

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

In the Matter of the Appeal of:

JONES LANG LASALLE
320 North Harbor Boulevard
Fullerton, CA 92832

Employer

**DOCKETS 13-R3D1-0608
and 0609**

DECISION

STATEMENT OF THE CASE

On November 8, 2012, Associate Safety Engineer (ASE) Andrew Kong, employed by the Division of Occupational Safety and Health (the Division) began an inspection at a work site maintained by Jones Lang Lasalle, (Employer) at 320 N. Harbor Boulevard, Fullerton, California (work site). On February 12, 2013, the Division cited Employer for failure to report a serious injury to the Division, failure to establish, implement and maintain an effective written Injury and Illness Prevention Program, and failing to guard the attic access with a cover capable of safely supporting the greater of 400 pounds or twice the weight of the employee.

The Employer filed an appeal contesting the violation of the safety order and the reasonableness of the penalties for Citation 1, Items 1 and 2; the violation of the safety order, classification and the reasonableness of the penalty for Citation 2 and the affirmative defenses as follows: the citation is unreasonably vague, ambiguous and overbroad as applied, lack of employer knowledge of the violation, and the independent employee act defense.

The matter came on regularly for hearing before Clara Hill-Williams, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at West Covina, California on April 17, 2014, and on July 30, 2014. Employer was represented by Attorney Jason Mills. District Manager Richard Fazlollahi represented the Division. The parties presented oral and documentary evidence.¹

¹ Exhibits received and testifying witnesses are listed in Appendix A. The Certification of the Record is signed by the ALJ. Unless otherwise specified, all section references are to Sections

The ALJ extended the submission date to May 31, 2015.

ISSUES

1. Did Employer fail to report a serious injury to the Division as a result of an incident that occurred at the worksite on November 1, 2012?
2. Did Employer fail to implement and maintain an effective Injury and Illness Prevention Program that met all of the requirements of the program, by failing to conduct and record safety inspections to identify and evaluate work place hazards prior to allowing employees to perform building maintenance?
3. Was the penalty proposed for failure to establish, implement and maintain an effective IIPP reasonable?
4. Did Employer fail to guard the attic access with a cover capable of supporting the greater of 400 pounds or twice the weight of the employee as alleged in Citation 2?
5. Was the classification of Citation 2 unreasonably vague, ambiguous and overbroad as applied?
6. Did the Division properly classify Citation 2 as “Serious Accident Related”?
7. Did Employer demonstrate that it did not and could not with the exercise of reasonable diligence know of the existence of a violation to invalidate a serious classification?
8. Did Employer establish that Citation 2 was the result of independent employee action?

FINDINGS OF FACT

1. Employer is a maintenance contractor which provides maintenance services to its clients’ buildings.
2. Mobile engineers are employed by Employer to service its clients. At the

time of the November 1, 2012 accident, Employer was contracted to provide maintenance services at the work site of Citibank, which had been a client for two years.

3. Employer failed to report a serious injury to the Division.
4. The Fullerton Fire Department reported the serious injury to the Division on November 1, 2012, at 7:30 p.m. (Exhibit 6)
5. David Garner (Garner) employed by Employer since May 4, 2009, as a mobile engineer², suffered serious injuries on November 1, 2012.
6. Garner was trained to check out the worksite for every job assignment before beginning work. On the day of the accident Garner did not make an inquiry regarding the weight that the work area could support.
7. Employer did not provide documentation of a pre-job inspection of the work site on November 1, 2012.
8. Employer did not conduct a hazard assessment prior to allowing employees to work at the work site.

ANALYSIS

1. Did Employer fail to report a serious injury to the Division as a result of an incident that occurred at the worksite on November 1, 2012?

Employer was required to immediately report a serious injury that occurred at Employer's work site. Section 342 subdivision (a) provides:

Every employer shall report immediately by telephone or telegraph to the nearest District Office of the Division of Occupational Safety and Health any serious injury or illness, or death, of an employee occurring in a place of employment or in connection with any employment.

Immediately means as soon as practically possible, but no longer than 8 hours after the employer knows or with

² Steve Armendariz, Garner's supervisor testified that mobile engineers had a duty to inspect the assigned work sites and a duty to report hazards at the work sites.

diligent inquiry would have known of the death or serious injury or illness. If the employer can demonstrate that exigent circumstances exist, the time frame for the report may be made no longer than 24 hours after the incident.

