

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal
of:

SAVANT CONSTRUCTION, INC.
13830 Mountain Ave.
Chino, CA 91710

Employer

DOCKETS 14-R3D1-3018
through 3021

DECISION

Statement of the Case

Savant Construction Inc. (Employer) is a construction contractor. Beginning July 2, 2014, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer Christine Hoffman (Hoffman), conducted an accident inspection at a place of employment maintained by Employer at 3030 El Camino Real, Tustin, California (the site). On September 2, 2014, the Division cited Employer for four violations of California Code of Regulations, title 8¹, three of which remain at issue: Citation 2, for failing to protect employees working at grade from reinforcing steel and other similar projections; Citation 3, for failing to protect employees working above grade from reinforcing steel and other similar projections; and, Citation 4, for failing to prevent employees from standing on the guardrails of an elevating work platform to gain greater working height or reach.²

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

² Citation 1, for failing to implement high heat procedures as part of Employer's Heat Illness Prevention Program (HIPP), was withdrawn by the Division at hearing in exchange for Employer waiving its right to recover costs under Labor Code section 149.5. Good cause having been shown, the parties' settlement is affirmed and is incorporated into this Decision via the attached summary table.

Employer filed a timely appeal contesting the existence of the alleged violations; the classifications for Citations 2, 3 and 4; and the reasonableness of the proposed penalties. Employer also alleged numerous defenses.³

This matter came regularly for hearing before Howard Isaac Chernin, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at West Covina, California on June 3, 2015. Eugene F. McMenam, Attorney, of Atkinson, Andelson, Loya, Ruud and Romo, represented Employer. David Pies, Staff Counsel, represented the Division. The parties presented oral and documentary evidence. The matter was submitted on June 29, 2015 by agreement of the parties, to allow for optional post-hearing briefing.

Issues

1. Were employees working at grade exposed to the hazard of impalement by protruding rebar⁴?
2. Were employees working above grade exposed to the hazard of impalement by protruding rebar?
3. Did Employer violate section 3646, subdivision (e), by permitting employees to stand on the guardrails of an elevating scissor lift to gain greater height?
4. Did Employer prove any of its pleaded defenses?
5. Did the Division correctly classify Employer's alleged violations?
6. Did Employer rebut the Serious classification of Citation 4?
7. Did the Division propose reasonable penalties for Employer's alleged violations?

Findings of Fact

1. Employer was acting as a general contractor and was responsible for general safety and oversight at the site on July 2, 2014, while two employees of subcontractor SG Framing were engaged in installing ceiling joists in a building that was under construction.
2. Hoffman observed 2 employees of SG Framing standing on the midrail⁵ of an elevated scissor-lift while installing the joists. Hoffman did not observe any employees working at grade.

³ Except as noted below, Employer failed to provide testimony or evidence regarding its pleaded defenses, and therefore, the defenses are considered waived.

⁴ Rebar was not defined during hearing by the parties, nor is it defined by California Code of Regulations, title 8, but it is commonly understood to mean "A steel bar or rod used to reinforce concrete." (McGraw-Hill Dictionary of Scientific and Technical Terms (6th Ed. 2003) p. 1758, col. 2.)

⁵ A midrail is "[a] rail approximately midway between the top rail and platform, that is secured to the uprights erected along the exposed sides and ends of platforms." (Cal. Code Regs., tit. 8, § 1504). In defining guardrail, title 8 refers to the definition of railing, which is

3. During her inspection of the site, Hoffman observed that 2 out of 421 exposed protruding rebar, measuring approximately 50 and ½ inches in height above the ground, were missing end caps.
4. Employer's on-site superintendent Dale Poelvoorde (Poelvoorde) was Employer's only employee at the site on July 2, 2014. Poelvoorde was in his office in a trailer over 200 feet away from the scissor lift, separated by chain link fencing covered with a "gawk screen", while the 2 subcontractor employees were on the scissor-lift. From his location, Poelvoorde could not see the scissor-lift.
5. Poelvoorde last inspected the site approximately 45 minutes before Hoffman arrived at the site.
6. There were multiple scissor-lifts at the site on July 2, 2014. Hoffman only observed violations with respect to work being performed on one scissor-lift.
7. Standing on the midrail of an elevated scissor-lift platform created a realistic possibility of serious physical harm or death from falling.

