BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1549611**
METCALF, INC. **2690 POMONA BLVD.** **POMONA, CA 91768**	**DECISION**
Employer	

Statement of the Case

Metcalf, Inc. (Employer) is a construction contractor providing services in plaster and lath. On August 25, 2021, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineers Emerson Butler (Butler) and Joey Crocker (Crocker), commenced an inspection of a site located at 2097 Imola Avenue in Napa, California (jobsite), after report of an injury at the jobsite on August 20, 2021.

On December 8, 2021, the Division cited Employer for four alleged safety violations: failure to correct unsafe conditions of an employee climbing a ladder while carrying a plaster hose; failure to correct unsafe conditions of employees working under or around scaffolding without toeboards installed; failure to ensure that toeboards were installed on scaffolding; and failure to ensure that an employee climbing a ladder did not carry a plaster hose.

Employer filed timely appeals of the citations, contesting the existence of the violations for each citation. For Citation 2, Employer also asserted that the classification was incorrect and the proposed penalty was unreasonable. Additionally, Employer asserted numerous affirmative defenses to each of the citations.[1]

This matter was heard by Christopher Jessup (Jessup), Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (Appeals Board). On January 30 to February 1, 2024, June 11 to 13, 2024, and July 10, 2024, ALJ Jessup conducted the hearing from Sacramento, California, with the parties and witnesses appearing remotely via the Zoom video platform. Matthew McMillan, attorney with Donnell, Melgoza & Scates, LLP,

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

represented Employer. Jonathan Louie and Lauren Ocadiz, Staff Counsel, represented the Division. The matter was submitted for decision on December 30, 2024.

Issues

1. Did Employer fail to correct unsafe conditions in accordance with its safety program?

2. Did Employer fail to install toeboards on scaffolds where persons were required to work or pass under the scaffold?

3. Did Employer fail to prevent an employee from climbing a ladder while carrying equipment or materials which prevented the safe use of the ladder?

4. Did Employer establish that it was not responsible for the violation in Citation 2 based on the Independent Employee Action Defense?

5. Did the Division establish a rebuttable presumption that Citation 2 was properly classified as Serious?

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

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

8. Are the proposed penalties reasonable?

Findings of Fact[2]

1. On August 20, 2021, Employer's employee, Hugo Carrillo (Carrillo), was injured while carrying a plaster hose as he climbed a ladder to access upper levels of a scaffold.

2. Employer's Injury and Illness Prevention Program (IIPP) requires its supervisors to "[c]orrect unsafe acts and conditions that could cause accidents."

3. Miguel Garcia (Garcia), Employer's foreman at the jobsite, was present at the time of Carrillo's accident on August 20, 2021.

[2] Findings of Fact Nos. 1, 13, 14, 16, 17, and 18 were stipulations by the parties.

4. Garcia did not stop Carrillo from climbing the ladder while carrying the hose.

5. Garcia instructed Carrillo to carry the hose up the ladder instead of using an available rope to pull it to the upper levels.

6. Garcia had instructed other employees to carry hoses up ladders on occasions prior to Carrillo's accident.

7. Employer's IIPP requires the installation of toeboards on scaffolding when at heights of six feet or higher.

8. The scaffolds at the jobsite were taller than six feet.

9. There were no toeboards installed on the scaffolds at the jobsite.

10. Employees were required to work or pass under the scaffold at the jobsite.

11. Carrillo's action of draping a 100-pound hose across his body as he climbed up a multi-story ladder prevented the safe use of that ladder.

12. Carrillo was experienced in the task of climbing ladders to access upper levels of a scaffold.

13. At the time the accident occurred, Metcalf had a safety program that included training. Employees were trained regarding (1) the hazards of climbing ladders while carrying items, and (2) the hazards of climbing ladders without maintaining three points of contact at all times.

14. Employer's safety program included a procedure to ensure compliance with safety rules, including disciplining and correcting employees who violate safety rules, and Employer enforced that safety policy.

15. Carrillo was not aware that his actions were in violation of any of Employer's safety procedures.

16. There was a realistic possibility of serious physical harm, as defined by Labor Code section 6432, when Carrillo climbed the ladder while carrying the plaster hose.

17. Carrillo suffered a serious injury when he fell on August 20, 2021.

18. The penalty for Citation 2 was calculated in accordance with the Division's policies and procedures.

19. The two hazards for which Employer was cited in Citation 1, Item 1, are the same two hazards for which Employer was cited in Citation 1, Item 2, and Citation 2.