A serious injury or illness is defined in subdivision (h) of section 330, which states in pertinent part, that a serious illness “occurring in a place of employment or in connection with any employment which requires inpatient hospitalization for a period in excess of 24 hours for other than medical observation[.]”

In citing Employer, the Division specifically alleged: “The employer failed to report a work related incident resulting in a serious injury to the Division of Occupational Safety and Health occurring in a work place on November 1, 2012.”

The Division has the burden of proof with respect to each element of an alleged violation by a preponderance of the evidence. *Howard J. White Inc.* Cal/OSHA App. 80-720, Decision After Reconsideration (July 29, 1981). The Division must establish that Employer failed to report the injury beyond the time limit - normally, within eight hours, or in the case of exigent circumstances, within 24 hours after "employer knows or with diligent inquiry would have known . . . of the [serious] injury."

At the Hearing the parties stipulated that David Garner (Garner) suffered a serious injury as a result of an incident that occurred at the work site on November 1, 2012. The parties also stipulated that the Fire Department reported Garner’s injuries. Employer acknowledged being aware of his serious injuries³ and Garner’s hospitalization but relied on the Fire Department’s assurance that the Fire Department would report Garner’s serious injuries to the Division.

In *Orange County Fire Authority*, Cal/OSHA App 13-3667, Decision After Reconsideration (Jan.3, 2013) the Board found that the Orange County Fire Authority (OCFA) was required to report serious injuries and fatalities to the Division. The Board explained as follows:

“Labor Code section 6409.2 is the analog or complement of Labor Code section 6409.1(b), which requires employers themselves, in addition to first responders, to report serious illnesses, injuries or deaths involving their employees. The

³ The Fire Department reported that Garner sustained fractured ribs on November 1, 2012. Employer learned that Garner suffered serious injuries, hospitalized and received surgery on November 1, 2012.

statutes together establish a regime in which both employers and first responders are required to report such events to the Division. The legislative intent of this dual reporting requirement is to increase the probability that the Division will receive "immediate" notice of serious workplace illnesses, injuries, or deaths, and shows a strong policy interest in thus providing the Division the opportunity to investigate such events shortly after they occur."

Here, Employer, pursuant to section 342, subdivision (a) and the Fullerton Fire Department as a first responder pursuant to section 342, subdivision (b) were required to report Garner's serious injury to the Division. Employer's Chief Engineer, Steve Armendariz (Armendariz) testified that the Fullerton Fire Department personnel advised that Employer was not required to report, which was why Employer did not report Garner's injuries. However, section 342, subdivisions (a) and (b) require both the employer and first responder, in this incident, the Fullerton Fire Department to report the serious injury. The accident should have been reported by Employer within eight hours after the employer knew or with diligent inquiry would have known of the death or serious injury or illness after Garner's accident, in addition to the Fire Department's report to the Division.

The Board analyzed the legislative history of the 2002 amendment of Labor Code section 6409.1(b) in *Allied Sales and Distribution, Inc.*, Cal/OSHA App. 11-0480, Decision After Reconsideration (November 29, 2012) and *SDCCD - Continuing Education NC Center*, Cal/OSHA App. 11-1196, Decision After Reconsideration (Dec. 4, 2012). The Board found that "one clear intent of the Legislature is that the penalty for failing to report a serious injury or illness, or death, should be \$ 5,000" (See *Allied Sales and Distribution, Inc.*, *supra*). In *SDCCD - Continuing Education NC Center* the Board held: "the purpose of this portion of the Act, as clarified by the Legislative history, is to impose a \$5,000 penalty in all cases of non-reporting, except if it would result in a miscarriage of justice, then a zero penalty is allowed."

The evidence submitted in this matter supports a finding that Employer's failure to report the serious injury requires an imposition of a \$5,000 penalty, since Employer submitted no evidence to suggest imposing such a penalty would result in a miscarriage of justice. As such, the proposed penalty of \$5,000 is found to be reasonable and is hereby imposed.

2. Did Employer fail to implement and maintain an effective Injury and Illness Prevention Program that met all of the requirements of the program, by failing to conduct and record safety inspections to

identify and evaluate work place hazards prior to allowing employees to perform building maintenance?