Analysis

1. Were Employees Working At Grade Exposed To The Hazard Of Impalement By Protruding Rebar?

Section 1712, subdivision (c)(1), states in relevant part:

(c) Protection from Reinforcing Steel and Other Similar Projections.

(1) 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 6 feet above grade or other work surface, with protective covers, or troughs.

In citing Employer, the Division specifically alleged:

On or before July 2, 2014, employees working at grade were exposed to protruding reinforcing steel and other similar projections and were not protected against the hazard of impalement by guarding all exposed ends that extend up to 6 feet above grade

"[a] barrier consisting of a top rail and a midrail secured to uprights and erected along the exposed sides and ends of platforms. (*Id.*) A midrail is, therefore, a type of guardrail for purposes of section 1712.

with protective covers, or *troughs*, Savant Construction (Controlling employer) was responsible for safety and health conditions at the site and failed to protect the employees of SG Framing from several unprotected ends of protruding reinforcing steel that extended approximately 50 = inches above the surface.⁶

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 Cal.App. 4th 472, 483.)

To establish a violation of section 1712, subdivision (c)(1), the Division must show that: (1) There were present at the site exposed protruding reinforcing steel or other similar projections; (2) Employees were working at grade or at the same surface as said reinforcing steel or similar projections; (3) the reinforcing steel or similar projections extended up to 6 feet above grade; and, (4) the reinforcing steel or similar projections were not protected on their exposed ends against the hazard of impalement.

Section 336.10 allows the Division to cite the “controlling employer” for any requirement enforceable by the Division if it has evidence that the employer is responsible, by contract *or* through actual practice, for safety (and health) conditions at the worksite, and has the authority to correct the violative condition. (*United Association Local Union 246, AFL-CIO v. Occupational Safety and Health Appeals Board* (2011) 199 Cal. App. 4th 273 at 281 (“Local 246”).) An employer is subject to the citations issued under the multi-employer worksite regulation, regardless of whether its own employees were exposed to the hazards under the provisos in subsection (c). “The Board defines ‘exposure’ as reliable proof that employees are endangered by an existing hazardous condition or circumstance.” (*Stiles Paint Manufacturing*, Cal/OSHA App. 02-1630, Decision After Reconsideration (Aug. 16, 2006), citing *Ford Motor Company*, Cal/OSHA App. 76-706 Decision After Reconsideration (July 20, 1979).) A violation “may not be based on speculation, assumptions, or conjecture that employees will be exposed to the hazard which the safety order is designed to abate, but rather upon definite evidence of a past or existing danger.” (*Ford Motor Company*, supra.)

⁶ Italicized text denotes grammatical and typographical errors present in the original.

There are two tests for exposure: actual exposure, and “zone of danger” analysis. Under the former, the Division must prove that employees were actually exposed to the hazard addressed by the safety order. (*Rudolph & Sletten, Inc.* Cal/OSHA App. 80-602 Decision After Reconsideration (March 5, 1981); and *Moran Constructors, Inc.*, Cal/OSHA App. 74-381 Decision After Reconsideration (Jan. 28, 1975).) Under the “zone of danger”⁷ test, the Division must prove that employees have been, or are likely to be, exposed to the hazard created by the violative condition. (*Ja Con Construction Systems, Inc.*, Cal/OSHA App. 03-441, Decision After Reconsideration (Mar. 27, 2006); see *Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (Apr. 24, 2003).) The Division has the burden of demonstrating some evidence that employees came within the zone of danger while performing work-related duties, pursuing personal activities during work, or employing normal means of ingress and egress to their work stations, and cannot be proven merely by evidence that employees were not prevented from accessing a worksite. (*Id.*)

The first element is met by undisputed testimony from both Hoffman and Poelvoorde that there were numerous exposed protruding reinforcing steel projections (rebar) at the site during Hoffman’s inspection. (See Exhibits 8, 10.) The third element is met by undisputed testimony from Hoffman that the rebar extended approximately 50 and ½ inches above grade. (See Exhibit 10.) The fourth element is met by undisputed testimony from both Hoffman and Poelvoorde that two exposed rebar ends were not protected when Hoffman inspected them. (See Exhibits 8, 9.)