Analysis

1. Did Employer fail to correct unsafe conditions in accordance with its safety program?

California Code of Regulations, title 8, section 1509, subdivision (a),[3] requires that "[e]very employer shall establish, implement and maintain an effective Injury and Illness Prevention Program in accordance with section 3203 of the General Industry Safety Orders." Citation 1, Item 1, references section 3203, subdivision (a)(6), which provides:

> (a) Effective July 1, 1991, every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program (Program). […]
>
> (6) Include methods and/or procedures for correcting unsafe or unhealthy conditions, work practices and work procedures in a timely manner based on the severity of the hazard:
>
> (A) When observed or discovered; and, […]

In Citation 1, Item 1, the Division alleges:

> Prior to and during the course of the inspection, including but not limited to, on August 25, 2021, the employer failed to implement and maintain an effective Injury and Illness Prevention Program in the following instances:
>
> Instance 1:
> The supervisor failed to correct the unsafe condition of an employee climbing a scaffolding ladder while carrying a plaster hose.
>
> Instance 2:

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

> The supervisor failed to correct the unsafe conditions of allowing employees to work under or around scaffolding without standard toeboards installed.

The Division has the burden of proving a violation by a preponderance of the evidence. (*Wal-Mart Stores, Inc. Store # 1692,* Cal/OSHA App. 1195264, Decision After Reconsideration (Nov. 4, 2019).) "'Preponderance of the evidence' is usually defined in terms of probability of truth, or of evidence that[,] when weighed with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence." (*Sacramento County Water Agency Department of Water Resources,* Cal/OSHA App. 1237932, Decision After Reconsideration (May 21, 2020).) Full consideration is to be given to the negative and affirmative inferences to be drawn from all the evidence. (*Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 483.)

Instance 1: Correction of the unsafe condition of climbing a scaffolding ladder while carrying a plaster hose

The primary issue is whether Employer effectively implemented procedures for correcting unsafe work practices or procedures in a timely manner based on the severity of the hazard. Notably, while an employer may have a comprehensive IIPP, the Division may still demonstrate an IIPP violation by showing that the employer failed to implement that plan. (*DPR Construction, Inc., et al. dba DPR Construction*, Cal/OSHA App. 1206788, Decision After Reconsideration (Feb. 19, 2021).)

> Implementation of an IIPP is a question of fact. [Citation.] Proof of implementation requires evidence of actual responses to known or reported hazards. [Citation.] Further, the corrective action taken by the employer must be sufficient in magnitude and scope to address the particular hazard. [Citation.]

(*Papich Construction Company, Inc.*, Cal/OSHA App. 1236440, Decision After Reconsideration (Mar. 26, 2021), citing to *National Distribution Center, LP, Tri-State Staffing*, Cal/OSHA App. 12-0391, Decision After Reconsideration (Oct. 5, 2015).)

As an initial matter, the Division did not identify an issue with Employer's written IIPP with regard to its contents for correcting hazards. Employer's IIPP provides that its supervisors are required to "[c]orrect unsafe acts and conditions that could cause accidents." (Exh. R, p. 7.) Additionally, the IIPP states "[a]ny and all hazards identified will be corrected as soon as practical in accordance with the company hazard correction policy." (Exh. R, p. 47.) The IIPP also provides details on how to "evaluate, prioritize and correct identified safety hazards." (Exh.

R., p. 49.) As no deficiency of the IIPP was identified and such a deficiency is not readily apparent, the next question is regarding implementation of the IIPP.

To consider implementation, it is necessary to first consider whether there was an unsafe practice at the jobsite. There was no dispute that, on August 20, 2021, Carrillo climbed a ladder to access upper levels of the scaffold while carrying the nozzle-end of a plaster hose. Carrillo testified that he had the hose draped across his body at a diagonal from his shoulder down across his chest toward his feet. Crocker and Carrillo testified that a hose such as this would weigh around 100 pounds at the point where Carrillo had carried it before he fell. Carrillo testified that the weight of the hose would increase the higher he went with it. He explained that it was possible to ascend to the fourth floor using this method but not as high as the fifth or sixth floor because the weight of the hose would become too much. Additionally, this incident resulted in Carrillo falling from the ladder, even while receiving the assistance of Garcia.

In addition to testifying about his accident, Carrillo testified at length about Employer's regular work practices prior to the accident. Carrillo testified that he had carried the hose to upper levels of scaffolding multiple times, prior to the accident, and that he had seen other employees use the same method to bring up the hose.

Pursuant to the foregoing, it is found that the method of carrying the plaster hose up the ladder in the manner that led to the incident is an unsafe practice because the evidence establishes that the weight of the hose would increase with height and could increase to a weight that could not be supported by the employee carrying the hose. Further, it is found that the unsafe practice was used at the jobsite at the time of the accident.