Section 3203 Injury and Illness Prevention provides:

(a) ...Every employer shall establish, implement and maintain an effective injury and Illness Prevention 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.

(b) Records of the steps taken to implement and maintain the program shall include:

(1) Records of scheduled and periodic inspections required by subsection (a)(4) to identify unsafe conditions and work practices, including person(s) conducting the inspection, the unsafe conditions and work practices that have been identified and action taken to correct the identified unsafe conditions and work practices. These records shall be maintained for at least one (1) year; and

(2) Documentation of safety and health training required by subsection (a)(7) for each employee, including employee name or other identifier, training dates, type(s) of training, and training providers. This documentation shall be maintained for at least one (1) year.

The Division alleges as follows:

On and before November 8, 2012, the employer failed to establish, implement and maintain an effective Injury and Illness Prevention Program in writing in accordance with the above safety order. The program submitted by the employer did not meet the requirement by containing all elements listed above. In addition, the employer did not conduct and record safety [inspection] to identify and evaluate work place [hazard] prior to allowing employees to perform building maintenance.

To establish an Injury Illness Prevention Program (IIPP) violation, the Division must prove that flaws in the Employer's written IIPP amounted to a failure to "establish" or "implement" or "maintain" an "effective" program. A single, isolated failure to "implement" a detail within an otherwise effective program does not necessarily establish a violation for failing to maintain an effective program where that failure is the sole imperfection. (See *GTE California*, Cal/OSHA App. 91-107, Decision After Reconsideration (Dec. 16, 1991); *David Fischer, dba Fischer Transport, A Sole Proprietorship*, Cal/OSHA App. 90-762, Decision After Reconsideration (Oct. 16, 1991).)

Here, Andrew Kong (Kong), Associate Safety Engineer cited subdivisions (a)(4) and (a)(7) of the safety order section 3203, which requires that Employer's IIPP include the following: (1) Procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices, and inspections to identify and evaluate hazards; (2) Records maintained for one (1) year of the steps taken to implement and maintain the program that includes records of the scheduled and periodic inspections identifying unsafe conditions and work practices and the action taken to correct the unsafe conditions and work practices; and (3) Documentation of safety and health training for each employee, including the employees' name, training dates, type of training, and training providers for at least one (1) year.

At the Hearing Kong established that Employer failed to implement procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices, and inspections to identify and evaluate hazards. Kong testified that he asked Armendariz for a pre-job inspection and hazard assessment reports but received no such reports. Nor was any evidence provided of periodic inspections. The only report Kong received was the accident/injury report from the Fullerton Fire Department (Exhibit 6). Armendariz testified that a mobile engineer's failure to report a hazardous condition is a violation of Employer's safety policies. If Garner had called to report the circumstances that resulted in the accident on November 1, 2012, Armendariz would have put the work assignment on hold and taken a photo; which has been the procedures communicated to the mobile engineers in the past. Thus, the Division has offered sufficient evidence to prove that Employer did not implement procedures for identifying and evaluating workplace hazards.

Next, it is necessary to determine whether Employer retained records of scheduled and periodic inspections for at least one year. At the Hearing

Armendariz stated he had never been to the accident work site, nor was he aware of the hatchway because none of the mobile engineers had previously reported a hatchway problem to him. Armendariz could not recall having a conversation regarding the attic hatchway with either of the two mobile engineers assigned to the work site on November 1, 2012, the day of the accident.

In considering whether documentation of safety and health training for each employee, including the employees' name, training dates, type of training, and training providers for at least one (1) year, Armendariz testified that he conducts regular safety tool box meetings every month with the mobile engineers and goes over Employer's safety policies. Armendariz submitted documentation of Employer's safety program, its policies and procedures regarding safety rules. Armendariz acknowledged receiving, a signed acknowledgment from Garner when he was given Employer's "Mobile Engineering Services Policies and Procedures Handbook", Employer's 2011 and 2012 safety training online courses, records of monthly "tool box" safety meetings⁴ for one (1) year prior to the accident showing Garner was present at the safety meetings, and copies of a monthly Employer newsletter titled "Safety Corner" (Exhibits A through H).