As to the second element, however, the Division offered scant evidence that employees were working at grade (exposed) when the violation occurred. In *Stiles Paint Manufacturing*, Cal/OSHA App. 02-1630, Decision After Reconsideration (Aug. 16, 2006), the Division cited the employer for operating a forklift without a functioning warning horn. The Administrative Law Judge issued a decision granting Employer’s appeal, and dismissing the citation, finding that the Division offered insufficient evidence of employee exposure. (*Id.*) There, the Division offered no photographs of exposed employees, and the Division’s inspector William Somers did not testify as to the presence of exposed employees, nor did the Division ask the employer’s owner whether any workers were in the vicinity of the forklift (in the “zone of danger”). (*Id.*) Also, the Division failed to refute the employer’s assertion that the forklift’s horn was only momentarily inoperative. (*Id.*)

⁷ The Board has defined the “zone of danger” as “the area surrounding the hazard created by the violation.” (*Stiles Paint Manufacturing*, Cal/OSHA App. 02-1630, Decision After Reconsideration (Aug. 16, 2006), citing *Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (Apr. 24, 2003).)

In comparison, here only one photograph (Exhibit 10) depicts employees at grade, but that photograph was taken after Hoffman brought Poelvoorde to the worksite, when there was no evidence that work was being performed⁸. Poelvoorde, in fact, credibly testified that Hoffman's inspection came at the end of the work day when the only work being performed was the observed framing work. The rest of Hoffman's photographs (Exhibits 2 through 9) showed 2 employees working on a scissor lift, above grade and standing on the midrails of the scissor-lift.⁹ Hoffman did not describe any work that she observed being performed at grade, nor was there evidence that she interviewed employees working at grade while the alleged violation existed.¹⁰ In light of the absence of compelling evidence of any employees working at grade at the time of the alleged violation, the Division failed to meet its burden of proof and consequently failed to prove a violation of section 1712, subdivision (c)(1).

2. Were Employees Working Above Grade Exposed To The Hazard Of Impalement By Protruding Rebar?

Section 1712, subdivision (c)(2), states in relevant part:

(2) Employees working above grade or any surface and exposed to protruding reinforcing steel or other similar projections shall be protected against the hazard of impalement. Protection shall be provided by:

- (A) The use of guardrails, or
- (B) Approved fall protection systems meeting the design requirements of Article 24, or
- (C) Protective covers as specified in subsection (d).

In citing Employer, the Division specifically alleged:

⁸ It is not clear from the record who the individuals are who are depicted in the photograph, or what they were doing at the site. The evidence at hearing overwhelmingly suggested that after the 2 employees were ordered down from the scissor-lift, no further work occurred at the site that day.

⁹ Exhibit 2 appears to show an additional one or two employees working on another elevating work platform, but no evidence was offered as to who they were or what they were doing at the time of the inspection.

¹⁰ Hoffman only testified that she interviewed the 2 employees observed on the elevating scissor-lift.

On or before July 2, 2014, employees working above grade or any surface were exposed to protruding reinforcing steel and other similar projections and were not protected against the hazard of *impalement*, Savant Construction (Controlling employer) was responsible for safety and health conditions at the site and failed to protect *the employees of SG Framing (exposing employer) from (2) employees* elevated on an approximately 26 foot scissor lift standing on the midrail that were exposed to protruding reinforcing steel and were not protected against the hazard of impalement.¹¹

In order to prove a violation, the Division has the burden of establishing (1) There was exposed protruding reinforcing steel or other similar projections present at the site; (2) Employees were working above grade or any surface; and, (3) Employer failed to provide (a) guardrails, or (b) approved fall protection systems, or (c) protective covers to protect the employees against the hazard of impalement.

