

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

In the Matter of the Appeal of:

**HANOVER R S CONSTRUCTION LLC.
233 A Street, Suite 706
San Diego, CA 92101**

Employer

Inspection No. 1205077

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code issues the following Decision After Reconsideration in the above-entitled matter.

JURISDICTION

Hanover R S Construction LLC (Employer or Hanover) was the general contractor and controlling employer on a large multi-family residential construction project, known as Mission Gorge, in San Diego, California. At all relevant time periods, Hanover and various subcontractors engaged in the construction of a multi-story parking garage for the project.

On May 19, 2017, the Division cited Hanover as the controlling employer and issued two citations, alleging three violations of California Code of Regulations, title 8.¹ Citation 1, Item 1, alleged a violation of section 1509, subdivision (a) [failure to establish, implement and maintain an effective injury and illness prevention program]. Citation 1, Item 2, alleged a violation of section 3395, subdivision (i) [failure to establish, implement, and maintain an effective heat illness prevention program]. Citation 2 asserted a Serious Accident-Related violation of section 1632, subdivision (h) [requiring floor “hole” covers be secured against accidental displacement]. Citation 2 is the sole citation at issue.

This matter was heard before J. Kevin Elmendorf, an Administrative Law Judge (ALJ) for the Board. David Donnell, Esq., of the law firm of Donnell, Melgoza and Scates LLP, represented Employer. Clara Hill-Williams, Esq., Staff Counsel, represented the Division. The hearing was held over three days.

On the last day of hearing, the Division moved to amend Citation 2 to assert a violation of section 1632, subdivision (b), requiring, relevant here, that floor “opening” covers be secured against accidental displacement. The ALJ subsequently granted the amendment and then, in his

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

Decision, found Hanover in violation of section 1632, subdivision (b), but reduced the classification of the citation to General. (Decision, pp. 7-8.)

Hanover filed a timely Petition for Reconsideration of the ALJ's Decision. Hanover's petition raised two issues with regard to Citation 2: (1) whether the ALJ properly granted the Division's request to amend Citation 2; and, (2) assuming the amendment was proper and a violation was established, whether Hanover established the due diligence affirmative defense applicable to controlling employers. Issues not raised in the Petition for Reconsideration are deemed waived. (Lab. Code, § 6618.) The Board granted reconsideration and took the matter under submission. Because the second issue is dispositive, as we shall explain below, we need not, and do not, reach the first issue.

In making this Decision After Reconsideration, the Board engaged in an independent review of the entire record. The Board considered the pleadings and arguments filed by the parties. The Board has taken no new evidence.

ISSUES

1. Did Hanover establish the due diligence affirmative defense applicable to controlling employers as to Citation 2, asserting a violation of section 1632, subdivision (b)?

FINDINGS OF FACT

1. Hanover was the general contractor, owner on a large ten acre, multi-family residential construction project, known as Mission Gorge, in San Diego, California.
2. The Mission Gorge worksite was a multi-employer worksite.
3. Hanover was the controlling employer for this worksite.
4. Hanover utilized the services of multiple subcontractors at the worksite, including Bomel Construction Co. (Bomel), which engaged in structural concrete work.
5. Hanover engaged in appropriate supervision of the subcontractors at the worksite.
6. Hanover ensured its subcontractors maintained detailed site-specific safety plans
7. Hanover engaged in appropriate efforts to identify and correct hazards at the worksite, including through regular inspections.
8. Hanover enforced compliance with safety and health requirements.
9. Hanover vetted the safety background of any subcontractors it hired, and reviewed their work, before hiring them.
10. On the morning of November 21, 2016, Hanover's subcontractors were conducting work on the second floor of the parking garage, which was under construction. At one point, an

unsecured cover was placed over an opening. A few moments later, an employee of Automatic Fire Sprinklers (AFS) walked on the cover, displaced it, and fell through the opening to the ground, ten feet below, suffering serious physical harm.

11. The particular accident that occurred here was not foreseeable by Hanover.

ANALYSIS

1. Did Hanover establish the due diligence affirmative defense applicable to controlling employers as to Citation 2, asserting a violation of section 1632, subdivision (b)?

Citation 2 asserts a Serious, Accident-Related violation of section 1632, subdivision (b). Section 1632, entitled "Floor, Roof, and Wall Openings to Be Guarded," provides, in relevant part:

(a) This section shall apply to temporary or emergency conditions where there is danger of employees or materials falling through floor, roof, or wall openings, or from stairways or runways.

