

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

In the Matter of the Appeal of:

SHIMMICK-OBAYASHI  
33744 Borel Road  
Winchester, CA 92596

Employer

Dockets 08-R3D3-5023 through 5025

**DECISION AFTER  
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken the petition for reconsideration filed by the Division of Occupational Safety and Health (Division) matter under submission, renders the following decision after reconsideration.

**JURISDICTION**

Beginning on June 30, 2008, the Division conducted an accident inspection at a place of employment in Winchester, California maintained by Shimmick-Obayashi (Employer). On December 8, 2008, the Division issued three citations to Employer alleging violations of workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.<sup>1</sup>

Citation 1 alleged a General violation of section 1509(a) [Ineffective Injury and Illness Prevention Program: failure to ensure that employees comply with safe and healthy work practices]. Citation 2 alleged a Serious violation of 1509(a) [Ineffective Injury and Illness Prevention Program: failure to identify and evaluate work place hazards, including scheduled periodic inspections]. Citation 3 alleged a Serious violation of 1646(b)(1)<sup>2</sup> [no midrail on scaffold platform].

Employer filed timely appeals of the citations, asserting a list of 14 affirmative defenses.

Administrative proceedings were held, including a contested evidentiary hearing before an Administrative Law Judge (ALJ) of the Board. The Employer

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<sup>1</sup> Unless otherwise specified, all references are to California Code of Regulations, Title 8.

<sup>2</sup> The citation includes a typo, listing the safety order as 1646(b)(1)(6), which does not exist.

stipulated that if the serious classification was sustained, Employer agreed that Michael Medrano (Medrano) had sustained a serious injury due to the fall which occurred on June 9, 2008.

After taking testimony and considering the evidence and arguments of counsel, the ALJ issued a Decision on July 14, 2010. The Decision granted Employer's appeal, dismissing all three citations and setting aside the proposed civil penalties, on the grounds that the Division failed to meet its burden of proof, and had cited the wrong entity.

The Division timely filed a petition for reconsideration of the ALJ's Decision. The Employer filed an answer to the petition.

### **ISSUE**

Did the ALJ properly dismiss the citations?

### **EVIDENCE**

The definition of an employer is to be found at section 3300. The Division, as the party bearing the burden of proof in this civil proceeding, had a responsibility to prove by a preponderance of the evidence that it had cited the proper employer.<sup>3</sup>

Associate Safety Engineer, James Morris, testified that he believed he spoke with a representative of Shimmick-Obayashi on June 9, 2008, when he took a call reporting a scaffold fall injury. Morris also testified that he properly completed the Cal/OSHA Accident Report form, which lists the employer at the site as "Shimmick-Obayashi," (the joint venture). (Ex. 2).

Associate Safety Engineer Ramesh Gupta testified on behalf of the Division. Gupta testified that he conducted an opening conference with Employer (Shimmick-Obayashi) regarding the accident of June 9, 2008 on June 30, 2008. During the conference and inspection Gupta met with several representatives of the Employer, including Scott Goss, Structural Superintendent, Ike Riser, Corporate Safety Director, Butch Anderson, Stripping Crew Foreman, Cuberto Ortiz, Finishing Crew Foreman, and Walter Sorriano, a cement mason and co-worker of the injured cement mason, Michael Medrano. Gupta testified that he exchanged business cards with management officials, but the cards were not introduced into evidence.

Gupta testified that the accident had occurred in a water treatment plant tank (or cell), where Medrano was assigned to do finishing work on June 9, 2008. While Medrano was preparing to begin his cement finishing work, a carpentry crew was doing stripping work in an adjoining section of the room. The two sections of the room were divided by a baffle wall.

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<sup>3</sup> Employer's attachment to its appeal forms includes a 14 point list of affirmative defenses. Number 10 on the list is "[t]he citation was issued to the wrong employer and/or a non-existing employer."

Gupta examined the tank where the accident had occurred, but the scaffold was no longer there. He was able to view the scaffold in another location, and photos were introduced of the scaffold and tank where the fall occurred. (Ex.s 3-7). The scaffold was the same, except Gupta was informed by Goss that the midrail had been replaced. Gupta learned both from Medrano and Ortiz, that at the time of the fall, the midrail of the scaffold had not been installed. Consequently, Medrano fell through the gap left by the missing midrail a distance of 24 feet onto the concrete floor after being struck by a beam falling from above.

