

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

*In the Matter of the Appeal of:*

**WEST VALLEY CONSTRUCTION, INC.**  
**2793 S. Golden State**  
**Fresno, CA 93727**

Employer

**DOCKET 12-R2D5-3526**

**DECISION**

**Background and Jurisdictional Information**

West Valley Construction, Inc. (Employer) is a contractor involved in underground utility construction projects. Beginning August 23, 2012, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Ron Harris, conducted a referral inspection at a place of employment maintained by Employer at Abbey Street, Fresno, California. On November 28, 2012, the Division cited Employer for the following alleged violation of the occupational safety and health standards and orders found in Title 8, California Code of Regulations<sup>1</sup>:

<b><u>Cit/Item</u></b>	<b><u>Section</u></b>	<b><u>Type</u></b>	<b><u>Penalty</u></b>
1/1	1629(c)(3) [Failure to ensure side rails of all ladders extend three feet above level they serve]	General	\$160

Employer filed a timely appeal contesting the existence of the violation. Employer also asserted a series of affirmative defenses.

This matter came on regularly for hearing before Kevin J. Reedy, Administrative Law Judge for the California Occupational Safety and Health Appeals Board, at Fresno, California on November 6, 2013. Manuel Melgoza, of the Robert D. Peterson Law Corporation, represented Employer. Jerry Walker, District Manager, represented the Division. The parties presented oral and documentary evidence. The matter was submitted for decision on November 6, 2013. The submission date, on the Administrative Law Judge's own motion, was extended to February 6, 2014.

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

**Citation 1, Item 1, General, §1629(c)(3)**

**Summary of Evidence**

The Division cited Employer for failing to ensure that the side rails of all ladders extended three feet above the level they served.

The inspection was conducted by Ron Harris (Harris), Associate Safety Engineer, who has been employed by the Division for over four years and had conducted 140 inspections at the time of the instant inspection.

When Harris arrived at the work site, he observed an employee working in a manhole, standing on the top of an A-frame ladder, measuring six feet in length (Exhibit 4). Exhibit 3 is a view of the manhole, which shows an extension ladder, measuring 10 feet in length, which employee Jarred Tickel (Tickel) had also been using inside the manhole. The top of the extension ladder was one foot down from the manhole landing. The side rails and rungs of neither ladder extended to the required 36 inches above the landing level, nor did they extend any distance above the landing level. The side rails are used as handles when an employee is climbing at the landing level.

Exhibit 2 shows a tripod and equipment attached thereto which was set up over the open manhole. The tripod depicted is also known as a retrieval device. In this type of system an employee wears a harness, clips a line to his harness, which is attached to a winch, and which remains attached while he is working. The device could also be used to keep an employee from falling when descending into a hole. Harris could not recall if Tickel was using the device at the time of the inspection.

Exhibit B is a two page document containing five copies of photographs taken at the inspection site. The lower, left photo on page one shows the tripod with a fall-restraint system which was set up at the work site. The lower, right photo shows a winch hanging from a line attached to the tripod. The lower-right photo also shows a yellow-colored fresh air intake duct on the ground near the manhole.

Employer Exhibit A, which is a specification sheet for the retrieval system utilized by Employer on the day of the inspection, depicts a tripod and winch of the type used at the work site. The tripod is designed for emergency evacuation, in situations such as those where an employee may have been engulfed in a vapor or chemical inside a manhole, or where an employee may have passed out from the lack of oxygen, and is incapacitated. Exhibit A, which includes the "Features" of Employer's tripod, includes the following language: "For emergency evacuation only."

Harris testified that Tickel was exposed to falling on the day of the inspection, because of the absence of a ladder with side rails which extended three feet above the landing. The safety order is designed to protect the employee in safely stepping off the rungs of the ladder at the landing area. Harris testified that ladder climbing involves a “three point stance.”<sup>2</sup> The purpose of extending side rails in the instant matter is to help the employees lift themselves out of the manhole. If there are no side rails available at the landing the employee could fall. According to Harris, a fall hazard might still exist even with the side rails of the ladder extending three feet above the landing.

Tickel, called by Employer, works as a laborer for West Valley Construction. He was working inside a manhole on the day of the inspection. At the worksite, Tickel wore a “sniffer,”<sup>3</sup> and a harness. Tickel attached the harness to the winch before entering the manhole. The top-right photo on page 1 of Exhibit B shows that the legs of the tripod can be adjusted up and down for different elevations.