Here, Employer provided sufficient documentation of its safety and health training for its mobile engineers that included employees' names, training dates and a description of the training for at least a year (See Exhibit H). While Armendariz described Employer's procedures of encouraging its mobile engineers to call if there was a question or concern with the assigned work site, Employer did not provide records of the steps taken to implement and maintain its program with records of scheduled and periodic inspections identifying unsafe conditions and work practices and the action taken to correct the unsafe conditions and work practices. Clearly with 2,200 facilities in Southern California (see footnote 6), there should have been some documentation of scheduled periodic inspections identifying unsafe conditions and work practices and action taken to correct the conditions and practices.

In review of the evidence, Employer failed to provide documentation of scheduled periodic inspections identifying unsafe conditions and work practices and action taken to correct the conditions and practices. Here, these missing elements amount to Employer's failure to implement or maintain an

⁴ See Exhibit H – Monthly topics included hand tools, ladders, drowsy driving, heat prevention, work life balance, hand protection, eye protection, lock out tag out, hearing protection and power tools.

effective program, which is more than just an isolated detail when implementing an effective program (see *GTE California, supra*).

Employer was correctly cited for failure to implement and maintain a written IIPP and for not having a procedure to investigate an occupational injury or illness. The Division established that Employer did not implement and maintain a program that met the IIPP requirements by conducting and recording safety inspections to identify and evaluate work place hazards prior to allowing employees to perform building maintenance.

3. Was the penalty proposed for failure to establish, implement and maintain an effective IIPP reasonable?

The Division must calculate proposed penalties in accordance with its regulations and present proof sufficient to support its calculations on likelihood, etc. (*Gal Concrete Construction Co., Cal/OSHA App. 89-317/318, DAR (Sept. 27, 1990).*) The Division must properly rate the employer's safety program and its experience to justify a penalty. (*Monterey Abalone, Cal/OSHA App. 75-786, DAR (March 15, 1977).*)

In calculating the penalty, Kong classified the violation as a general violation. A general violation is a violation which is specifically determined not to be of a serious nature, but has a relationship to occupational safety and health of employees. Kong rated severity as high. Severity is based on the type and amount of medical treatment likely to be required or which would be appropriate for the most likely type of injury. Kong classified severity as high because Employer's inadequate training and implementation of its IIPP contributed to a serious injury. Kong classified extent as low. Section 335, subdivision (a)(2) provides that when the safety order violated does not pertain to illness, extent is based on the ratio of number of violations of a certain order to the number of possibilities for a violation at the work site. Kong classified extent as low because Employer did not provide all of the elements of the IIPP by failing to document or conduct a pre-job inspection, thereby reducing the penalty by 25 percent. Likelihood as set forth in section 335, subdivision (a)(3) is based on the number of employees exposed to the violative condition and the extent to which the violation has in the past resulted in injury, illness or disease to the Employer's employees or the industry in general. Here Kong rated likelihood as low because only two employees of over 100 employees were exposed to the hazard, reducing the penalty by 25 percent. Kong gave 50 percent abatement resulting in a proposed penalty of \$375. Kong's penalty calculations (C-10 Worksheet - Exhibit #7) were correctly determined in accordance with the Division's policies and the California Code of Regulations. Therefore, the proposed penalty of \$375 is assessed.

4. Did Employer fail to guard the attic access with a cover capable of supporting the greater of 400 pounds or twice the weight of the employee?

Section 3212, subdivision (b), provides:

Floor and roof opening covers shall be designed by a qualified person and be capable of safely supporting the greater of 400 pounds or twice the weight of the employees, equipment and materials that may be imposed on any one square foot area of the cover at any time. 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.

The Division alleged as follows:

On and before November 1, 2012, the employer failed to safe guard the attic access with cover capable of safely supporting the greater of 400 pounds or twice the weight of the employee. The attic access was determined not secured in place to withstand the weight of the injured employee when he inadvertently stepped on it while attempting to reach for an air filter. The attic access fell when pressured along with the injured employee as he fell approximately 12.5 feet through the opening to the asphalt near the drive up ATM outside.

To establish a violation, the Division must show that Employer violated one or both of these requirements: (1) That an opening in a floor or roof is designed by a qualified person and is capable of supporting 400 pounds per square foot or twice the weight of an employee with their equipment, or (2) The cover must be secured in place and have affixed a mandatory written warning.