Gupta gave testimony on Citations 1 through 3, and explained how he believed the Employer had violated the cited safety orders. Gupta described the Employer's safe and healthy work policy which mandated separating the stripping and finishing crews, which he had learned of from Medrano, Anderson and Goss. Gupta alleged the policy was violated when Medrano was assigned to work in the tank on June 9. The Employer also allegedly had an affirmative step in the policy which involved blocking a door with red tape, and having the responsible foreman sign the tape, where a stripping crew is working, to bar others from entering. Gupta testified he learned of this practice from Ortiz, Medrano and Sorriano, and was informed that there was no tape on the door to the tank the day Medrano was injured.

Employer provided Gupta with its document entitled "Aluma-Systems Scaffold Safe Work Practice." The program states all employees will wear a body harness and have a means to tie off when on this particular scaffold. The scaffold document also mandates that the scaffold will be constructed with midrails, and inspected prior to each shift use, including additional inspection of the guard rails.

Gupta testified on cross-examination that he had received a partial copy of the Employer's Illness and Injury Prevention Program (IIPP), which has a section on discipline for violations of safety rules, as well as procedures for safety inspections. Gupta admitted that he had not questioned the Employer about whether they had enforced the disciplinary provision of the IIPP. Gupta stated his concern was whether the scaffold had been inspected on the actual date of the accident.

Injured employee Michael Medrano also testified on behalf of the Division. Medrano testified that he worked for Shimmick-Obayashi from January through June of 2008. Medrano testified that he was an apprentice, so his duties were limited, and he had to wait for assignments and direction from Cuberto Ortiz (his foreman, who is also his stepfather).

Medrano testified that it was unusual for cement masons to work in the same tank with carpenters doing stripping work; in fact, June 9 was the first time he had done so. He had been told that it was dangerous, and was a violation of the Employer's policy. In the past, he had seen entryways to tanks

cordoned off with red caution tape, to keep employees out when the carpenters were doing their work.

Medrano testified as to the accident which occurred on June 9, 2008, around 7 am. He explained that he was going up the scaffold, wearing a fall protection harness that was not tied off to anything at that time, as he had just gotten up and had not yet had a chance to tie off. Medrano testified that he always wore a body harness with a lanyard, and he would tie off to the scaffolding railing. He testified that there were no yo-yos or other means to tie off, besides the scaffold. He also testified that on June 9 the scaffold was missing a midrail and that on several prior occasions Medrano and his co-worker had to finish constructing the scaffold themselves, although it was a carpentry job and they had no training in how to build a scaffold.

When Medrano reached the top of the scaffold, he was about to pull up a bucket from his co-worker on the ground when he was hit by a falling super stud yellow heavy beam, which struck the left side of his head. He fell through the opening in the scaffold platform where the midrail was absent, and struck the pavement.

The Employer called Ike Riser, Corporate Safety Director. Riser testified that he did not personally receive the citations that were issued by the Division in this matter, and although he did view them at the corporate office, did not recall what date that was.

Over the Division's objection, the Employer introduced Shimmick Construction Company's IIPP, Shimmick Construction Company Employee Disciplinary Warnings, and a quarterly report of disciplinary actions of Shimmick employees and subcontractors. These documents were authenticated as being accurate by Riser.

Page one of the written disciplinary warnings submitted by Employer include disciplinary actions written by Ike Riser on the date and around the time of Medrano's fall from the scaffold. (Ex. B) The first citation was issued to Cuberto Ortiz, and the second discipline on the page is issued to a cement mason named Walder Ramirez, for "unsafe work practices—led apprentice into unsafe work area." The disciplinary notices appear to be standard forms created by Shimmick Construction, which include a box labeled "Employer (if not SCCI)." The disciplinary form is labeled "Shimmick Construction Co., Inc.," and we infer that "SCCI" is shorthand for Shimmick Construction Company, Incorporated. On both disciplinary notices, the Employer box has been filled in as "SOJV" (Shimmick-Obayashi Joint Venture).

Riser testified to the Employer's safety procedures and safety incentive program, as outlined in the IIPP. Employer's IIPP was around 600 pages long, but Riser stated the Employer produced the relevant portions to the Division pursuant to its request for information. Riser testified as to pages 18 and 19 of the IIPP, which describe "Shimmick Construction and Subsidiary Joint

Ventures Employee Safety Incentive Program for Operators, Foremen, Supervisors,” and accompanying documents showing enforcement of said program. (Ex.s A, C).

On cross-examination, Riser agreed that he understood the Employer had some policy related to finishing and stripping crews working together: he believed the finishing crew should not work underneath the stripping crew, for fear that things would fall down on the finishing crew and they would be injured.