As noted above, the first element is established by the uncontroverted evidence that there was protruding reinforcing steel present at the site at the time of the alleged violation. The second element is proven by the uncontroverted evidence that there were employees working on an elevated scissor-lift at the time of the alleged violation.

As to the third element, however, Hoffman admitted the scissor-lift was outfitted with a midrail and stated that in her opinion there would not have been a violation if the employees had not been standing on the midrail. Employer fulfilled its duty by providing a midrail. Absent evidence that Employer instructed its employees to stand on the midrail, or condoned such behavior, no violation was proven by the Division. Therefore, the Division failed to establish a violation of section 1712, subdivision (c)(2).

3. Did Employer Violate Section 3646, Subdivision (e), By Permitting Employees To Stand On The Guardrails Of An Elevating Scissor Lift To Gain Greater Height?

Section 3646, subdivision (e), states in relevant part:

Employees shall not sit, stand or climb on the guardrails of an elevating work platform or use planks, ladders, or other devices to gain greater working height or reach.

¹¹ Italicized text denotes grammatical errors present in the original.

In citing Employer, the Division specifically alleged:

On or before July 2, 2014, employees working at a construction site located at Building 3030 Tustin Marketplace, 3030 El Camino Real in Tustin, were exposed to fall hazards as a result from standing or climbing on the guardrails of an elevated work platform to gain greater working height or *reach*, Savant Construction (controlling employer) is responsible for safety and health conditions at the construction site and failed to protect the employees of SG Framing (exposing employer) from fall hazards as two (2) employees *stand* on the midrail of a scissor lift to gain greater working height.¹²

To establish a violation of section 3646, subdivision (e), the Division has the burden of proving that in order to gain greater working height or reach, (1) employees sat, stood or climbed; (2) on guardrails; (3) of an elevating work platform.

Here, Hoffman gave uncontroverted testimony and offered numerous photographs establishing that employees were standing on the midrail of a scissor-lift approximately 26 feet above grade located at the site. Hoffman also testified, and Employer did not dispute, that the scissor-lift is an elevating work platform. Thus, the Division established a violation of the safety order.

4. Did Employer Prove Any Of Its Pleaded Defenses?

Employer pleaded and argued at hearing that it 1) exercised due diligence and 2) there was no causal link.¹³ An employer bears the burden of proving its affirmative defenses by a preponderance of the evidence. (*Ernest W. Hahn, Inc.*, Cal/OSHA App. 77-576, Decision After Reconsideration (Jan.25, 1984); *Gal Concrete Construction Co.*, Cal/OSHA App. 89-317, Decision After Reconsideration (Sep. 27, 1990).)

Employer presented evidence and argued that it was entitled to relief under the “due diligence” affirmative defense. The defense, recognized by the Board in *Harris Construction Company, Inc.*, Cal/OSHA App. 03-3914, Decision After Reconsideration (Feb. 26, 2015), and the Court of Appeal in

¹² Italicized text denotes grammatical errors present in the original.

¹³ Employer’s causation defense is inapposite, because the Division did not characterize the violation as “accident-related”. Additionally, Employer pleaded 11 separate defenses to Citation 4, but only presented evidence and argued in support of those defenses identified in this decision. Employer’s remaining defenses are deemed waived.

United Association Local Union 246, AFL-CIO v. California Occupational Safety and Health Appeals Bd. (2011) 199 Cal.App.4th 273, applies to general contractors acting as the “controlling employer” at a worksite.¹⁴ “The due diligence required of a general contractor when it is the ‘controlling employer’ varies according to the circumstances. For example the frequency of its inspections depend on the nature of the work, how much the general contractor knows about the safety history and practices of the subcontractor and the subcontractor’s level of expertise. The general contractor is not normally required to inspect for hazards as frequently or to have the same level of expertise and knowledge of applicable standards as the subcontractor it hired.” (*Harris Construction Company, Inc.*, supra.)