When a safety standard includes two or more distinct requirements, as indicated in section 3212, subdivision (b), if an employer violates any one of the requirements, it is considered a violation of the safety standard. (*Golden State Erectors*, Cal/OSHA App. 85-0026, DAR (Feb. 25, 1987). Also: *California Erectors Bay Area Inc* Cal/OSHA App. 93-503, DAR (Jul 31, 1998).) Here, if

Employer failed to satisfy any one of those elements of safety order section 3212, subdivision (b) regarding floor openings, floor holes or roofs, it has violated section 3212, subdivision (b).

Because only one of the two subdivisions need to be proven, analyzing the remaining requirement is not necessary. Here, the Division established the requirement of *securing the cover in place to prevent accidental removal or displacement* was not met in the factual circumstances presented at the Hearing. The facts indicate that on November 1, 2012, Garner was assigned to work on an air conditioning unit located in an attic crawl space at the work site. The floor of the attic crawl space was located on a level above the driveway. As Garner crawled on the floor through the space and attempted to reach for an air filter, the tip of his foot tapped wood, which gave way and he fell 12.5 feet. Garner was not aware of an unsecured hatch door, which he could not see as he crawled through the attic (Photo Exhibits 2, 3 and 5).

The Division established that Employer assigned Garner and another employee, "Courey" to the work site to work on the HVAC (heating and air conditioning unit) that was located in an attic crawl space. Neither Armendariz, Garner nor Cory had been to the work site before the accident occurred (Exhibits 2, 3, 4 and 5).

Employer exposed its employee to the hazards associated with an unsecured cover over an opening in the floor of an attic crawl space at the workplace. The above facts are sufficient to establish a violation of § 3212(b).

5. Was the language of section 3212, subdivision (b) unreasonably vague, ambiguous and overbroad as applied?

The Employer contends that the language of section 3212 is overbroad and vague as applied, which must be analyzed according to Appeals Board precedent with respect to statutory construction.

The Board has held that a safety order will not be found to be void for uncertainty if any reasonable and practical construction can be given its language. *Broadway Sheet Metal*, Cal-OSHA App. 90-1355, Decision After Reconsideration (Nov. 23, 1992) (citing *Duke Timber Construction Co.*, Cal-OSHA App. 81-347, Decision After Reconsideration (Aug. 19, 1985); *Novo-Rados Enterprises*, Cal-OSHA App. 75-1170, Decision After Reconsideration (May 29, 1991).) As long as the safety order provides an employer with fair notice of the prohibited conduct, the safety order will be found to be sufficiently definite and specific (*Duke Timber, supra*).

In this case a reasonable and practicable construction of the language "floor and roof opening covers capable of safely supporting the greater of 400 pounds or twice the weight of the employees, equipment and materials that may be imposed on any square foot area of the cover at any time" is readily apparent. "Imposed" is defined as to place or to set (*Merriam Webster Online Dictionary*). Similarly, the word "secured" is equally straightforward. "Secure" is defined as to make (something) safe by guarding or protecting it, to put (something) in a place or position so that it will not move. *Merriam Webster, supra*.

Hence, if the cover, in this case the hatch door on the floor of the attic's crawl space cannot support the greater of 400 pounds or twice the weight of the employees, equipment and materials placed on any square foot area of the cover at any time as stated in section 3212, the reasonable and practical construction of that language is that the cover may collapse or will not support the weight. Likewise, if the cover is not secured or guarded to prevent displacement and there is not a warning sign stating "Do Not Remove" painted on the cover, the cover may be removed causing an employee serious injuries. The prohibited conduct is clear. Since the Employer did not provide any evidence that section 3212, subdivision (b) is unreasonably vague, ambiguous and overbroad as applied, Employer did not meet its burden. Thus, I do not find section 3212, subdivision (b) ambiguous, overly broad or vague as applied.