Tickel testified that the purpose of the hoist is to catch the worker if he falls off the ladder. Tickel explained that emergency situations in which the tripod might be useful might include hazards associated with gases, health issues, or just about any emergency which could happen at any time while working in the hole.

An attendant stays on ground level when the employee is lowered down into the hole while attached to the tripod. The system will prevent the worker from falling more than four to six inches.

Tickel was attached to the system when Harris arrived for the inspection. Tickel had two ladders in the hole at the time of the inspection. Tickel was standing on the top of an A-frame ladder inside the hole. When Harris arrived, Tickel was called to the surface by the attendant, Will Gardner (Gardner). Tickel switched to the 10 foot extension ladder to ascend to the surface, which reached a height of one foot below the top of the hole. Tickel testified that because he was attached to the unit he could have fallen no more than four to six inches.

Tickel testified that nothing at the site made the tripod un-sturdy, and nothing, based on the way the tripod was set up, would have made the tripod tip over. Tickel did not need help getting out of the hole using the tripod system. The upper-right photo on Exhibit B shows the tripod foot which can articulate to sit on unlevelled ground. The tripod system always maintained tension in the line while an employee was ascending or descending the hole.

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<sup>2</sup> Climbing a ladder while using a combination of two hands and one foot, or one hand and two feet.

<sup>3</sup> A gas monitor used to detect harmful gases to which a worker may be exposed while working underground.

Tickel had received training in the proper use of the tripod system. Tickel testified that the tripod was set up with one leg in the patch, and one leg staked. Exhibit 5 is a photograph that shows one leg of the tripod, with a foot which can be positioned to use as a stake, in loose ground. The same foot can be positioned with the rubber side down to use on surfaces such as asphalt.

Tickel testified that he received training from Employer in the use of ladders. That training included information that a ladder should be positioned three feet above the landing, and the purpose of doing so is to help the worker out of the hole.

On the day of the inspection, Tickel placed both ladders in the 11 to 12 foot deep hole. Tickel testified that it would have been difficult to use a ladder longer than 10 feet because of the narrow opening in the hole. Tickel would have had to use a 15 foot ladder for a 12 foot deep hole to be three feet above the landing.

Austin Wollbrinck (Wollbrink), who was working at the job site on the day of the inspection, testified that he observed Gardner standing over the hole, doing his job as an attendant. Tickel was attached to the tripod system while in the manhole and when he climbed out of the manhole. There were two ladders in the hole, one of which reached to a height of one foot below the landing.

After the inspection, Anthony Scott Headley (Headley), Employer's Safety Manager, using Tickel, performed a test with a retrieval hoist of the same model at issue to confirm that its engaging device would perform as expected. The device stopped a free-fall within four to six inches. Headley testified that the manufacturer's specifications indicate that the tripod device is "for emergency evacuation only" (Exhibit A). Headley testified that Tickel did not use the tripod equipment in a manner inconsistent with the manufacturer's instructions.

Headley testified that the purpose of a ladder is for use as a means of egress. Headley, as Safety Manager, has conducted ladder safety training where one of the topics included the requirement that ladders must reach three feet above the landing. Headley testified that using a 15 foot ladder in the manhole at the inspection site would have created a tip hazard with the ladder rising almost straight up; the angle would have created a "tip back" hazard. No "falling back" hazard would exist with the use of a tripod system.

## **Findings and Reasons for Decision**

### **Citation 1, Item 1, §1629(c)(3)**

- a) The record, by a preponderance of the evidence, establishes a violation of §1629(c)(3).**
- b) Employer did not present evidence sufficient to establish any affirmative defense.**
- c) A penalty of \$160 is assessed for the General violation.**

### **The violation of §1629(c)(3)**

Section 1629(c)(3), “Stairways and Ladders,” within the “Access and Egress” section of the Construction Safety Orders, in pertinent part, provides the following:

(c) Ladder Use.

(3) Side rails of all ladders shall extend at least 3 feet above the landing or level they serve.

In the citation, the Division alleges the following:

The ladders side rails had not extended 3 feet beyond the level which employee had been working while inside a manhole of a newly constructed sewer.