### **DECISION AFTER RECONSIDERATION**

In making this decision, the Board relies upon its independent review of the entire evidentiary record in the proceeding. The Board has taken no new evidence. The Board has also reviewed and considered Division’s petition for reconsideration and the Employer’s answer to it.

Labor Code section 6617 sets forth five grounds upon which a petition for reconsideration may be based:

- (a) That by such order or decision made and filed by the appeals board or hearing officer, the appeals board acted without or in excess of its powers.
- (b) That the order or decision was procured by fraud.
- (c) That the evidence does not justify the findings of fact.
- (d) That the petitioner has discovered new evidence material to him, which he could not, with reasonable diligence, have discovered and produced at the hearing.
- (e) That the findings of fact do not support the order or decision.

Division petitioned for reconsideration on the basis of Labor Code section 6617(a), (b) and (c). The Division’s petition makes a number of arguments, including: the Appeals Board exceeded its authority by relying on invalid and bad case law; the ALJ’s decision that the Division did not cite the proper entity is not supported by the evidence; Employer’s conduct may have violated its duty of candor to the tribunal, and to the extent its arguments persuaded the ALJ, the decision was procured by fraud.

### **The ALJ’s Finding on the Issue of “Actual Employer”**

Upon review of the entire record, the Board finds the decision of the ALJ granting Employer’s appeal was in error. The Division carries the burden of proof in demonstrating that it cited the proper entity. (*Alfredo Annino/Alfredo Annino Construction, Inc. of Nevada*, Cal/OSHA App. 98-311, Decision After Reconsideration (Apr. 25, 2001).) The Board finds that burden was met given the totality of the evidence. (See, *Delta Development Co; Division of Industrial Safety*, Cal/OSHA App. 74-319, Grant of Petition for Reconsideration and

Decision After Reconsideration (Oct. 30, 1974) [it is the responsibility of the Board to weigh all relevant evidence in reaching a decision].)

Assuming the citations were timely served (an issue addressed below), it is clear from the record that Employer was aware that it was named in the citation, and yet attended all days of hearing without mentioning the issue of whether or not Employer was properly named. Therefore, under California case law, due process is satisfied, and the Board had jurisdiction to hear the case. (*Dynaelectric*, Cal/OSHA App. 03-4101, Decision After Reconsideration (Feb. 3, 2011), citing *Billings v. Edwards* (1979) 91 Cal.App.3d 826, 830), *Western Door*, Cal/OSHA App. 01-2827, Decision After Reconsideration (Jun. 9, 2008).)

Employer asserts that Division cited a joint venture, but had offered into the record only evidence regarding a single Employer, namely, Shimmick Construction Company, Incorporated. (Decision, p. 11). In support of this position, Employer lists in its post-hearing brief points in the record where Division counsel referred to “Shimmick-Obayashi” and other instances where Division counsel referred to “Shimmick,” which, according to Employer, showed that the Division was either litigating a case against Shimmick Construction Company, Incorporated, or was unclear as to the difference between the Shimmick-Obayashi Joint Venture and Shimmick Construction.

The Employer’s argument rings less true when the documents are examined. The bulk of documents which are explicitly labeled “Shimmick Construction Company, Inc.” were introduced not by the Division, but by Employer, over the objection of the Division. (Ex.s A, B, C). After making that objection, the Division’s counsel was careful to note in questioning, “were you aware of a policy at Shimmick-Obayashi, on this project-- I’m calling it Shimmick-Obayashi because that was the joint venture that was working on this project and that was the entity that the Division cited...” References to “Shimmick” in earlier questioning, by both the Division and Employer, interchangeably with “Shimmick-Obayashi,” can be taken in context as shorthand, rather than confusion on the part of the parties as to whom the citations were issued to.

At key points, the Division was clear in its questioning. Medrano was asked about his employment at “Shimmick-Obayashi,” and if he still worked for “Shimmick-Obayashi.” He was asked about the procedure “Shimmick-Obayashi” used to keep carpenters and cement workers separate. On cross-examination, the Employer’s counsel also asked Medrano how long he had been working for “Shimmick-Obayashi” when he went to work at this particular jobsite. Similarly, the Division counsel questioned Gupta as to his inspection of “the appellant herein, Shimmick-Obayashi.”