(b) (1) Floor, roof and skylight openings shall be guarded by either temporary railings and toeboards or by covers.

[. . .]

(3) ... Covers shall be secured in place to prevent accidental removal or displacement, and shall bear a pressure sensitized, painted, or stenciled sign with legible letters not less than one inch high, stating: "Opening--Do Not Remove." Markings of chalk or keel shall not be used.

An opening is defined as:

An opening in any floor or platform, 12 inches or more in the least horizontal dimension. It includes: stairway floor openings, ladderway floor openings, hatchways and chute floor openings. (§ 1504.)

In Citation 2, the Division alleges:

Prior to and during the course of the inspection, including, but not limited to, on November 21, 2016, the controlling employer failed to guard and secure floor opening covers as required by this section. On 11/21/17 [*sic*] an employee was seriously injured when he walked over a floor opening cover that was not secured falling from 10 feet from the second level of a parking structure onto the ground sustaining multiple fractures.

Here, as the ALJ found, the evidence preponderates to a finding that section 1632, subdivision (b), was violated. (Decision, pp. 7-8.)

Bomel had been hired to perform concrete work for a multi-story, parking structure on the Mission Gorge project. On the morning of November 21, 2016, Bomel's employees and the employees of other subcontractors worked on the second floor of the parking structure. Bomel's Superintendent, Sean Parrington, supervised the stressing of cables or "tendons" placed through the elevated concrete deck. No Hanover employee was present. The cables were located below the working surface. In order to reach the cables to perform the stressing, the subcontractors' employees removed a plywood cover over an opening located on the second floor, which had been properly secured until that point. The opening was approximately 26 inches wide and 192 inches in length. The workers then stressed the cables using a hydraulic ram and replaced the cover. The cover was replaced over the opening, whereupon it was left unsecured for a short period of time, while the tools and equipment necessary to secure the cover were obtained. A short moment later, an employee of AFS, Samuel Alvarez, Jr., walked on the unsecured cover, displaced it, and fell through the opening to the ground, ten feet below. These facts establish a violation of section 1632, subdivision (b). In short, they establish that an opening existed², that the cover was not secured in place to prevent accidental removal or displacement, and that employees were exposed to this dangerous condition. Further, although no employee of Hanover was present or injured, the testimony of Adam Parr, Hanover's General Superintendent, and Paul Espino (Espino), Division Safety Engineer, established that Hanover is a controlling employer and, as such, was properly cited for this violation under the multi-employer worksite regulation.³ However, that does not end our inquiry.

In *United Association Local Union 246, AFL-CIO v. California Occupational Safety and Health Appeals Bd.* (2011) 199 Cal.App.4th 273, the Court of Appeal required the Board recognize a due diligence defense for controlling employers. The contours of the due diligence defense were subsequently set forth in cases such as *Harris Construction Company, Inc.*, Cal/OSHA App. 03-3914, Decision After Reconsideration (Feb. 26, 2015) (*Harris*) and *McCarthy Building Companies, Inc.*, Cal/OSHA App. 11-1706, Decision After Reconsideration (Jan 11, 2016) (*McCarthy*). Here, as a controlling employer, Hanover raises the controlling employer due diligence defense.

² The area at issue here fits the "opening" definition within section 1504, as it was approximately 26 inches wide and 192 inches in length.

³ Section 336.10 defines the categories of employers that may be cited. Employers that may be cited include (1) the employer whose employees were exposed to the hazard (the exposing employer); (2) the employer that actually created the hazard (the creating employer); (3) the employer who was responsible, by contract or through actual practice, for safety and health conditions on the worksite, which is the employer who had the authority for ensuring the hazardous condition is corrected (the controlling employer); and (4) the employer who has the responsibility for actually correcting the hazard (the correcting employer). (§ 336.10.) Controlling, correcting, and creating employers may be cited regardless of whether their own employees were exposed to the hazard. (§ 336.10; Lab. Code §6400, subdivision (b).)

Where the controlling employer exercises “due diligence” it may be relieved from liability for violation of a safety order. (*McCarthy, supra*, Cal/OSHA App. 11-1706; *Harris*, Cal/OSHA App. 03-3914.) The Board has recognized that “[t]he 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, supra*, Cal/OSHA App. 03-3914.)