In *Harris Construction Company, Inc.*, supra, the Board found that the employer exercised due diligence in light of the fact that the subcontractor was performing specialized work and had on-site managers and foreman on site overseeing the work. In addition, the violation cited by the Division was failure to relieve internal pressure before opening a closed system (section 3329, subdivision (d)), which was an unknown hazard created by unanticipated employee inadvertence. (*Id.*) Here, in contrast, Employer offered no evidence that the framing subcontractor (whose employees Hoffman observed standing on the scissor-lift’s midrail) provided on-site supervision at the time of the alleged violation. Furthermore, Employer offered no evidence that the type of work being performed by the subcontractor was specialized to the extent that Employer could not be expected to effectively supervise (Poelvoorde in fact appeared through his testimony to be quite knowledgeable about wood framing). Nor did Employer offer evidence as to the subcontractor’s history of safety or its qualifications, other than Poelvoorde’s testimony that he was not aware of any similar violations prior to Hoffman’s inspection. Accordingly, Employer failed to establish that it acted with due diligence.

For the reasons set forth above, Employer failed to prove its pleaded defenses.

5. Did The Division Correctly Classify Employer’s Alleged Violations?

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

¹⁴ The “controlling employer” is the employer responsible, by contract or through actual practice, for safety and health conditions at the worksite. (Lab. Code, § 6400, subd. (b)(3); Cal. Code Regs., tit. 8, § 336.10.) In the instant matter, both parties offered evidence that the site was cited as a multiple employer worksite (MEW), and both offered compelling evidence that Employer was the “controlling employer” by contract and through Poelvoorde’s actual practice of inspecting the site and admonishing or disciplining subcontractor employees for safety violations.

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.

Serious physical harm is defined as any injury or illness occurring at a place of employment that results in either a) inpatient hospitalization for treatment; b) the loss of any member of the body; c) any serious degree of permanent disfigurement; or, d) impairment sufficient to cause a part of the body or function of an organ to become both permanently and significantly reduced, as through such injuries as broken bones and other internal injuries. (Lab. Code, § 6432, subd. (e).) The term "realistic possibility", though undefined in the Labor Code, has been held by the Board to mean "within the bounds of reason, and not purely speculative." (*Langer Farms, LLC*, Cal/OSHA App. 13-0231, Decision After Reconsideration (Apr. 24, 2015).)

The Division offered strong evidence creating a presumption that the violation alleged in Citation 4 was Serious. Hoffman testified that she observed employees standing on the midrail of a scissor-lift, approximately 26 feet above ground. Based on her knowledge and work experience¹⁵, she determined the violation exposed the employees to a realistic possibility that death or serious physical harm, including broken bones and head trauma, could result. It is axiomatic that one can fall from a raised platform, and it follows that a fall from a height of approximately two stories (26 feet) can

¹⁵ Hoffman testified that she received a Bachelor's degree in occupational safety and health. Furthermore, she was a claims adjuster from approximately 1991 through 2010, and a worked in loss control at the State Compensation Insurance Fund (SCIF) from approximately 2010 through October, 2013, when she joined the Division as an Associate Safety Engineer. She testified that she received significant training and experience from her past employment, relating to investigation of accidents at construction sites. Hoffman and Division Senior Safety Engineer Brandon Hart (Hart) testified to the fact that Hoffman was current in her Division mandated training at the time of the subject inspection. Thus, Hoffman was competent to give her opinions per Labor Code section 6432, subdivision (g). (See *Wright & Associates, Inc.*, Cal/OSHA App. 95-3649, Decision After Reconsideration (Nov. 29, 1999).)

cause serious physical harm or death.¹⁶ Thus, the Division's evidence was sufficient to create a rebuttable presumption that the violation of section 3646, subdivision (e) was Serious, thereby shifting the burden to Employer to rebut the presumption.¹⁷