The analysis found in *C.C. Myers, Inc.*, Cal/OSHA 00-008 Decision After Reconsideration (Apr. 13, 2001), is useful in weighing the evidence before the Board. In *C.C. Myers*, the Employer argued that the Division had cited the

wrong entity—in that instance, C.C. Myers, Inc., rather than a joint venture entity C.C. Myers was a party to. The injured employee had been at work at an airport construction site. There was evidence in the record that the construction work had been awarded to the joint venture. However, a variety of documents were in the “C.C. Myers” name: the Division’s accident report form, airport commission safety award program documents, and permits for individual employees to work at the airport. Individual employees at the worksite believed themselves to be employees of “C.C. Myers”, not a joint venture. Upon reviewing and weighing the evidence, the Board ruled that the employer involved in the citations was the joint venture.

The “C.C. Myers” name was used as a matter of convenience by the joint venture, which was a temporary entity for the purpose of the airport project. The Board found it understandable that employees would think of themselves as employees of C.C. Myers, with whom they had a long-standing employment relationship, rather than the temporary joint venture, with whom they were on contract with for the duration of the project. The Board did not tally up the number of documents and which name was affixed on each, but examined the facts presented, and in the light of that evidence, found it reasonable to conclude that the joint venture was the actual employer.

The evidence here preponderates to a finding that the employer of the injured employee, which is the subject of the citations at issue in this hearing, was Shimmick-Obayashi. There is credible testimony on the record from Medrano, as well as Gupta, that the Employer is Shimmick-Obayashi. This testimony is not undone by documents produced by Employer which are labeled with a different name. These documents may have the “Shimmick” name affixed, but as in *C.C. Myers*, this does not undermine the presence of a joint venture entity; particularly, as here, where those documents on their face make it clear that they are ‘on loan’ in a joint venture context. The IIPP at page 17 states specifically that it may be extended to Shimmick joint ventures, and the disciplinary documents filled out by Riser on the date of the accident indicate the Employer as “SOJV.”

The Division presented sufficient evidence to meet its burden of proof regarding the identity of the Employer at the worksite where Medrano was injured on June 9, 2008. The Board had jurisdiction to hear the appeal, and the ALJ improperly vacated the citations on a finding that the Division failed to cite the proper entity. Having found Shimmick-Obayashi to be the properly-cited employer, the Board need not reach the other arguments raised by the Division in its petition. The Board will conduct an analysis of the citations dismissed by the ALJ.

**Citation 1, Item 1: General Violation of 1509(a) Reference 3203(a)(2)**

The Division has not established, by a preponderance of the evidence, that the Employer did not implement and maintain an effective Illness and Injury Prevention Program (IIPP), by developing a program for ensuring that

employees comply with safe and healthy work practices, as required by section 1509(a). (See, *Howard J. White, Inc., Howard White Construction, Inc., Cal/OSHA Inc. 78-741* (Jun 16, 1983).) Citation 1, Item 1 references the following section of Title 8, Section 3203(a)(2):

The Program shall be in writing and shall, at a minimum: (2) include a system for ensuring that employees comply with safe and healthy work practices. Substantial compliance with this provision includes recognition of employees who follow safe and healthful work practices, training and retraining programs, disciplinary actions, or any other such means that ensures employee compliance with safe and healthful work practices.

The citation makes several allegations, which can be summarized as follows: the Employer failed to ensure that the usual safe work practice of putting up red tape to keep employees out of the area where the stripping crew was working; did not ensure that the finishing crew did their work after the stripping crew, rather than simultaneously; did not ensure that the scaffold used by Medrano had midrails, as designed; and did not ensure that employees, who were directed to wear body harnesses while on the scaffold, had a safe place to tie off.

A finding of a violation of 3202(a)(2) involves fact questions. The Division must show that the Employer has failed to meet “substantial compliance” with the provision via the methods outlined by the section. The methods an employer may use to ensure that its employees comply with safe work practices include: “recognition of employees who follow safe and healthful work practices, training and retraining programs, disciplinary actions, or any other such means that ensures employee compliance with safe and healthful work practices.” (*Ironworks Unlimited*, Cal/OSHA App. 93-024, Decision After Reconsideration (Dec. 20, 1996), *Marine Terminals Corp. dba Evergreen Terminals*, Cal/OSHA App. 08-1920, Decision After Reconsideration (Mar. 5, 2013).) As stated in *Marine Terminals Corp.*, “the Division must show that Employer did not comply with *any* of the four listed options under section 3203(a)(2).” (Emphasis added.)

Gupta testified that the Division received a partial copy of the Employer’s IIPP, which he reviewed. Gupta admitted on cross examination that although he learned from Goss that the Employer had a disciplinary program, he did not ask for any further information about how the program was enforced.

