

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

In the Matter of the Appeal of:

**CENTRAL VALLEY PAINTING INC.
P.O. Box 2240
Lodi, CA 95241**

Employer

DOCKET 14-R6D1-3694

DECISION

Statement of the Case

CENTRAL VALLEY PAINTING INC. (Employer) is a painting contractor located in Lodi, California. Beginning on July 14, 2014, the Division of Occupational Safety and Health (the Division) through Paul Hurd (Hurd), Associate Safety Engineer, conducted an inspection at 424 Jacquelyn Lane, Petaluma, CA 94953. On October 24, 2014, the Division cited employer for a serious violation of, California Code of Regulations, title 8, section 1644, subdivision (a)¹ for using the upper level of a scaffold located 22 feet above the ground that was missing end rails.

Employer filed a timely appeal of the citation, contesting whether, the classification was correct. Employer moved to amend the appeal to challenge whether the safety order was violated, and to assert the employer knowledge defense. This motion was granted over the objections of the Division.

The matter was heard in Oakland, California before Mary Dryovage, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (Appeals Board) on May 28, 2015 at 1515 Clay Street, Suite 1301, Oakland CA. The Division was represented by Clement Hsieh, District Manager, Division of Occupational Safety and Health, High Hazard Unit – Northern California. Employer was represented by Carlo Zicari, Owner. The matter was submitted for decision at that time. The Administrative Law Judge extended the submission date to June 16, 2015 on her own motion.

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

Issues

- A. If Employer's employees used a scaffold with missing end rails to apply exterior paint 22 feet above ground level, was section 1644, subdivision (a)(6) violated?**
- B. Was the violation properly classified as serious?**
- C. Did Employer rebut the presumption of a serious violation?**
- D. Was the penalty of \$1,800 reasonable?**

Findings of Fact

1. Employer's employees used a scaffold to apply exterior paint at approximately twenty-two feet above the ground level.
2. The scaffold on the third level was missing end rails at the place the two employees were painting.
3. The Division established a realistic possibility that death or serious physical harm could result from the exposure to the hazard of missing end rails on scaffolding while working at twenty-two feet above the ground.
4. Employer failed to establish lack of employer knowledge.
5. The penalty of \$1,800 was reasonable.

Analysis

- A. If Employer's employees used a scaffold with missing end rails to apply exterior paint 22 feet above ground level, was section 1644, subdivision (a)(6) violated?**

The Division cited employer for a violation of section 1644, subdivision (a)(6), which provides:

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 1/2 feet or more above grade. The top rail shall be located at a height of not less than 42 inches nor 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.

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

- (A) 'X' bracing is acceptable as a toprail if the intersection of the 'X' occurs at 45 inches (plus or minus 3 inches) above the work platform, provided a horizontal rail is installed as a midrail between 19 and 25 inches above the work platform. The maximum vertical distance between the 'X' brace members at the uprights shall not exceed 48 inches.
- (B) 'X' bracing is acceptable as a midrail if the intersection of the 'X' falls between 20 inches and 30 inches above the work platform.

Exceptions:

- (1) Railings are not required on that side of bricklayers' and masons' scaffold adjacent to the work under construction provided the wall is higher than the adjacent work platform.
- (2) For end rail openings less than 3 feet, double wrapped iron wire at least No. 12 gauge in thickness, or wire rope at least 1/4 inch minimum diameter is permitted, provided the wire or wire rope is securely fastened.

Citation 1, Item 1 alleges:

On or about the date of the inspection, metal scaffolding was erected around a new residential construction project located at the Quarry Heights Stone Ridge development in the City of Petaluma. Workers were using the upper level of the scaffold to apply exterior paint. End rails were not installed on the platform at a height of 22 feet above ground level.

The Division has the burden of proving each element of its case by a preponderance of the evidence. (*Cambrio Manufacturing Co.*, Cal/OSHA App. 84-923, Decision After Reconsideration (Dec. 31, 1986), p. 4; *Howard J. White*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).) The Division may establish employee exposure by showing the investigator observed employees accessing the zone of danger while in the course of assigned work duties, pursuing personal activities during work, or during ingress and egress. (*Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (Apr. 24, 2003).)