6. Did Employer Rebut The Serious Classification Of Citation 4?

An employer can rebut the presumption of a Serious violation by establishing lack of knowledge, by offering evidence that even with reasonable diligence, the Employer could not, and did not, know of the presence of the condition that violates the safety order. (Lab. Code, § 6432, subd. (c), *C.C. Myers, Inc.*, Cal/OSHA App. 08-952, Decision After Reconsideration (Dec. 6, 2013).) Failure to exercise supervision adequate to insure employee safety, however, is equivalent to failing to exercise reasonable diligence, and will not excuse a violation on the claim of lack of employer knowledge. (*Stone Container Corporation*, Cal/OSHA App. 89-042, Decision After Reconsideration (Mar. 9, 1990).) Reasonable diligence includes the obligation by foremen or supervisors to oversee the entire work site where safety and health hazards are present if exposure to an unsafe condition exists. (See *A. A. Portanova & Sons, Inc.*, Cal/OSHA App. 83-891, Decision After Reconsideration (Mar. 19, 1986).) Likewise, a hazard that could have been discovered through periodic safety inspections is deemed discoverable through reasonable diligence. (*Anheuser-Busch, Inc.*, Cal/OSHA App. 84-113, Decision After Reconsideration (July 30, 1987); and *Sturgeon & Son, Inc.*, Cal/OSHA App. 91-1025, Decision After Reconsideration (July 19, 1994).)

Poelvoorde testified that he was in charge of the safety program for the site that included regular safety meetings with subcontractor forepersons, though he stated that he was based out of a trailer approximately 250 feet from the subject scissor-lift, and separated from the site by perimeter fencing covered with a "gawk screen", a solid material that covers the fencing and makes it impossible to see through. Poelvoorde testified to the existence of a job site inspection procedure, and stated he spent more time in the field at the site than in his office; nonetheless, Poelvoorde admitted his last inspection of the site was approximately 45 minutes before Hoffman observed the conditions described in the Division's citations. Employer offered no further evidence of on-site supervision or inspections of the site on the subject date. It is generally understood that active construction sites contain numerous conditions with the potential to imperil employee safety and health.

¹⁶ General human experience demonstrates that falls from even shorter heights can cause serious physical harm or death, depending on such factors as the way the person lands, the surface the person lands on, etc.

¹⁷ Because the undersigned Administrative Law Judge finds good cause to grant Employer's appeal of Citations 2 and 3, discussion of their classification and proposed penalties is properly omitted.

Employer's failure to provide more adequate supervision and inspection in light of the conditions and activities being performed was unreasonable, and therefore, Employer failed to rebut the Serious classification of Citation 4.

For the reasons stated above, the Division met its burden of demonstrating that it properly classified Employer's violation of section 3646, subdivision (e) as Serious, and Employer failed to rebut the classification.

7. Did The Division Propose Reasonable Penalties For Employer's Alleged Violations?

The Division enjoys a rebuttable presumption that its proposed penalties are reasonable, provided that the Division establishes that its penalties were calculated in accordance with the Division's policies, procedures and regulations. (*Stockton Tri Industries, Inc.*, Cal/OSHA pp. 02-4946, Decision After Reconsideration (Mar. 27, 2006).) Section 336, subdivision (c), sets the initial base penalty for a Serious violation at \$18,000. The base penalty is then adjusted for Extent and Likelihood, and the resulting figure is the "Gravity-based penalty". (*Id.*) In situations such as the one here, where the violation did not cause a serious injury, illness or death, the Gravity-based penalty is further adjusted for the Size of the Business, the Employer's Good Faith, and the Employer's History of compliance, resulting in the "Adjusted Penalty". (Cal. Code Regs., tit. 8, § 336, subd. (d).) The Adjusted Penalty is subject to a further 50% credit if the Employer abated the violation at the time of the initial or a subsequent inspection visit, prior to issuance of a citation, or submitted a signed affidavit and supporting evidence within 10 working days of the period fixed in the citation for abatement, evidencing that abatement has occurred. (Cal. Code Regs., tit. 8, § 336, subd. (e).)