Employer provided testimony and documents to rebut the Division’s assertion that it was not in “substantial compliance” with 3203(a)(2). This includes records of disciplinary citations that the Employer’s safety director, Riser, had issued on the day of the accident to Medrano’s foreman and coworker. Employer also provided a handful of other safety citations, for various infractions of safety policies, as well as a yearly report of citations issued. (Ex.s B, C). Riser testified on Employer’s safety bonus program from

the IIPP, which he confirmed has provisions both for recognition of those employees who followed the safe and healthy work practices, and discipline for those who did not. (Ex. A).

The record establishes that the Employer had an established program of sanctions and financial incentives tied to its safety program. While Gupta testified to evidence of violations of several of Employer's promulgated safe and healthy work rules on June 9, the Division did not present testimony to show that the Employer lacked a working system to ensure compliance with those safe work practices. The Division's burden in showing a breach of 3203(a)(2) is to provide evidence that the Employer was failing to comply with any of the options listed by the safety order. (*Marine Terminals Corp., supra*, citing *E. L. Yeager Construction Company, Inc.*, Cal/OSHA App. 01-3261, Decision After Reconsideration (Nov. 2, 2007).)

Employer's appeal is granted and the penalty is vacated.

**Citation 2, Item 1: Serious Violation of 1509(a) Reference 3203(a)(4)**

The Division cites the following safety order in Citation 2:

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

Reference: Title 8, CCR 3203(a)(4), Illness and Injury Prevention Program

(a)Effective July 1, 1991, every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program (Program). The Program shall be in writing and, shall, at a minimum:

[...]

(4) Include procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices. Inspections shall be made to identify and evaluate hazards.

(A) When the Program is first established;

[...]

(B) Whenever new substances, processes, procedures or equipment are introduced to the workplace that represent a new occupational safety and health hazard; and

(C) Whenever the employer is made aware of a new or previously unrecognized hazard.

The citation alleges the following: on June 9, 2008, two crews, finishing and stripping crews, at or about 7 a.m., were working simultaneously in cell number 4, contractor building B, in violation of Employer procedures; the foremen of the two crews did not perform inspections to ensure that the finishing crew did not enter the area; there was no red tape at the door to prevent the crew from entering, per Employer rules; the finishing crew foreman

did not inspect the tower scaffold prior to assigning them to work on it, and the tower scaffold was missing a midrail. Finally, Division's citation alleges that company procedures were not available for review.

Gupta testified that pursuant to his document request, he received portions of the Employer's IIPP, but was not given a written copy of the Employer's policy regarding separation of finishers and strippers, or the use of red tape to caution others not to enter the stripping workspace. According to Gupta, after making a formal request for this safe practice "pertaining to the operation of stripping and finisher crews" he was informed the policy was verbal, rather than written.

Medrano testified that June 9 was the first day he had been assigned to work in the same tank with a crew doing stripping work. His understanding was that it was not allowed per Employer's policy and there usually would be red tape up at the door to keep others out of areas where the stripping crew was working.

Gupta testified to Ortiz's admission that the room was not taped off, and that Ortiz had not conducted an inspection of the room on the morning of June 9. Knowledge of a supervisor, such as Ortiz, will be imputed to the Employer. (*Tri-Valley Growers, Inc.*, Cal/OSHA App. 81-1547, Decision After Reconsideration (Jul. 25, 1985), citing *Greene & Hemly, Inc.*, Cal/OSHA App. 76-435 Decision After Reconsideration (Apr. 7, 1978).) Medrano testified to the status of Ortiz and Anderson as foremen. Riser corroborated that status in testimony in which he confirmed that Ortiz and Anderson were both disciplined on the day of the accident. The disciplinary documents further corroborate the supervisory status of Ortiz; Exhibit B lists Ortiz as cement foreman. A supervisor's statements may properly be attributed to the Employer as authorized admissions by a supervisor representative of the Employer.<sup>4</sup> (See, *Duinick Bros., Inc.*, Cal/OSHA App., 06-2870, Decision After Reconsideration and Order of Remand (Apr. 13, 2012).)

The evidence establishes that on June 9, Medrano was working in an area where a stripping crew was working, which had not been blocked off with red hazard tape. This constituted a new work practice for Medrano. An employer must have procedures in place that include inspections to identify and evaluate workplace hazards; under 3203(a)(4), the requirement is triggered when a new work practice is instituted. (See, *Brunton Enterprises, Inc.*, Cal/OSHA App. 08-3445, Decision After Reconsideration (Oct. 11, 2013).) The evidence presented by the Division establishes that there was no inspection of the tank prior to Medrano beginning his shift on June 9, 2008.