Section 1644, subdivision (a)(6) requires proof that 1) the end rail was missing from the scaffold, and 2) one or more employees were exposed to a fall over seven and one half feet from the ground.

Hurd testified that the end rails of the scaffold were missing on the third level, twenty-two feet above ground level. Exhibits 5, 6, 7, 8, 9, 10, 11 and 12 are photographs of the site showing the scaffolding, on which he drew in red marker on the photograph, lines where the rails should have been. Employer presented no evidence to contradict this testimony. The Division satisfied its burden of showing that the end rail of the scaffold on the third level was missing.

Hurd testified that on July 14, 2014, he observed two employees who were painting a new three story residential building while standing on a scaffold which he estimated based on his measurements was approximately twenty-two feet above ground level. (Exhibits 5, 6, 7, 8, 9, 10, 11 and 12.) From the street level, he saw Damien Oregel (Oregel) climb from the scaffold platform on the third level to the roof and then walk on the roof. Hurd took pictures of the work site at 8:49 a.m. which documented Oregel's actions. (Exhibits 5 and 6.) The scaffold on the third level did not have end rails, which were required to prevent the employee from falling to the ground below. (Exhibits 7 and 8.) A close up photograph taken at 8:50 a.m. shows Oregel painting on the exterior of the building. (Exhibit 9.)

Oregel and Miguel Angel Mora-Garcia (Mora-Garcia) were working on the third level, directly in front of the place on the scaffold missing end or side rails. (Exhibit 10.) A close up photograph taken at 9:17 a.m. shows Mora-Garcia standing on the platform holding a paint bucket, in front of the place with missing rails. (Exhibit 11.) Hurd testified that there was nothing to prevent a fall of twenty-two feet, and the ground below was hard-packed gravel.

The Division established a violation of Section 1644, subdivision (a)(6) because employees were working above seven and one-half feet above ground level on a scaffold that did not have end rails.

B. Was the violation properly classified as serious?

To sustain a serious violation of Labor Code section 6432, subdivision (a), the Division was required to establish the serious classification:

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 harm²

² "Serious physical harm" means "any injury or illness, specific or cumulative, occurring in the place of employment or in connection with any employment, that results in any of the following: (1) Inpatient hospitalization for purposes other than medical observation. (2) The loss of any member of the body. (3) Any serious degree of permanent disfigurement. (4) Impairment sufficient to cause a part of the body or the function of an organ to become permanently and significantly reduced in efficiency on or off the job, including, but not limited to, depending on the severity, second-degree or worse burns, crushing injuries including internal injuries even

could result from the actual hazard created by the violation. The demonstration of a violation by the division is not sufficient by itself to establish that the violation is serious. The actual hazard may consist of, among other things:

- (1) A serious exposure exceeding an established permissible exposure limit.
- (2) The existence in the place of employment of one or more unsafe or unhealthful practices, means, methods, operations, or processes that have been adopted or are in use.

The Appeals Board has defined “realistic possibility” to mean a prediction that is within the bounds of human reason, not pure speculation. (*Bellingham Marine Industries, Inc.*, Cal/OSHA App. 12-3144, Decision After Reconsideration (Oct. 16, 2014), citing *Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (September 27, 2001). The Appeals Board has held that falls from twenty or more feet were properly classified as serious because of the realistic possibility of death or serious injuries from falling from such distances. (*Western Pacific Roofing Corp.*, Cal-OSHA App. 96-528, Decision After Reconsideration (Oct. 18, 2000); *John Jackson Masonry*, Cal-OSHA App. 77-765, Decision After Reconsideration (Dec. 13, 1978).)

Exhibits 5, 6, 7, 8, 9, 10, 11 and 12 depict the worksite showing the two employees, Mora-Garcia and Oregel working twenty-two feet above the ground level on a platform of a scaffold which was missing the end rails. Hurd’s opinion³ was that an employee would likely suffer a serious accident if he fell from the unprotected scaffold at approximately twenty-two feet above ground level. He testified that the injuries of a fall from that height, under those conditions, could result in severe skeletal injuries, serious bone fractures or a fatality. The realistic possibility of a serious injury combined with existence of the actual hazard caused by failure to have end rails on the scaffold at the third floor level, is sufficient evidence for the rebuttable presumption to apply. (Section 6432, subdivision (c).) It now must be determined whether employer rebutted the presumption.