Because she determined that the violation was Serious, Hoffman started with a base penalty of \$18,000. Hoffman testified that in calculating the proposed penalty for Citation 4, she found 2 exposed employees. She further testified that standing on the midrail of an elevating work platform presented significant risk of a fall hazard. As a result, Hoffman testified that she determined the Extent and Likelihood were high, resulting in a 50% upward adjustment and a \$27,000 Gravity-based penalty. Hoffman then applied a 15% adjustment for Good Faith, 20% for Size, and 10% for History, resulting in an Adjusted Penalty of \$14,850. (See Exhibit 13.) She then applied the 50% abatement credit, resulting in the proposed penalty of \$7,425.

The Division's proposed penalty was not calculated entirely in accordance with the Board's regulations, because the Division's evidence did not support the adjustments made to the Base Penalty for Extent and Likelihood. Extent is based upon "the degree to which a safety order was violated" and 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."

(Cal. Code Regs., tit. 8, § 335, subd. (a)(2)(ii).) Extent is rated as “low” when an “isolated violation” occurs, or less than 15% of the applicable units are in violation.

Here, the evidence of one occasion involving two employees standing on the midrail of one elevating scissor-lift¹⁸ platform does not support a “high” Extent rating, and instead supports a “low” rating, or an adjustment of 25% subtracted from the Base Penalty. (Cal. Code Regs., tit. 8, § 336, subd. (c).)

Likelihood is defined as “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 the employees of the firm and/or industry in general, as shown by experience, available statistics or records.” (Cal. Code Regs., tit. 8, § 335, subd. (a)(3).) Hoffman testified credibly as to the possibility of serious physical harm or death from falling, as a result of employees standing on the elevated midrail. However, the fact that the evidence established only 2 employees out of at least 4 who appeared to be working on elevating platforms (see Exhibit 2) were exposed to the hazard (see Exhibits 2 through 6) weighs against a “high rating”, and instead warrants a finding of “low” Likelihood, and a resulting subtraction of 25% from the Base penalty. Accordingly, the Gravity-based penalty for Citation 4 should have been \$9,000.

The remaining adjustments applied by the Division for Good Faith, Size and History, were presumptively reasonable because they were calculated in accordance with the Board’s regulations. Employer did not offer sufficient evidence to rebut the Division’s Good Faith adjustment resulting from a finding that Employer’s safety program was average, and Employer received the maximum allowable adjustment for History. (Cal. Code Regs., tit. 8, § 336, subd. (c).) Accordingly, a preponderance of the evidence established that Employer was entitled to a 40% total adjustment to the Gravity-based penalty, resulting in an Adjusted Penalty of \$5,400. Furthermore, the preponderance of evidence at hearing demonstrated that the violation was abated immediately when the employees came down from the elevating platform, so Employer was entitled to a 50% (\$2,700) abatement credit. Applying the above adjustments and credits, the resulting penalty for Employer’s violation of section 3646, subdivision (e), is \$2,700.

¹⁸ Although not the subject of testimony, Exhibits 2, 8 and 11 appear to show more than one elevating work platform at the site. In particular, Exhibit 2 shows what appear to be two unidentified workers standing on the platform of a second piece of equipment similar in appearance to the subject scissor-lift.

For the foregoing reasons, therefore, a penalty of \$2,700 is assessed for Citation 4, for Employer's violation of section 3646, subdivision (e).¹⁹

Conclusions

The Division failed to prove by a preponderance of the evidence that Employer exposed employees working at ground level to the risk of impalement from 2 uncapped rebar. Therefore, Employer's appeal of Citation 2 is granted.

The Division failed to prove by a preponderance of the evidence that Employer exposed employees working above grade to the risk of impalement from 2 uncapped rebar. Therefore, Employer's appeal of Citation 3 is granted.