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<sup>4</sup> See Evidence Code section 1222: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if: (a) The statement was made by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement; and (b) The evidence is offered either after admission of evidence sufficient to sustain a finding of such authorization or, in the court's discretion, as to the order of proof, subject to the admission of such evidence."

Medrano also testified that the scaffold he fell from on June 9 was missing a midrail. In his testimony, he stated that on several prior occasions he and his coworker had found the scaffold to be missing parts, such as the bottom or midrail. The Division presented the Employer's safe work practice document for the tower scaffold, which requires inspection of the scaffold prior to use before each shift, with the instruction to "additionally inspect the guard rails, connectors, fasteners, tie-ins and bracing." (Ex. 8).

Employer presented a portion of its IIPP, which mandates safety inspections "at the beginning of a job and once every week" by the foreman, and training before employees begin new work tasks. (Ex. A). However, the Employer did not provide any rebuttal evidence to show it had conducted inspections as required by its own IIPP and safe work practices, and by section 3203(a)(4).

While the Division was able to establish by a preponderance of the evidence that a new work procedure involving the stripping and finishing crews was introduced on June 9, triggering the requirement to conduct inspections under 3203(a)(4), the Division did not make a similar demonstration in regards to the tower scaffold. The Division's evidence suggests problems with the scaffold were long-standing, rather than new. According to Medrano's testimony, he had used the tower scaffold on a regular basis since beginning his employment with Employer, and had encountered problems with the railing on several occasions. Section 3203(a)(4), which specifically addresses new safety programs, new work processes, or new or previously unrecognized hazards, is, without more evidence, not applicable to this set of facts.

The Division introduced little testimony related to the probability of death or serious physical harm due to failure to properly implement 3203(a)(4) when new work procedures are introduced. The Board finds a general violation, rather than a serious violation, to have been shown. Employer knowledge is not an element of a general citation, and need not be proven. (*Bimbo Bakeries USA*, Cal/OSHA App. 03-5215, Decision After Reconsideration (Jun. 8, 2010), citing *Ayoob & Perry*, Cal/OSHA app. 86-937, Decision After Reconsideration (May 18, 1987).) Having so found, the Board will assess a penalty of \$185, applying the applicable adjustment credits.

### **Citation 3, Item 1: Serious Violation of 1646(b)(1)**

Section 1646(b)(1) describes the construction and erection of tower scaffolds, such as the Aluma scaffold used by Employer. The section states:

(b) Construction and Erection

(1) The uprights, ledgers, ribbons, braces, and splices shall be equivalent to the standards specified in other applicable Sections of these Orders. Railings are required if the platform is 7 ½ feet or

more above grade. Railings shall be installed in accordance with the provisions of Section 1644(a)(6).

NOTE: Toeboards or side screens may also be required (See Section 1621)

[...]

(6) Securely attached railings as provided by the scaffold manufacturer, or other material equivalent in strength to the standard 2- by 4-inch wood railing made from “selected lumber” (see definition), shall be installed on open sides and ends of work platforms 7 ½ feet or more above grade. The top rail shall be located at a height of not less than 42 inches or more than 45 inches measured from the upper surface of the top rail to the platform level. A midrail shall be provided approximately halfway between the top rail and the platform.

Exhibit 8 is a copy of Employer’s safe work practice regarding the Aluma scaffold, which requires that the system be properly installed per the manufacturer’s instructions, with guardrails.

Medrano testified that although he wore a body harness, the only place inside the tank available to tie off was the scaffold itself. He testified that it was his usual practice to tie off to the scaffold, but he had not yet had a chance to do so on the morning of the accident, since he had just climbed onto the scaffold platform when he was struck. As described above, Medrano testified that the midrail of the platform was missing, and when he was hit with the beam, he fell through the opening in the platform and onto the concrete. Gupta was able to confirm with Ortiz and Goss that the midrail had been missing, although no other employee actually witnessed Medrano fall.

Cal/OSHA regulations specifically prohibit tying off to a guardrail.<sup>5</sup> Employer introduced a federal OSHA interpretation letter regarding the substitution of a fall restraint system for guardrails. This federal OSHA letter is not controlling in California. (See, *Janco Corporation*, Cal/OSHA App. 99-565, Decision After Consideration (Sept. 27, 2001).)

Employer contends that it may take other measures to protect employees from falls besides railings, and points to the fall protection equipment that Medrano was wearing as an acceptable alternative. Employer argues this is evident from the language of section 1621(a):

[u]nless otherwise protected, railings as set forth in Section 1620 shall be provided along all unprotected and open sides, edges and ends of all built-up scaffolds, runways, ramps, rolling scaffolds,

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<sup>5</sup> Section 1670 (b) Personal fall arrest systems and their use shall comply with the provisions set forth below. Effective January 1, 1998, except as permitted in subsections (c) and (d), body belts shall not be used as part of a personal fall arrest system.