Having determined that an unsafe practice was used at the jobsite, the next consideration is whether Employer took action to correct the hazard when observed or discovered. At the time of the accident, Carrillo climbed a ladder while carrying a plaster hose and while Garcia, a supervisor, was present. Carrillo testified that he had been instructed by Garcia to take the hose to the top of the scaffold. Carrillo explained that Garcia did not stop him as he walked toward the ladder holding the hose, nor did he try to stop him as he climbed. Carrillo testified that Garcia attempted to assist him in carrying the hose up the ladder by pushing the hose up from behind. A video of the accident, Exhibit J-3, shows several important details. The first important detail in the video is that it shows that Garcia and Carrillo were near each other as Garcia began to ascend the ladder. (Exh. J-3.) The second notable detail is that Garcia began exiting the scaffold to assist Carrillo within six seconds after Carrillo began to ascend the ladder. (*Id.*) These two details, in combination, support Carrillo's testimony and support the inference that Garcia was aware that Carrillo was ascending the ladder with the hose and that Carrillo was in the plain view of Garcia. As Garcia did not stop Carrillo from proceeding with the task, it is found that Employer did not

take effective action to correct the hazard, but instead, allowed Carrillo to proceed up the ladder with the hose.

The parties stipulated that there was a rope available to pull the hose up from the ground to the upper levels of the scaffold at the time of Carrillo's accident. Employer argued that Carrillo's actions were entirely unanticipated and that using the rope pulley was Employer's standard practice at all times. This argument is unsupported by Carrillo's testimony which has been credited and relied upon, as noted above. Employer's argument appears to rely primarily on the testimony of Garcia in support of its position. However, when Garcia was asked if he had ever seen anyone transport the hose up the scaffolding any way other than carrying it while climbing the ladder, he testified that the employees engaged in a method of passing the hose up from one person to another person standing on higher levels of the scaffold. Garcia's testimony did not establish that the rope method was the exclusive and expected method of raising the hose to the top level. As such, Employer's argument is unpersuasive.

Accordingly, Employer failed to implement its IIPP by correcting the unsafe condition of carrying a hose up a ladder, and a violation of section 1509, subdivision (a), is established. Instance 1 of Citation 1 is affirmed as a violation.

Instance 2: Allowing employees to work under or around scaffolding without standard toeboards installed

Instance 2 also deals with implementation of Employer's written IIPP. Specifically, Instance 2 alleges that Employer "failed to correct the unsafe conditions of allowing employees to work under or around scaffolding without standard toeboards installed."

An employer's IIPP may be satisfactory as written, but still result in a violation of section 3203, subdivision (a)(6), if the IIPP is not implemented, or through failure to correct known hazards. (*Contra Costa Electric, Inc*., Cal/OSHA App. 09-3271, Decision After Reconsideration (May 13, 2014).)

Employer's written IIPP requires the installation of toeboards under the following conditions:

> Toe boards and guardrails shall be installed if a scaffold or platform is erected to a height of 6 feet or more. Scaffolds shall be provided with a screen between the toe board and the guardrail, extending along the entire opening, consisting of No. 18 gauge wire one-half inch mesh or the equivalent, where workers are required to work or pass under the scaffolds.

(Exh. R, p. 34.) As discussed above, Employer's written IIPP did not have deficiencies identified by the Division and deficiencies were not readily apparent.

Turning next to implementation of the IIPP, the scaffold at the jobsite was substantially taller than six feet in height, with four levels providing access to a multi-story building. (Exh. 11 through 16 and J-3.) There was no dispute that the scaffold had no toeboards. This is supported by photographs taken at the jobsite in addition to testimony by Crocker and Butler that they observed no toeboards on the scaffold when they inspected the jobsite. Thus, Employer did not implement the toeboard provisions of its IIPP with regard to scaffolding six feet or higher.

Employer's manager, Chad Farry (Farry), testified that Employer does not install toeboards on the platforms of scaffolding unless employees will be working or passing under the scaffold to access a building at ground level. For the job involved in the inspection, there was no ground level access into the building. Thus, Employer's argument is that there was no violation of its IIPP because the toeboards were not required by the IIPP in the first place.

There are two flaws with Employer's argument. First, the plain language of Employer's IIPP requires toeboards on scaffolding that is six feet or higher: "Toe boards and guardrails shall be installed if a scaffold or platform is erected to a height of 6 feet or more." (Exh. R, p. 34.) As written, the statement in Employer's IIPP related to workers below the scaffold is part of the requirement to have a mesh screen: "Scaffolds shall be provided with a screen between the toe board and the guardrail … where workers are required to work or pass under the scaffolds." (Exh. R, p. 34.) As noted above, the scaffold at the jobsite was substantially taller than six feet in height. It was patent that Employer had no toeboards installed despite the requirement in the plain language of its IIPP.