In determining whether the controlling employer exercised due diligence the totality of circumstances will be considered. (*McCarthy, supra*, Cal/OSHA App. 11-1706.) As stated in *McCarthy*, multiple factors are relevant to the determination of due diligence. (*Ibid.*) The Board considers factors such as: whether the controlling employer implemented and relied on a functioning testing methodology to monitor subcontractor performance; whether the controlling employer researched the safety history of the subcontractor; whether the hazard was latent and unforeseeable; whether the controlling employer conducted periodic inspections of appropriate frequency; whether the controlling employer implemented an effective system for promptly correcting hazards; and, whether the controlling employer enforces the other employer's compliance with safety and health requirements with an effective, graduated system of enforcement and follow-up inspections. (*Ibid.*)

The Board also considers factors set forth by the State of Washington in WISHA Regional Directive 27.00, which requires consideration of whether the controlling employer fulfilled the following list of responsibilities:

contractually requiring the subcontractor to provide all safety equipment required to do the job, or providing the safety equipment itself; establishing work rules designed to prevent safety violations, such as developing an accident prevention program that is reasonably specific and tailored to the safety and health requirements of particular job sites and/or operations, and that includes training and corrective action; engaging in efforts to ensure that subcontractors have appropriate and reasonably specific accident prevention programs; engaging in appropriate efforts to communicate work rules to its subcontractors; establishing an overall process to discover and control recognized hazards, with the degree of oversight dependent on a number of factors such as the subcontractor's activity, experience, and level of specialized expertise; and, the general contractor must effectively enforce its accident prevention and safety plans via contractual language, appropriate disciplinary action, and documentation.

(*McCarthy, supra*, Cal/OSHA App. 11-1706.)

The Board does not consider or apply the foregoing factors mechanically. (*McCarthy, supra*, Cal/OSHA App. 11-1706.) “Rather, the respective weight assigned to each factor, or combination

thereof, will properly depend on the circumstances of each case, including the type and severity of the hazard presented.” (*Ibid.*)

Here, we observe that the Division issued an “Accident-Related” citation. As such, this matter concerns compliance with the safety order during the narrow window of time surrounding the accident. After an independent review of the record, we conclude that multiple considerations prevail in favor of application of the due diligence defense to Hanover during this narrow window of time.

Hanover demonstrated it engaged in multiple efforts to provide appropriate supervision and oversight at the site. Many of these efforts are documented in Hanover’s site specific safety plan. (See Exhibit B.)

First, Hanover had three full time employees at the project that spent approximately sixty to seventy percent of their time in the field reviewing, among other things, safety, the progress of construction, and scheduling. Parr noted that safety is always one of the highest responsibilities when they are in the field.

Second, Hanover engaged in additional appropriate efforts to identify and correct hazards at the worksite. In addition to having several employees in the field overseeing the work for multiple hours each work day, Parr also noted that Hanover conducted weekly dedicated safety inspections, using occupational safety and health software designed by Predictive Solutions. Hanover prepared lengthy reports based on these inspections. (See Exhibit F.) Espino admitted Hanover conducted inspections, evaluated hazards, and corrected hazards.

Third, the evidence demonstrates that Employer enforced compliance with safety and health requirements. Hanover had a system for promptly correcting safety violations, and for follow-up. Parr said if a Hanover employee observed a safety violation, it would contact the foreman of the subcontractor and require immediate correction. If, for whatever reason, it could not be immediately corrected, Hanover’s Predictive Solutions software would be utilized to log the incident as an “open” item and send daily reminders until addressed. Hanover also enforced progressive discipline at the site for safety violations. Parr noted that the first violation would result in a verbal warning, the second a written warning, and the third removal from the site.

Fourth, Hanover maintained, and required its subcontractors to maintain, a site-specific safety plan. Indeed, Hanover maintained a detailed site specific safety plan and provided safety orientations to its subcontractors. Hanover’s plan prohibited unsecured covers over holes or openings. (Exhibit B, p. 74.) Hanover also required fall protection where there is exposure to a fall of six feet or more. (*Ibid.*) Further, Hanover required Bomel to develop and utilize a site specific safety plan. Bomel’s own plan also required the cover over the opening to be secured and marked. (Exhibit C, p. 10.)⁴ Bomel’s plan also required use of fall protection at six feet. (*Id.* at p. 8.) And

⁴ It is noted that the ALJ found, and the Division does not contest that, the Division failed to demonstrate any defects in Hanover’s IIPP. (Decision pp. 3-7; Lab. Code, § 6618 [Division waived this point by failing to contest].)

although the language of the plans did not mirror section 1632 in every detail, Espino stated he had no concerns with how the opening had been secured prior to the accident, noting it had been properly secured and marked. Further, Parr noted that prior to this accident he personally saw this cover and observed it was properly secured and marked.

