and his later interview with Castro, Hart determined that Ekedal had actual knowledge that Castro was using the "A" framed ladder in an unsafe manner. Further from review of the evidence Ekedal attempted to mislead Hart to assume that the "A" framed ladder was open and used in an appropriate manner when Castro fell and suffered serious injuries on June 27, 2012 in his placement of an opened "A" framed ladder during Hart's July 17, 2012 investigation.

Thus the evidence has established that the willful classification is appropriate because Employer was aware that the ladder was used in an inappropriate manner and was not truthful in disclosing the circumstances surrounding the accident.

In calculating the penalties for a willful classification, Hart calculated severity as high, the extent as medium and the likelihood as high because of the use of the ladder in an unsafe manner; with a total gravity base penalty of \$22,500 with a size adjustment of 30 percent, resulting in a penalty of \$7,875. Because of the willful characterization, pursuant to section 336(h) the proposed penalty is multiplied by five, which shall not be less than \$5,000 or exceed \$70,000, the assessed penalty is \$39,375.

In conclusion, the Division has established that Employer willfully failed to ensure portable step ladders were not used as a single ladder in a partially closed position, resulting in a penalty of \$39,375.

Decision

It is hereby ordered that the citations are established, modified, or withdrawn as indicated above and as set forth in the attached Summary Table.

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

Dated: May 1, 2015

CLARA HILL-WILLIAMS
Administrative Law Judge

CHW: ao

APPENDIX A

SUMMARY OF EVIDENTIARY RECORD

EKEDAL CONCRETE, INC. Dockets 13-R3D1-0131 through 0133

Date of Hearing: January 22, 2014

Division's Exhibits

| Exhibit Number | Exhibit Description | Admitted |
|-----------------------|--|-----------------|
| 1 | Jurisdictional Documents | X |
| 2 | Photo of an "A" framed ladder | X |
| 3 | Citation and Notification of Penalty | X |
| 4 | Order - Ekedal Concrete, Inc. 10-R6D5-2425-2428 | X |
| 5 | Letter from McCann & Carroll, dated July 30, 2010 | X |
| 6 | Letter from McCann & Carroll, dated July 8, 2010 | X |
| 7 | Photo of "anchor bolt" and "rebar" | X |
| 8 | Photo of "anchor bolt" | X |
| 9 | Photo of "capped and uncapped anchor bolt" | X |
| 10 | Document Request Sheet | X |
| 11 | C-10 Proposed Penalty Worksheet | X |
| 12 | Photo of "oxygen and gas cylinders" | X |
| 13 | Photo close-up "oxygen and gas cylinders" | X |
| 14 | Photo close-up "oxygen and gas cylinders" | X |
| 15 | Photo of "workers and capped/uncapped anchor bolts" | X |
| 16 | Photo of "A" framed ladder | X |
| 17 | Photo close-up "A" framed ladder | X |
| 18 | Photo of plywood over opening | X |
| 19 | Ekedal Concrete Inc. "TAILGATE/TOOLBOX SAFETY TRAINING" | X |
| 20 | Facsimile print out to Division – Newport Beach Report of Accident | X |
| 21 | Ekedal's Injury and Illness Prevention excerpt – VI Investigating injuries and illnesses | X |
| 22 | Cal/OSHA Form 300 – Log of Work-Related Injuries and Illnesses | X |
| 23 | Ekedal's "Accident Investigation" procedures | X |
| 24 | "FINAL STATEMENT OF REASONS ...Section 1712 – Hazards Associated with Reinforcing Steel and Other Similar Projections – MODIFICATIONS AND REPOSE...45 DAY PUBLIC COMMENT PERIOD" /2007 | X |

Employer's Exhibits

| Exhibit Letter | Exhibit Description | Admitted |
|-----------------------|--|-----------------|
| A | Appellant Exhibit Tabs: 20, 21, 31, 32, 35, A36,A37, A38 60 (Binder #14) | X |
| B | Form 36 Notes from Jack Dillion | X |
| C | Page 5 of DOSH 1B | X |
| D | D & D2 Diagram | X |

Witnesses Testifying at Hearing

1. Miguel Vargas
2. Ascension Castro
3. Auston Ling
4. Brandon Hart
5. Edgar Bahena
6. Sergio Urquibez
7. Mark Arcaris
8. Edward Matinet

CERTIFICATION OF RECORDING

I, Clara Hill-Williams, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hear the above 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

In the Matter of the Appeal of:

EKEDAL CONCRETE, INC.
Dockets 13-R3D1-0131/0133

Abbreviation Key: Reg=Regulatory
G=General W=Willful
S=Serious R=Repeat
Er=Employer DOSH=Division

IMIS No. 315530089

| DOCKET | C I T A T I O N | I T E M | SECTION | T Y P E | DESCRIPTION | A F F I R M E D | V A C A T E D | PENALTY PROPOSED BY DOSH IN CITATION | PENALTY PROPOSED BY DOSH AT HEARING | FINAL PENALTY ASSESSED BY BOARD |
|------------------|--------------------------------------|------------------|----------------|------------------|---|--------------------------------------|---------------------------------|--|---|--|
| 13-R3D1-0131 | 1 | 1 | 342(a) | Reg | ALJ found the report was late applying size and history credits | X | | \$5,000 | \$5,000 | \$2,250 |
| | 1 | 2 | 1509(a) | G | ALJ dismissed the violation | | X | \$250 | \$250 | \$0 |
| | 1 | 3 | 4650(d) | G | ALJ affirmed the violation | X | | \$420 | \$420 | \$420 |
| 13-R3D1-0132 | 2 | 1 | 1712(c)(1) | S W | ALJ affirmed the willful classification but did not find a repeat violation | X | | \$65,700 | \$65,700 | \$32,850 |
| 13-R3D1-0133 | 3 | 1 | 3276(e)(16)(C) | SAR W | ALJ affirmed the violation | X | | \$70,000 | \$70,000 | \$39,375 |
| Sub-Total | | | | | | | | \$141,370 | \$141,370 | \$74,895 |

Total Amount Due*

\$74,895

(INCLUDES APPEALED CITATIONS ONLY)

NOTE: Please do not send payments to the Appeals Board. **All penalty payments must be made to:**

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 any questions.

ALJ: CHW/ao
POS: 05/01/2015