C. Did Employer rebut the presumption of a serious violation?

though skin surface may be intact, respiratory illnesses, or broken bones.” (Labor Code Section 6432, subdivision (e).)

³ Hurd’s opinion was based upon a reasonable evidentiary foundation consisting of his experience and training. See *Wright & Associates, Inc.*, Cal/OSHA App. 95-3649, Decision After Reconsideration (Nov. 29, 1999.) He has worked for the Division for over 19 years and was current in his Division mandated training. (Exhibit 3) Prior to working for the Division, he worked as an Emergency Medical Technician and for the Sherriff’s Department doing search and rescue operations. During his employment as an Associate Safety Engineer, he conducted hundreds of inspections, including construction industry investigations.

Employer raised “lack of employer knowledge.” However, the statute was changed in 2011, so that the Employer is required to rebut the presumption that the violation is a serious violation, by establishing the elements set forth in Labor Code Section 6432, subdivision (c), which provides:

If the division establishes a presumption pursuant to subdivision (a) that a violation is serious, the employer may rebut the presumption and establish that a violation is not serious by demonstrating that the employer did not know and could not, without the exercise of reasonable diligence, have known of the presence of the violation. The employer may accomplish this by demonstrating both of the following:

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

Employer will be found to have failed to rebut the presumption that a realistic possibility of a serious injury exists by arguing that it was unaware of safety requirements. (*International Paper Company, Cal/OSHA App. 14-1189 Decision After Reconsideration (May 29, 2015.)*) This argument has been consistently rejected by the Appeals Board. An example is *McKee Electric Company, Cal/OSHA App. 81-0001, Denial of Decision After Reconsideration (May 29, 1981)*, where the Appeals Board determined it is the duty of all California employers to stay current with the safety standards and orders and regulations affecting their operations.

Carlo Zicari, owner of Central Valley Painting, testified that he went to the jobsite one or two days prior to the day of the inspection. At that time, the scaffolding appeared to be intact. He provided no details concerning the steps he took to determine that the scaffolding was compliant with the regulations or whether he took steps to confirm that the scaffolding would not be dismantled prior to the completion of the painting job. Hurd testified that the foreman, Manuel Oreja, was not on the jobsite at the time of the inspection and the temporary foreman, Oregel was unaware that the end rails were missing from the scaffolding. Zicari admitted that neither he nor his foreman or temporary foreman had scaffolding training prior to the inspection, but they obtained certification in scaffolding after the citation in this case issued. Reasonable diligence was not shown, at the time of the inspection, to have existed.

Employer failed to rebut the presumption of a realistic possibility of a serious injury. The violation was properly classified as serious.

D. Was the penalty of \$1,800 reasonable?

The proposed penalty for Citation 1, Item 1 was \$1,800. Hurd testified that he calculated the penalty based on the Division's procedures, as shown in the proposed penalty calculation worksheet, Exhibit 2. The initial base penalty for a serious violation is \$18,000. This was reduced to \$1,800 due to the following calculation: The gravity based penalty was reduced by \$4,500 due to low "extent" rating. It was further reduced by \$4,500, due to low "likelihood" rating. (\$18,000 minus \$9,000 equals \$9,000.) (§336, subd. (c).)

Based on his assessment of employer's "good faith" (30 percent reduction), "size" of approximately 50 employees (20 percent reduction) and "history" (10 percent reduction),⁴ a 60% penalty adjustment factor was given, which resulted in a reduction from \$9,000 to \$3,600. (\$9,000 minus \$5,400 equals \$3,600.) (§336, subd. (d)(1) – (5).)

The 50% abatement credit was applied, further reducing the penalty to \$1,800. (§336, subd. (e).) Employer did not dispute these calculations or present any evidence that a different analysis was appropriate. The penalty of \$1,800 is reasonable and is assessed, as set forth in the summary table.

Conclusion

Employer's employees used a scaffold with missing end rails to apply exterior paint 22 feet above ground level, in violation of section 1644, subdivision (a)(6). Employer failed to rebut the presumption that the citation was properly classified as serious.