The second flaw with Employer's argument that it was properly implementing its IIPP with regard to toeboards relates to where employees were working. Farry asserted that there was no requirement to install toeboards because there was no ground level access to the building that required employees to work or pass under the scaffold. However, the photographic evidence directly contradicts this assertion. While there may not have been a need to walk under the scaffold to gain access inside the building, employees were working at ground level below and adjacent to the scaffold. In Exhibit 11, there is a worker standing on the ground just inches from the edge of the scaffold. Exhibit 14 depicts a worker kneeling on the ground directly under the scaffold as he is performing work on the side of the building. In Exhibit 15, the previously-kneeling worker is carrying a large bucket as he walks away from the scaffold one minute after he was working below the scaffold in Exhibit 14. Thus, even if Employer's IIPP only required toeboards when employees were working or passing under the scaffold, the photographic evidence irrefutably demonstrates that workers were, in fact, working under the scaffold.

The Division established that Employer failed to implement its IIPP with regard to installation of toeboards on scaffolds. The IIPP requires toeboards when the scaffold was at a height of six feet or more. The scaffold at the jobsite was significantly taller than six feet and there were no toeboards on any of the levels of scaffolding.

A citation may be upheld on the basis of a single instance. (*Golden State Boring & Pipe Jacking, Inc.*, Cal/OSHA App. 1308948, Decision After Reconsideration (July 24, 2020).) Here, the Division established a violation in both instances of Citation 1, Item 1. Accordingly, Citation 1, Item 1, is affirmed.

2. Did Employer fail to install toeboards on scaffolds where persons were required to work or pass under the scaffold?

Section 1621, subdivision (b), provides:

(b) A standard toeboard shall be 4 inches (nominal) minimum in vertical height from its top edge to the level of the floor, platform, runway, or ramp. It shall be securely fastened in place and have not more than 1/4-inch clearance above floor level. It may be made of any substantial material, either solid, or with openings not over one inch in greatest dimension. Toeboards shall be provided on all open sides and ends of railed scaffolds at locations where persons are required to work or pass under the scaffold and at all interior floor, roof, and shaft openings.

In Citation 1, Item 2, the Division alleges:

Prior to, and during the course of the inspection, including but not limited to on, August 25, 2021, the employer failed to ensure that standard toeboards were provided on all open sides and ends of railed scaffolding where employees were required to work under or pass under the scaffolding at a jobsite located at 2097 Imola Ave., Napa California.

a. Were employees "required to work or pass under the scaffold"?

To establish a violation of the safety order, the Division must demonstrate the applicability of the safety order to the facts of the case. (*Dish Network California Service Corporation*, Cal/OSHA App. 12-0455 (Aug. 28, 2014).) In determining applicability of a safety order, the Appeals Board applies the principles of statutory construction to determine intent of the regulation's drafters. If the language of the regulation is unambiguous, the plain meaning of the language controls because it is presumed "the legislature meant what it said." (*Michels Corp,*

dba Michels Pipeline Construction, Cal/OSHA App. 07-4274, Denial of Petition for Reconsideration (Jul. 20, 2012).)

Where a term is not defined, "it can be assumed that the Legislature was referring to the conventional definition of that term." (*OC Communications, Inc.*, Cal/OSHA App. 14-0120, Decision After Reconsideration (Mar. 28, 2016), citing to *Heritage Residential Care, Inc. v. Division of Labor Standards Enforcement* (2011) 192 Cal.App.4th 75, 82.) "The rules of statutory and regulatory interpretation require that terms be given their ordinary meaning if not specially defined otherwise." (*California Highway Patrol*, Cal/OSHA App. 09-3762, Decision After Reconsideration (Aug. 16, 2012).) To obtain the ordinary meaning of a word, the Appeals Board may refer to its dictionary definition. (*Fedex Freight, Inc.*, Cal/OSHA App. 317247211, Decision After Reconsideration (Dec. 14, 2016).)

"Under" is defined as "in or into a position below or beneath something." (www.merriam-webster.com <accessed November 22, 2024>.) "Beneath" is defined as "in or to a lower position." (www.merriam-webster.com <accessed November 22, 2024>.) And finally, "below" is defined as "in or to a lower place." (www.merriam-webster.com <accessed November 22, 2024>.)

To the extent that Employer's argument that toeboards were not required relies on the claim that employees were not passing directly under the scaffold at ground level to access the building, the argument is not persuasive. As set forth above, there is a photograph where a worker is directly under the lowest level of the scaffold. Thus, it is clearly depicted that workers were working or passing "under" the scaffold. (Exh. 14.) Further, there were numerous other photographs depicting employees working at ground level, i.e., in a lower place, or below, and directly adjacent to the scaffold. (Exh. 11, 15, and 16.)