Fifth, the evidence demonstrated Hanover vetted the safety background of any subcontractors it hired, and reviewed their work. It reviewed their safety histories, their form 300s, and even went to their other job sites before hiring them.

Finally, this particular hazard was unforeseeable at the specific time the incident occurred. The Division never demonstrated an unattended and unsecured cover existed before this specific incident, nor after. Espino admitted he was not aware of any other occasion within the six-month statute of limitations where another floor opening had been unsecured. Parr stated this was the first elevated decking, and the first set of cables that needed to be stressed.

Hanover also demonstrated it had no knowledge, nor an expectation, that Bomel would have lifted the cover to stress the cables, nor that they would fail to require fall protection around the opening. Parr said the cables could have been accessed from the ground level via a scissor lift or some other device, rather than by removing the opening cover. Parr also demonstrated that both Hanover and Bomel maintained site specific safety plans precluding having unsecured openings and which also required fall protection. Given the contents of the site specific safety plans, we credit Parr's testimony, and conclude Hanover had no expectation that Bomel would fail to properly secure an opening cover. Indeed, even Espino admitted that Bomel had been aware of its duty to secure the covers.

Parr also noted that Hanover's personnel, while present at the site, did not see this specific activity, nor did they have a reasonable opportunity to observe it. The evidence supports his assertions. Here, the process of stressing the cables occurred in only minutes, and the evidence indicates the cover had been replaced and left unsecured for less than a minute. As such, Hanover did not have a reasonable opportunity to detect this particular violation.

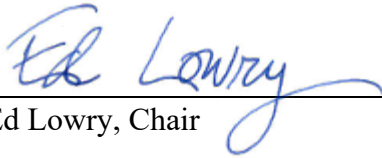
Ultimately, the aforementioned factors when considered in combination under the specific facts of this case, provide sufficient evidence demonstrating Employer's due diligence, and compel the Board to vacate the citation under the due diligence affirmative defense available to controlling employers. This holding is specific to the facts and circumstances of this particular case and this particular Employer.⁵

DECISION

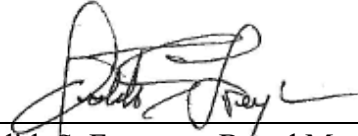
For the reasons stated above, we reverse the Decision of the ALJ and vacate Citation 2. We find Hanover established the due diligence affirmative defense.

⁵ We need not, and do not, decide whether any of the aforementioned considerations considered alone (or in a lesser combination), would also constitute due diligence.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD



Ed Lowry, Chair



Judith S. Freyman, Board Member



Marvin Kropke, Board Member



FILED ON: **05/26/2021**

SUMMARY TABLE
OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

Inspection Number: **1205077**

In the Matter of the Appeal of: **HANOVER R S CONSTRUCTION LLC**

Site address: **6151 Fairmount Avenue, San Diego, California**

Citation Issuance Date: **05/19/2017**

Citation	Item	Section	Class. Type*	Citation/Item Resolution	Affirm or Vacate	Final Class. Type*	DOSH Proposed Penalty in Citation	FINAL PENALTY ASSESSED
1	1	1509 (a)	G	ALJ sustained Appellant's appeal. Zero penalty.	V		\$260.00	\$0.00
1	2	3395 (i)	G	Parties stipulate to reclassify as Notice in Lieu and zero penalty.	V		\$260.00	\$0.00
2	1	1632 (b)	S	Decision After Reconsideration Issued. Citation Vacated.	V		\$10,800.00	\$0.00
Sub-Total							\$0.00	\$0.00
Total Amount Due**								\$0.00

*See Abbreviation Key

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

Please call 415-703-4310 or email accountingcalosha@dir.ca.gov if you have any questions.

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PENALTY PAYMENT INFORMATION

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Los Angeles, CA 90051-0595

If sending via Overnight Delivery:

US Bank Wholesale Lockbox
c/o 516547 CAL-OSHA Penalties
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La Mirada, CA 90638-5821

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*Classification Type (Class.) Abbreviation Key:

Abbreviation	Classification Type	Abbreviation	Classification Type	Abbreviation	Classification Type
FTA	Failure to Abate	RR	Repeat Regulatory	WR	Willful Regulatory
G	General	RS	Repeat Serious	WRG	Willful Repeat General
IM	Information Memorandum	S	Serious	WRR	Willful Repeat Regulatory
NL	Notice in Lieu of Citation	SA	Special Action	WRS	Willful Repeat Serious
R	Regulatory	SO	Special Order	WS	Willful Serious
RG	Repeat General	WG	Willful General		