The Division proved by a preponderance of the evidence that Employer failed to ensure that employees did not climb or stand on guardrails of an elevating work platform. Therefore, Citation 4 is affirmed.

Order

It is hereby ordered that Citations 1, 2, and 3 are vacated, and Citation 4 is established and the penalty is assessed as indicated above and as set forth in the attached Summary Table. Total penalties are assessed in the amount of \$2,700.

Dated: July 28, 2015

HOWARD I CHERNIN
Administrative Law Judge

HIC:ml

¹⁹ As noted previously, the undersigned ALJ found good cause to grant Employer's appeal from Citations 2 and 3. For that reason, a discussion of the proposed penalties pertaining to those citations has been omitted.

APPENDIX A

SUMMARY OF EVIDENTIARY RECORD

**Name: SAVANT CONSTRUCTION, INC.
Dockets 14-R3D1-3018 through 3021**

Date of Hearing: June 3, 2015

Division's Exhibits

Exh. No.	Exhibit Description	ADMITTED
1	Jurisdictional Documents	YES
1A	Division's 1BY	YES
2	Photo of employees standing on midrails of 26ft scissor lift, taken on date of inspection	YES
3	Photo of employee standing on midrail with 1 leg, no harness, taken on date of inspection	YES
4	Photo of employee standing on midrail and holding wood joist, taken on date of inspection	YES
5	Second photo of employee standing on midrail holding wood joist, taken on date of inspection	YES
6	Third photo of employee standing on midrail holding wood joist, taken on date of inspection	YES
7	Photo of joists installed on date of inspection, taken on date of inspection	YES
8	Photo of rebar without protective caps, taken on date of inspection	YES
9	Photo of broken rebar protective cap, taken on date of inspection	YES
10	Photo of measurement of rebar shown in Exh. 8, taken on date of inspection	YES
11	Photo of GS-2668 RT Scissor Lift, taken on date of inspection	YES
12	Photo of supervisor trailer in relation to worksite, taken on date of inspection	YES

13	Division's C-10 Proposed Penalty Worksheet	YES
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Employer's Exhibits

Exh. No.	Exhibit Description	ADMITTED
A	Division's Inspection Report, dated September 2, 2014	YES

Witnesses Testifying at Hearing

Christine Hoffman
Brandon Hart
Dale Poelvoorde

CERTIFICATION OF RECORDING

I, HOWARD I. CHERNIN, 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.

HOWARD I. CHERNIN

Date

SUMMARY TABLE DECISION

In the Matter of the Appeal of:

SAVANT CONSTRUCTION INC.
Dockets 14-R3D1-3018 through 3021

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

IMIS No. 316388585

DOCKET	C I T A T I O N	I T E M	SECTION	T Y P E	MODIFICATION OR WITHDRAWAL	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
14-R3D1-3018	1	1	3395(e)	G	DOSH withdrew Citation. Citation vacated pursuant to stipulation of the parties, in exchange for waiver of costs.		X	\$135	\$0	\$0
14-R3D1-3019	2	1	1712(c)(1)	S	Appeal granted by the ALJ. Citation vacated.		X	\$4,950	\$4,950	\$0
14-R3D1-3020	3	1	1712(c)(2)	S	Appeal granted by the ALJ. Citation vacated.		X	\$4,950	\$4,950	\$0
14-R3D1-3021	4	1	3646(e)	S	Affirmed by the ALJ with modified penalty as set forth in decision.	X		\$7,425	\$7,425	\$2,700
								\$17,460	\$17,325	\$2,700

\$2,700

NOTE: *Please do not send payments to the Appeals Board. All penalty payments should be made to:*
 Accounting Office (OSH)
 Department of Industrial Relations
 P.O. Box 420603
 San Francisco, CA 94142

(INCLUDES APPEALED CITATIONS ONLY)

*You will owe more than this amount if you did not appeal one or more citations or items containing penalties.

ALJ: HIC/ml
 POS: 07/28/15