The Division established that there were employees "required to work or pass under the scaffold" and toeboards were required in accordance with section 1621, subdivision (b).

b. Exposure

The zone of danger is that area surrounding the violative condition that presents the danger to employees that the standard is intended to prevent." (*Benicia Foundry & Iron Works, Inc*., Cal/OSHA App. 00-2976, Decision After Reconsideration (Apr. 24, 2003).) The Division may demonstrate employee exposure by showing that an employee was actually exposed to the zone of danger or hazard created by a violative condition. (*Id.*) Actual exposure is established when the evidence preponderates to a finding that employees actually have been or are in the zone of danger created by the violative condition. (*Dynamic Construction Services, Inc.,* Cal/OSHA App. 14-1471, Decision After Reconsideration (Dec. 1, 2016).)

The violative condition in Citation 1, Item 2, was the failure to install toeboards "on all open sides and ends of railed scaffolds at locations where persons are required to work or pass under the scaffold… ." (§ 1621, subd. (b).) Thus, the violative condition directly addresses the exposure component of where employees would be located in order to be exposed to the condition.

While the employees at ground level next to the scaffold were not directly beneath the scaffold, there can be no serious argument that these employees were not exposed to the hazard of falling object resulting from not having toeboards on scaffolding. Indeed, it is an absurd interpretation to find that someone who is working beneath the scaffold is exposed to the hazard, but someone standing directly adjacent to the scaffold at ground level is not in a zone of danger. Toeboards are mandated throughout the safety orders where there is a hazard from falling tools, material, or equipment onto employees working below. (See, e.g., § 3210, subd. (b), § 3273, subd. (e)(1)(A), and § 1621, subd. (c).) An item falling from scaffolding above would be more likely to injure a person next to the scaffold at ground level than one who is working directly below the scaffolding and protected by the platforms overhead.

As noted above, photographs, such as Exhibits 11, 14, 15, and 16, establish that workers were working under, by being adjacent and below as well as beneath, the scaffold. As such, the evidence supports a finding that employees were exposed to the hazard by having actually been in the area of the violative condition.

Accordingly, the Division established that employees were actually exposed to the violative condition of not having toeboards installed on scaffolding.

c. Violation

There was no dispute that the scaffolding at the jobsite did not have toeboards. Having established that toeboards were required and that employees were exposed to the hazardous condition resulting from not having toeboards installed, the Division met its burden of proof to establish a violation of section 1621, subdivision (b). Accordingly, Citation 1, Item 2, is affirmed.

3. Did Employer fail to prevent an employee from climbing a ladder while carrying equipment or materials which prevented the safe use of the ladder?

Section 3276, which regulates the use, design, and maintenance of portable ladders, provides, in relevant part:

(e) Care, Use, Inspection and Maintenance of Ladders.

[…]

(15) Climbing and Working on Ladders.

[…]

(B) Employees shall be prohibited from carrying equipment or materials which prevent the safe use of ladders.

In Citation 2, the Division alleges:

> Prior to, and during the course of the investigation, the employer failed to ensure that an employee that used a ladder to gain access to a scaffold platform did so without carrying a plaster hose, which prevented the safe use of the ladder. As a result, on or about, August 20, 2021, the employee sustained a serious injury when he fell approximately 15 feet to ground level while climbing a scaffold ladder carrying a plaster hose.

"The Board has previously held that reasonable inferences can be drawn from the evidence introduced at a hearing." (*RNR Construction, Inc*., *supra*, Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017).) There was no dispute that Carrillo climbed a ladder to access upper levels of the scaffold. He was carrying the nozzle-end of a plaster hose. Carrillo testified that he had the hose draped across his body at a diagonal from his shoulder down across his chest toward his feet. Crocker and Carrillo testified that a hose such as this would weigh around 100 pounds at the point where Carrillo had carried it before he fell.

It is a reasonable inference that draping a hose, that increased in weight with height, across a worker's body as he or she climbed a multi-story ladder would prevent the safe use of that ladder. Accordingly, the Division established a violation of section 3276, subdivision (e)(15)(B).

4. Did Employer establish that it was not responsible for the violation in Citation 2 based on the Independent Employee Action Defense?

Employer asserted that it is not responsible for the violations related to ladder safety alleged in Instance 1 of Citation 1, Item 1, and Citation 2 based on the Independent Employee

Action Defense (IEAD). In order to successfully assert the affirmative defense of IEAD, an employer must establish each of the following elements:

(1) The employee was experienced in the job being performed;
(2) The employer has a well-devised safety program which includes training employees in matters of safety respective to their particular job assignments;
(3) The employer effectively enforces the safety program;
(4) The employer has a policy of sanctions against employees who violate the safety program; and
(5) The employee caused a safety infraction which he or she knew was contra to the employer's safety requirements.