Order

It is hereby ordered that Employer's appeal is denied. Citation 1, Item 1 is affirmed and the penalties as set forth in the attached Summary Table shall be assessed, for the reasons stated above.

DATED: July 15, 2015
MD:sp

MARY DRYOVAGE
Administrative Law Judge

⁴ Hurd testified that prior to the hearing, he checked the employer's history with the Division. He determined that the history credit should not have been given, due to the Employer's history which a prior serious accident resulting in a OSHA citation occurred within the prior three years. However, this information was not available at the time the penalty was calculated. The penalty adjustment factors will not be decreased from 60% to 50% in this appeal.

APPENDIX A

SUMMARY OF EVIDENTIARY RECORD

**CENTRAL VALLEY PAINTING, INC.
Docket 14-R6D1-3694**

Exh. No.	Exhibit Description
1	Jurisdictional Documents
1-1	Notice of Hearing, dated April 8, 2015.
1-2	Docketing letter, dated November 18, 2014.
1-3	Appeal, dated Nov. 5, 2014.
1-4	Employer's motion to amend appeal, dated May 13, 2015.
1-5	Letter to parties from ALJ, dated May 14, 2015.
1-6	DOSH objection to employer's motion to amend appeal, dated May 13, 2015.
1-7	Order granting motion to amend appeal, dated May 22, 2015.
1-8	Citation and Notification of Penalty, issued Oct. 24, 2014.
2.	Proposed Penalty Worksheet.
3.	Letter re: Paul Hurd's Cal OSHA mandated training is current, dated May 27, 2015.
4.	Photo of identification card of Miguel Angel Mora-Garcia.
5.	Photo of worker #1 climbing onto roof at job site.
6.	Photo of worker #1 standing on the roof.
7.	Photo of worker #1 on scaffold with missing guardrail.
8.	Photo of worker #1 on scaffold (wide angle view).
9.	Photo of worker #1 painting house on scaffold with missing guardrail (close up view).

10. Photo of two workers on scaffold with missing guardrail at twenty-two feet above ground level.
11. Photo of worker #2 on scaffold in front of window with paint bucket.
12. Photo of two workers on scaffold with missing guardrail.
13. 1-B-Y form dated July 14, 2014 and employer receipt. (2 pages)

Employer's Exhibits

<i>Exhibit Letter</i>	Exhibit Description
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	None
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Witnesses Testifying at Hearing

1. Paul Hurd, DOSH Associate Safety Engineer
2. Carlo Zicari, Owner

CERTIFICATION OF RECORDING

I, Mary Dryovage, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hear the above matter, hereby certify the proceedings therein were electronically recorded. The recording was monitored by the undersigned and constitutes the official record of said proceedings. To the best of my knowledge, the electronic recording equipment was functioning normally.

July 15, 2015

MARY DRYOVAGE

Date

SUMMARY TABLE ORDER

In the Matter of the Appeal of:

**CENTRAL VALLEY PAINTING INC.
DOCKET 14-R6D1-3694**

Abbreviation Key:

Reg=Regulatory	W=Willful
G=General	R=Repeat
S=Serious	DOSH=Division
Er=Employer	
Ee=Employee	

Inspection No. 317432698

Site: 424 Jacquelyn Ln, Petaluma, CA 94953

Date of Inspection: 08/14/14

Date of Citation: 10/24/14

DOCKET	CITATION	ITEM	SECTION	TYPE	ALLEGED VIOLATION DESCRIPTION MODIFICATION OR WITHDRAWAL	A F F I R M E D	V A C A T E D	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT PRE- HEARING or STATUS CONF.	FINAL PENALTY ASSESSED BY BOARD
14-R6D1-3694	1	1	1644(a)	S	[Using a scaffold in which end rails were not installed on a platform 22 feet above ground level.] ALJ affirmed citation.	X		\$1,800	\$1,800	\$1,800
Sub-Total								\$1,800	\$1,800	\$1,800

Total Amount Due*

\$1,800

Please do not send payments to the Appeals Board.
All Penalty payments must be made to:

Accounting Office (OSH)
Department of Industrial Relations
P.O. Box 420603
San Francisco, CA 94142
(415) 703-4291, (415) 703-4308 (payment plans)

*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:MD
POS: 07/15/15**