The Division’s burden is to prove a violation, including the applicability of the safety order, by a preponderance of the evidence (*Ja Con Construction*, Cal/OSHA App. 03-441, Decision After Reconsideration (Mar. 27, 2006).) To sustain a violation, the Division must also show that the employer exposed its employees to a hazard that the cited safety order was designed to protect. (*General Motors Corp.*, Cal/OSHA App. 77-573, Decision After Reconsideration (Aug. 9, 1978).)

To establish a violation of §1629(c)(3) it was incumbent upon the Division to prove by a preponderance of the evidence that the employer did not ensure that the side rails of all ladders extended three feet above level they served, and that Employer exposed the workers to hazards associated with the lack of safe access and egress that §1629(c)(3) was designed to protect.

It is not disputed by the parties that the side rails of the ladder in use at the job site did not extend at least three feet above the manhole level. It is also not disputed that an employee of Employer was working within that manhole. There are no exceptions to §1629(c)(3).

The Division, in closing, argued that: (1) the ladder was at the job site for access and egress to the manhole; (2) the purpose of §1629(c)(3) is to allow an employee to arrive safely at the landing, and (3) the tripod retrieval system utilized by Employer is not designed for fall protection; that system is designed to retrieve an employee who is incapacitated because of exposure to gases or other hazards.

The Division is correct in its assertion that the purpose of §1629(c)(3) is to allow an employee to arrive safely at the landing. The safety order requires that any employee, who may need to enter or exit the hole at the job site, be afforded the safety of a ladder with side rails extending above the landing, providing safe employee access to and egress from the hole. Another employee may need to enter the hole to physically assist or render first aid to an employee in the hole, and that second employee should also be afforded safe access and egress provided by ladder side rails. Side rails provide the added assurance that an employee can use the ladder to quickly and safely enter and leave the hole in emergency and rescue situations.

The tripod system utilized by Employer does, in fact, provide a level of fall protection. This device is designed for emergency evacuation, in situations where an employee may have been engulfed in a vapor or chemical inside a manhole, or where an employee may have passed out from the lack of oxygen. In a situation where an employee senses dangerous gases or vapors, that employee may need to quickly exit the confined space. Side rails would certainly assist that employee in a quick exit from the hole.

Employer, in closing, argued that Tickel was not exposed to the hazard that is addressed by the safety order, specifically, the hazard of falling. Employer cites two Board Decisions, *Rudolph & Sletten, Inc.*, Cal/OSHA App. 80-602, Decision After Reconsideration (Mar. 5, 1981), and *Huber, Hunt & Nichols, Inc.*, Cal/OSHA App. 75-1182, Decision After Reconsideration (Jul. 26, 1977). The Board found, in both *Rudolph, supra*, and *Huber, supra*, found that employee exposure to a hazard cannot be established on the basis of general speculation; there must be evidence sufficient to establish exposure to the hazard(s). Employer also cites *Ray Products, Inc.*, Cal/OSHA App. 99-3169, Decision After Reconsideration (Aug. 20, 2002), reemphasizing the requirement that the Division must establish that employees were actually exposed to the hazard for which the regulation was designed to protect.

The Appeals Board, in *Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (April 24, 2003), held the following:

"the Division may establish the element of employee exposure to the violative condition without proof of actual exposure by showing employee access to the

zone of danger based on evidence of reasonable predictability that employees while in the course of assigned work duties, pursuing personal activities during work, and normal means of ingress and egress would have access to the zone of danger.” (*Benecia Foundry & Iron Works, Inc., supra.*)

The "zone of danger" is "that area surrounding the violative condition that presents the danger to employees that the standard is intended to prevent." (*Benecia Foundry & Iron Works, Inc., supra.*)

Both Tickel and Headley acknowledged that the safety order requires that the side rails of a ladder extend three feet above a landing. The tripod retrieval system may serve an added purpose to prevent falls, not inconsistent with the manufacturer’s instruction that the device be used “for emergency evacuation only,” but such use of the tripod is not anticipated as a substitute for the requirements of the regulation. The regulation allows for no such exception.

Employer’s main premise is that the hazard for which §1629(c)(3) was designed to protect is the hazard of an employee falling from a ladder. Employer argues that the tripod system it was using was better than the ladder required by the safety order, which would have created a greater fall hazard for Tickel. Employer posits that the use of its tripod system obviated the use of a ladder meeting the requirements of the safety order.