(*Fedex Freight, Inc*., *supra,* Cal/OSHA App. 317247211; *Mercury Service, Inc*., Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980).)

a. Was Carrillo experienced in the job being performed?

This requirement is satisfied when an employer shows that the employee had sufficient experience performing the work that resulted in the alleged violation. (*West Coast Communication*, Cal/OSHA App. 05-2801, Decision After Reconsideration (Feb. 4, 2011).)

Carrillo testified that he had worked for Employer since 2018, with a period of time where he performed the same work for another company, then returned to working for Employer. Thus, Carrillo had been performing plastering work that involved climbing ladders for at least three years prior to the accident. As such, Employer satisfied the first element of the IEAD.

b. Did Employer have a well-devised safety program?

The second element of the IEAD requires the employer to have a well-devised safety program which includes training employees in matters of safety respective to their particular job assignments. (See *Mercury Service, Inc*., *supra,* Cal/OSHA App. 77-1133.)

Employer's written IIPP was produced to the Division during the inspection as part of Employer's responses to a document request. (Exh. R.) The written IIPP includes all the topics required by section 3203, subdivision (a), and has a particular section dedicated for a "Scaffolding Safety Program." The Division did not establish that Employer had any deficiencies in its written safety program.

The parties stipulated that "[a]t the time the accident occurred, Metcalf had a safety program that included training. Employers were trained regarding (1) the hazards of climbing

ladders while carrying items, and (2) the hazards of climbing ladders without maintaining three points of contact at all times."

Accordingly, Employer established the second element of the IEAD.

c. Did Employer effectively enforce its safety program?

"While an employer may have a well-defined safety program on paper, an employer must also demonstrate that it effectively enforces that safety program to meet the IEAD. Proof that Employer's safety program is effectively enforced requires evidence of meaningful, consistent enforcement." (*Fedex Freight, Inc*., *supra,* Cal/OSHA App. 317247211.)

> "[E]nforcement is accomplished not only by means of disciplining offenders but also by compliance with safety orders during work procedures." [Citation omitted.] Where there is lax enforcement of safety polices, an employer cannot be said to have effectively enforced its safety plan. [Citation omitted.] Employer has the burden to show that it enforces the safety policies and procedures promulgated in its IIPP and training programs, and promotes a safe working environment. [Citation omitted.]

(*General Dynamics NASSCO*, Cal/OSHA App. 1300984, Decision After Reconsideration (Jan. 23, 2023).)

Farry testified that, in addition to having its employees attend safety meetings conducted by general contractors, Employer conducts safety meetings and tailgate meetings. (Exh. E, F.). Employer's IIPP includes instructions regarding climbing ladders safely in addition to scaffold safety. (Exh. R, p. 14 [three-point contact on ladder at all times; do not carry items in hands while climbing] and p. 33 [toeboards installed if scaffold is six feet or higher].)

However, as set forth above in Citation 1, Item 1, Employer failed to implement its IIPP by correcting unsafe conditions. Additionally, as noted above, Farry testified that Employer does not install toeboards on the platforms of scaffolding unless employees will be working or passing under the scaffold to access a building at ground level. Even if the particular instances at issue in this case are disregarded, Farry's testimony is credited for the position that Employer does not generally comply with its own IIPP. As such, Employer's safety program was not effectively enforced. Employer did not establish the third element of the IEAD.

d. Did Employer have a policy of sanctions against employees who violate the safety program?

"Element four requires a demonstration that the employer has a policy of sanctions which it enforces against employees who violate the safety program." (*Synergy Tree Trimming, Inc*., Cal/OSHA App. 317253953, Decision After Reconsideration (May 15, 2017).)

The parties stipulated that Employer's safety program included a procedure to ensure compliance with safety rules, including disciplining and correcting employees who violate safety rules, and that Employer enforced that safety policy.

Therefore, Employer established the fourth element of the IEAD.

e. Did Carrillo commit a safety infraction that he knew was contra to Employer's safety requirements?

"The final element requires the employer to demonstrate that the employee causing the infraction knew he was acting contra to the employer's safety requirements." (*Synergy Tree Trimming, Inc*., *supra,* Cal/OSHA App. 317253953.) When the record lacks evidence that the employee actually knew of the safety requirement that was violated, the fifth element fails. (*Paso Robles Tank, Inc*., Cal/OSHA App. 08-4711, Denial of Petition for Reconsideration (Nov. 2, 2009). [Appeals Board found that the injured employee did not know he was taking an action in violation of the safety program, given his testimony that he had taken that same action on numerous occasions.])