[...]

(17) Personal fall arrest systems shall not be attached to hoists, except as specified in these Orders, nor shall they be attached to guardrails.

elevated platforms, surfaces, wall openings, or other elevations 7 1/2 feet or more above the ground, floor, or level underneath.

Where there is an alternative to a safety order, it is Employer's burden to show that it has met the requirements for meeting that alternative. (*Bragg Crane & Rigging Co.*, Cal/OSHA App. 01-2428, Decision After Reconsideration (Jun. 28, 2004).)

Although Employer argues that its fall protection system can substitute for railing, Employer has not shown that there was an acceptable means of tying off the fall protection system to the tower scaffold. Employer also failed to provide testimony or documentation to demonstrate that the tower scaffold met the requirements of 1670(d)(3), which requires that "[a]nchorage points used for fall restraint shall be capable of supporting four times the intended load." Gupta testified that there is risk in tying off to a scaffold; he testified that should the employee fall, the entire structure may fall as well. Employer's defense fails as it has not shown it has met any of the requirements of the alternative safety order which it proposes it was following in lieu of providing rails on the scaffold.

Employer also defends by stating it was unaware that the fall protection equipment would not protect Medrano. Lack of knowledge is an affirmative defense to the serious classification of a citation; when raised, it becomes the employer's burden to prove. An employer may defend through establishing that the violation occurred at a time and under circumstances which did not provide Employer with a reasonable opportunity to detect it. (*Bryant Rubber Corp.*, Cal/OSHA App. 01-1360, Decision After Reconsideration (Aug. 21, 2003).) Employer has provided no evidence on this point beyond Riser's conclusory statement that an employee may tie off to the scaffold, and a non-applicable Federal OSHA advice letter. (See, *Webcor Construction LP dba Webcor Builders*, Cal/OSHA App. 08-2499, Denial of Petition for Reconsideration (Oct. 12, 2009), citing *Jerlane, Inc., dba Commercial Box and Pallet*, Cal/OSHA App. 01-4344, Decision After Reconsideration (Aug. 20, 2007).) Employer has a responsibility to stay up to date on safety rules and regulations; the Board does not accept lack of knowledge of a safety order as a defense. (*Reinhold Industries, Inc.*, Cal/OSHA App. 95-4251, Decision After Reconsideration (Dec. 21, 2000).)

The parties stipulated that if the serious classification was sustained, Employer agreed Medrano sustained a serious injury as a result of his fall from the scaffold on June 9, 2008. A violation is classified as serious if it is substantially probable that it could result in serious physical harm or death, unless the cited employer proves that it did not know of the violation, and could not have known of it through the exercise of reasonable diligence.<sup>6</sup> (Labor Code 6432(a), *Bimbo Bakeries USA*, Cal/OSHA App. 03-5215, Decision After Reconsideration (Jun. 9, 2010).) In testimony, Gupta discussed his

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<sup>6</sup> Labor Code section 6432 was amended effective January 1, 2011. The rule is applied as it was in effect at the time of the violation.

experience with 120 fall accident investigations. He surmised that over 85% were at heights of 15 to 24 feet, and that around 80% of those accidents were serious. Medrano's fall was 24 feet onto concrete. The weight of the testimony regarding falls at this height, coupled with testimony regarding Medrano's serious back injury, is evidence to show substantial probability that a violation of the stated safety order will result in serious injury or death.

The Board finds that Employer should have known of the missing rail through "the exercise of reasonable diligence." (*The Herrick Corporation*, Cal/OSHA App. 99-786, Decision After Reconsideration (Dec. 18, 2001).) An employer need not have actual knowledge of a violative condition in order for a serious violation to be found; constructive knowledge is enough. Where the evidence demonstrates that the employer has failed to exercise reasonable diligence to insure that the safety order is met, a serious violation may be established. Medrano's foreman admitted to Gupta that he did not inspect the work area prior to the shift. Employer provided no evidence to the contrary to suggest that there was an inspection. (*Pierce Enterprises*, Cal/OSHA App. 00-1951, Decision After Reconsideration (Mar. 20, 2002).)