Employer’s position fails to take into account situations where a tethered employee may have to quickly exit the hole and arrive safely at the landing, or where other employees or rescue personnel may need to render assistance to the worker who is tethered to the tripod and is down in the hole. Although falls are one of the hazards which may be associated with §1629(c)(3), safe access and egress, for any employee at the work site, while using a ladder, is the primary concern of the regulation. The record established that Tickel was actually in the zone of danger, and that it was reasonably predictable that other employees, while in the course of assigned work duties would also have access to the zone of danger.

Employer presented testimony that using a 15 foot ladder would have created a “tip back” hazard for its worker using the ladder, and that no “falling back” hazard would exist with the use of a tripod system. Employer did not present enough evidence to support that opinion. And even if it is accepted as valid, Employer is not absolved from the mandate of the safety order. In *Certified Grocers of California, Ltd.*, Cal/OSHA App. 78-607, Decision After Reconsideration (Oct. 27, 1982), the Board held that employers are required to comply with all safety orders and are not permitted the discretion to decide when to follow a safety order, or substitute a safety measure for that required by a safety order.

Section 6407 of the California Labor Code provides the following:

Every employer and every employee shall comply with occupational safety and health standards, with Section 25910 of the Health and Safety Code, and with all rules, regulations, and orders pursuant to this division which are applicable to his own actions and conduct.

In view of the above, Employer was required to comply with the safety order cited. If it believed that using a ladder with side rails extending three feet above the landing was more dangerous than using its tripod system, it could have, prior to the start of work, applied to the Occupational Safety and Health Standards Board for a variance from the safety order upon a showing that an alternate method would provide equal or superior safety for its employee. (Labor Code §143; *Hubbard Structures, Inc.*, Cal/OSHA App. 86-329, Decision After Reconsideration (Dec. 31, 1986); *Hooker Industries, Inc.*, Cal/OSHA App. 77-525, Decision After Reconsideration (Feb. 24, 1982).)

In addition, §6450(a) of the California Labor Code provides, in relevant part, that “any employer may apply to the division for a temporary order granting a variance from an occupational safety or health standard.” Employer never submitted such an application for a temporary order granting a variance from the safety regulation at issue. As such, Employer was bound to abide by the regulation, which requires that “side rails of all ladders shall extend at least 3 feet above the landing or level they serve.”

The Division has established, by a preponderance of the evidence, that employer failed to ensure that the side rails of all ladders used at the work site extended three feet above the level they served. Employer provided no such ladder, and as such, exposed workers to the hazards associated with the lack of safe access and egress to and from the manhole at its job site.

### **Employer’s affirmative defenses**

Employer failed to provide evidence sufficient to establish any of its claimed affirmative defenses.

### **The penalty calculation**

The amount of the penalty is not under appeal and is therefore established by operation of law.

### **Decision**

The evidence supports a finding that Employer violated §1629(c)(3) by its failure to ensure that the side rails of a ladder extended at least three feet above the level it served, which exposed its employees to the hazard for which

§1629(c)(3) was designed to protect. A penalty in the amount of \$160 is assessed for the reasons described herein, and as set forth in the attached Summary Table.

Dated: February 24, 2014

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KEVIN J. REEDY  
Administrative Law Judge

# SUMMARY TABLE

## DECISION

<i>In the Matter of the Appeal of:</i>  <b>WEST VALLEY CONSTRUCTION, INC.</b> <b>DOCKET 12-R2D5-3526</b>					ABBREVIATION KEY:  Reg=Regulatory G=General S=Serious ER=Employer <span style="float: right; margin-left: 100px;">                     DOSH=Division                      W=Willful                      R=Repeat                 </span>					
IMIS No. 315077172										
DOCKET NO.	CIT. NO.	ITEM NO.	SECTION NO.	TYPE	MODIFICATION OR WITHDRAWAL	A	V	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT HEARING	<b>FINAL PENALTY ASSESSED BY BOARD</b>
12-R2D5-3526	1	1	1629(c)(3)	G	ALJ affirmed violation	X		\$160	\$160	<b>\$160</b>
<b>Sub-Totals</b>								\$160	\$160	<b>\$160</b>
<b>Total Due</b>										<b>\$160</b>
NOTE: Payment of final penalty amount should be made to:  Accounting Office (OSH) Department of Industrial Relations P.O. Box 420603 San Francisco, CA 94142					(INCLUDES APPEALED CITATIONS ONLY)  *You will owe more than this amount if you did not appeal one or more citations or items containing penalties. Please call (415) 703-4291 if you have any questions.					

**ALJ: KR**  
**POS: 02/24/14**