Carrillo testified that he had carried a hose up the ladder on previous occasions, that he had observed other employees engaged in the practice, and that his supervisor had instructed him to climb the ladder with the hose on the day of the accident. As such, Employer failed to establish that Carrillo knew he was violating Employer's safety requirements. Accordingly, Employer did not establish the fifth element of the IEAD.

A single missing element defeats the IEAD. *(Home Depot USA, Inc*., Cal/OSHA App. 10-3284, Decision After Reconsideration (Dec. 24, 2012).) Employer failed to establish the third and fifth elements and, therefore, has not met its burden of proof with regard to the affirmative defense of the IEAD.

5. Did the Division establish a rebuttable presumption that Citation 2 was properly classified as Serious?

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

(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:
[…]

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

The Appeals Board has defined the term "realistic possibility" to mean a prediction that is within the bounds of human reason, not pure speculation. (*A. Teichert & Son, Inc. dba Teichert Aggregates*, Cal/OSHA App. 11-1895, Decision After Reconsideration (Aug. 21, 2015), citing *Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (Sep. 27, 2001).)

At the commencement of the hearing, the parties stipulated that there was a realistic possibility of serious physical harm, as defined by Labor Code section 6432, when Carrillo climbed the ladder while carrying the plaster hose. The parties further stipulated that Carrillo suffered serious physical harm when he fell on August 20, 2021.

Accordingly, the Division established a rebuttable presumption that the violation cited in Citation 2 was properly classified as Serious.

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

Labor Code section 6432, subdivision (c), provides that an employer may rebut the presumption that a Serious violation exists by demonstrating that the employer did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation. In order to satisfactorily rebut the presumption, the employer must demonstrate both:

(1) The employer took all the steps a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation, taking into consideration the severity of the harm that could be expected to occur and the likelihood of that harm occurring in connection with the work activity during which the violation occurred. Factors relevant to this determination include, but are not limited to, those listed in subdivision (b) [; and]

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

Labor Code section 6432, subdivision (b), shifts the burden to the employer to rebut the presumption that the citation was properly classified as Serious. Employer asserted that it lacked actual or constructive knowledge of the violation.

The violation asserted in Citation 2 is the failure to ensure that employees do not climb ladders while carrying materials that prevent the safe use of the ladder. As set forth above, the Division established a violation of section 3276, subdivision (e)(15)(B). Having found that an employee was climbing the scaffold ladder carrying a plaster hose weighing approximately 100 pounds, and that carrying the hose prevented the safe use of the ladder, the burden shifts to Employer to establish that that it took all steps a reasonable and responsible employer should to take, before the violation occurred, to anticipate and prevent the violation.

When a supervisor is involved in the violation of a safety order, the supervisor's knowledge of the violation is imputed to the employer. (*Sacramento County Water Agency Department of Water Resources, supra,* Cal/OSHA App. 1237932.) Here, Carrillo testified credibly that his supervisor, Garcia, told him to carry the hose up to the fourth level. Carrillo further testified that he had observed Garcia telling other employees to do the same. Thus, Garcia's knowledge that Carrillo and others were carrying hoses up the ladder to upper levels of scaffolding is imputed to Employer. As Garcia did not stop Carrillo from either using the ladder while carrying the hose in the first place or from ascending the ladder further with the hose, Employer did not take all the steps a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation.

Accordingly, Employer did not establish that it met both elements of Labor Code section 6432, subdivision (c), and cannot rebut the presumption that Citation 2 was properly classified as Serious.

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

In order for a citation to be characterized as Accident-Related, there must be a showing by the Division of a "causal nexus between the violation and the serious injury." (*Webcor Construction LP dba Webcor Builders,* Cal/OSHA App. 317176766, Denial of Petition for Reconsideration (Jan. 20, 2017).) The violation need not be the only cause of the accident, but the Division must make a "showing [that] the violation more likely than not was a cause of the injury." (*Id.*, citing *MCM Construction, Inc*., Cal/OSHA App. 13-3851, Decision After Reconsideration (Feb. 22, 2016).)

The violation arose from Employer's failure to ensure that Carrillo did not carry the heavy plaster hose while climbing a ladder. Carrillo testified that the hose pulled him backward as he was reaching for a rung on the ladder. As such, Carrillo's injury was caused by the violation. The parties stipulated that the injury to Carrillo was a "serious injury" as defined by section 330, subdivision (h).

Therefore, Citation 2 is properly characterized as Accident-Related.