The citation is properly classified as serious and accident related. To show that a violation is accident-related, the Division must establish by a preponderance of the evidence a causal nexus between the violation and the serious injury. (*Pierce Enterprises*, *supra*, citing *Obayashi Corporation*, Cal/OSHA App. 98-3674, Decision After Reconsideration (Jun. 5, 2001).) Medrano testified in detail as to how his injury occurred on June 9. Photographs of the tank and scaffold, as well as supervisor statements to Gupta, support Medrano's uncontested version of events. Gupta testified that because the citation was related to Medrano's accident and Employer has over 100 employees, he was unable to lower the proposed penalty of \$18,000, which we uphold.

### **Timeliness of Citations**

The Division has established by a preponderance of the evidence that it issued Citations 1 through 3 timely, or on the date that is marked on the citations-- December 8, 2008. A citation may be time barred by the statutory six month limitation of section 6317, if not issued within the appropriate time period. As a jurisdictional issue, the time bar may be raised at any point in the appeals process, including by the Board itself, when justified by the record. In this instance, both parties were aware that the timeliness of the citations would be at issue, and the Employer raised the timeliness of the citations as a defense in its initial appeal. (*Sierra Wes Drywall, Inc.*, 94 Cal/OSHA App. 1071, Decision After Reconsideration (Nov. 18, 1998).)

The accident which gave rise to these citations occurred on June 9, 2008, and the citations issued by the Division have an issuance date of December 8, 2008. There is no dispute as to the date of the injury or the Division's responsibility to issue the citations within the six month statute of

limitations. This is a time period measured in calendar months, rather than days, which means the first day is excluded and the last day is included. (*Pierce Enterprises*, Cal/OSHA App. 00-1951, Decision After Reconsideration (Mar. 20, 2002).)

In general, the Board follows the rebuttable presumption that official duties have been regularly performed. (Evidence Code section 664). Division Office Technician Lopez was firm in her testimony that she had a usual practice of preparing all citations on the date labeled on the citation, and mailing them via certified mail that same day, although she had no particular memory of the citations at issue. Division Engineer Gupta was able to testify that he had handed the citations to Lopez on December 8, 2008, and that she returned the file to him on that date after mailing, but admitted he was not present to see her mail the citations to Employer.

Labor Code section 6319 states that notice of the citation must be provided to the employer within a reasonable time after conclusion of the investigation and inspection. The Board has concluded in *Pierce Enterprises* that this is a separate and distinct responsibility from the six month statute of limitations on issuance of citations which is found in section 6317. Employer did not argue or demonstrate that it has been prejudiced by an untimely receipt of the citations.

The Division has provided the citations, which are dated December 8, 2008, as documentary proof that the citations were issued within the statutory time limitation. The citations have the signature of both Gupta and the Division District Manager. In *Pierce Enterprises*, the Board first looked to the date on the citation, as the citation itself states an issuance date. The Board may presume this citation document was properly executed by a government official in the course of his or her duties. The Division provides Exhibit 1, the “jurisdictional documents,” as corroborating evidence provided by the Division. These include the appeals forms filled out by Employer’s counsel, and date stamped as received by the “OSH Appeals Board” on Wednesday, December 16, 2008. According to the stamp, there was a lapse of about eight days from the time the citations were allegedly issued to the date they were received at the Board in Sacramento.

Gupta also testified as to the closing conferences he held with two Employer representatives, and the document he filled out related to those conferences, on which he dated the close of the Shimmick-Obayashi matter as December 8, 2008. (Ex. E). This report generated in the normal course of business by the Division also corroborates the Division’s position that the citations were issued on December 8.

Presumably, the Employer has a copy of the envelope that the citations arrived in; as the Employer does not dispute that the citations were received at its corporate office. The Employer did not produce any evidence, physical or testimonial, at hearing, related to the date the citations were mailed, i.e.

postmarked, or received. The Board notes that the Employer's failure to offer evidence on this issue, although production of such evidence is easily within their power to do so, raises the inference that the evidence, if produced, would have been adverse to their position. (*Shehtanian v. Kenny* (1958) 156 Cal. App. 2d 576, 580).

The cumulative evidence on the record preponderates towards a finding that the citations were issued on December 8, 2008. Gupta testified as to having seen Lopez prepare the citations on that date. Lopez testified to her usual work practices, which included mailing all citations on the date of issuance. Having met its burden of proof establishing that the citations were issued on December 8, the Employer failed to provide any rebuttal evidence. (*Pouk & Steinle, Inc.*, Cal/OSHA App. 03-1495, Decision After Reconsideration, (Jun. 10, 2010).). The citations were issued timely.

ART CARTER, Chairman  
ED LOWRY, Member  
JUDITH S. FREYMAN, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
FILED ON: DECEMBER 30, 2013