8. Are the proposed penalties reasonable?

Penalties calculated in accordance with the penalty setting regulations set forth in sections 333 through 336 are presumptively reasonable and will not be reduced absent evidence that the amount of the proposed civil penalty was miscalculated, the regulations were improperly applied, or that the totality of the circumstances warrant a reduction. (*RNR Construction, Inc.*, *supra,* Cal/OSHA App. 1092600, citing *Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).)

The parties stipulated that the proposed penalty for Citation 2 was calculated in accordance with the Division's policies and procedures. Accordingly, the penalty for Citation 2 is found to be reasonable.

a. Duplicative penalties

Appeals Board precedent holds that "while the Division may issue multiple citations to an employer for a single hazard, it is proper to assess only one penalty where a single means of abatement is needed to address the hazard. [Citations omitted.]" (*Hansford Industries, Inc. dba Viking Steel*, Cal/OSHA App. 1133550, Decision After Reconsideration (Aug. 13, 2021).) The Appeals Board has held that "penalties which tend to be duplicative or cumulative, and are not needed to effectuate abatement, [are] inconsistent with the spirit and intent of the [California Occupational Safety and Health] Act." (See *A & C Landscaping Inc. aka A & C Construction, Inc*., Cal./OSHA App. 04-4795, Decision After Reconsideration (June 24, 2010).)

> The Board vacates that specific [General] penalty because the citation is "less directly related to the overall circumstances involved in this matter." (*Thyssenkruppp Elevator Corporation*, Cal/OSHA App. 11-2217, Denial of Petition for Reconsideration (March 11, 2013) [rev'd on other grounds on writ].) […] The Board also vacates the [general citation's] penalty because it was not issued as serious. (*Kimco Staffing Services*, Cal/OSHA App. 15-4594, Denial of Petition for Reconsideration (Aug. 26, 2016).)

(*Home Depot USA, Inc.*, Cal/OSHA App. 1011071, Decision After Reconsideration (May 16, 2017).)

Citation 1, Item 1, alleged two violations. Instance 1 is a failure to correct the unsafe practice of carrying a heavy hose while climbing a ladder that prevented the safe use of the ladder. Instance 2 is a failure to correct the unsafe practice of not installing toeboards on scaffolding. Thus, the two hazards for which Employer was cited in Citation 1, Item 1, are the same two hazards for which Employer was cited in Citation 1, Item 2, and Citation 2. Abatement of these hazards is stopping the unsafe practice of climbing a ladder while carrying a hose and installing toeboards on the scaffolding.

Employer argued the penalty in Citation 2 is duplicative of the penalty in Citation 1. As the hazards in Citation 1, Item 1, are duplicative of the hazards in Citation 1, Item 2, and Citation 2, the proposed penalty for Citation 1, Item 1, is vacated as duplicative of the penalties assessed in Citation 1, Item 2, and Citation 2. The penalty for Citation 1, Item 2, the reasonableness of which was not appealed, remains $420. The penalty for Citation 2, which the parties stipulated was calculated in accordance with the Division's policies and procedures, remains $12,600 and is found to be reasonable.

Conclusions

For Citation 1, Item 1, the Division established a violation of 1509, subdivision (a), because Employer failed to correct the hazards of an employee carrying a hose that prevented the safe use of a ladder and of not installing toeboards on a scaffold. The penalty is found to be duplicative of the penalties assessed for Citation 1, Item 2, and Citation 2, and is vacated.

For Citation 1, Item 2, the Division established a violation of section 1621, subdivision (b), because Employer failed to install toeboards on a scaffold where persons are required to work or pass under the scaffold. The penalty amount was not appealed and remains as issued.

For Citation 2, the Division established a violation of section 3276, subdivision (e)(15)(B), because Employer failed to ensure that an employee did not carry a hose that prevented the safe use of a ladder. The citation was properly classified as Serious, with an Accident-Related characterization. The penalty is reasonable.

Order

It is hereby ordered that Citation 1, Item 1, is affirmed. The penalty is vacated as duplicative of penalties sustained in Citation 1, Item 2, and Citation 2.

It is further ordered that Citation 1, Item 2, is affirmed and the penalty of $420 is sustained.

It is hereby ordered that Citation 2, is affirmed and the penalty of $12,600 is sustained.

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

/s/ Christopher Jessup
Christopher Jessup
Administrative Law Judge

Dated: 01/10/2025

The attached decision was issued on the date indicated therein. If you are dissatisfied with the decision, you have thirty days from the date of service of the decision in which to petition for reconsideration. Your petition for reconsideration must fully comply with the requirements of Labor Code sections 6616, 6617, 6618 and 6619, and with California Code of Regulations, title 8, section 390.1. **For further information, call: (916) 274-5751.**