6. Did the Division properly classify the alleged violation as "serious"?

The issue in this matter is whether there is sufficient evidence to support the "serious" classification as cited by Kong. In determining whether the Division presented sufficient evidence to prove the "serious" classification of the violation, the legal standard is expressed in Labor Code section 6432, subdivision (a) which states:

- (a) There shall be a rebuttable presumption that a "serious violation" exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation. The demonstration of a violation by the division is not sufficient by itself to establish that the violation is serious. The actual hazard may consist of, among other things:
 - (2) The existence in the place of employment of one or more unsafe or unhealthful practices,

means, methods, operations, or processes that have been adopted or are in use.

Here, the “practice” or “method of operation . . . adopted or in use” in determining whether the Division presented sufficient evidence to prove the “serious” classification of the violation, the legal standard is expressed in Labor Code section 6432, subdivision (a) which states:

The elements of a serious violation are: (1) a violation exists in a place of employment; (2) a demonstration of realistic possibility of death or serious injury; (3) employee exposure to actual hazard; and (4) if elements 1, 2, and 3 are established; there exists a rebuttable presumption that the violation is serious.

The first element, “a violation exists in a place of employment” is established by the evidence showing Employer assigned mobile engineers to provide maintenance services for its clients at the work site where the violation occurred.

The second element, a demonstration of “realistic possibility” of death or serious injury is not defined in the Labor Code or safety orders, but has previously been addressed by the Appeals Board. In *Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (Sep. 27, 2001), the Appeals Board determined that it was unnecessary for the Division to prove actual splashing of caustic chemicals but only a realistic possibility that splashing of chemicals occurred. The Appeals Board explained: “[c]onjecture as to what would happen if an accident occurred is sufficient to sustain (a violation)... if such a prediction is clearly within the bounds of human reason, not pure speculation.” Here, the parties stipulated that a serious injury occurred at Employer’s work site.

The third element is whether there is exposure to an actual hazard. Here the actual hazard was the employees’ exposure to an unsecured hatchway door because Employer failed to conduct a pre-job inspection to discover any existing hazards. Garner’s testimony regarding his job assignments on the day of the accident is consistent and credible. Employer failed to make the work area safe and exposed its employees to hazards section 3212, subdivision (b), was designed to address. Thus, Employer’s actions created a hazard that its employees could be seriously injured.

The first element is established because a violation existed in the workplace based upon Employer’s assigning Garner and Cory to a work site where the violation occurred. The second element is established because Kong

demonstrated that a realistic possibility of death or serious injury existed as stipulated by the parties that a serious injury occurred at the worksite. The third element showing that employees were exposed to an actual hazard is based upon the unsecured hatchway door that was not revealed through a pre-job inspection. Since the first, second and third elements are established, there is a rebuttable presumption that the violation is serious. Here, Employer did not present any evidence to rebut the presumption.

The Employer failed to present sufficient evidence to rebut the presumption that the violation was serious. Therefore, the Division has established that a serious violation occurred because all of the elements are present: (1) a violation existed at Employer's work site; (2) Kong demonstrated a realistic possibility of death or serious injury; and (3) the employees were exposed to an actual hazard, establishing (4) a rebuttable presumption that Employer failed to rebut. Thus, the serious classification of the citation is established.

7. Did the Division establish a nexus between the violation of the safety order and the serious injury sustained by the employee to sustain an accident-related characterization of the violation?

"To establish the characterization of the violation as accident-related, the Division must show by a preponderance of the evidence a causal nexus between the violation and the serious injury." (*Pierce Enterprises*, Cal/OSHA App. 00-1951, Decision After Reconsideration (Mar. 20, 2002) citing to *Obayashi Corporation*, Cal/OSHA App. 98-3674, Decision After Reconsideration (June 5, 2001). In order for the penalty reduction limitations of Labor Code §6319(d) to apply to the civil penalty as proposed, the Division must prove that a serious violation caused a serious injury. (*Southwest Engineering, Inc.*, Cal/OSHA App. 91-1366, Decision After Reconsideration (July 6, 1993).)

The Board requires a showing of a "causal nexus between the violation and the serious injury" to sustain the classification of accident-related. (*Sherwood Mechanical, Inc.*, Cal/OSHA App. 08-4692, Decision After Reconsideration (Jun. 28, 2012) citing *Obayashi Corp.*, Cal/OSHA App. 98-3674, Decision After Reconsideration (Jun. 5, 2001).) In other words, "where, as here, the evidence establishes that a serious violation caused a serious injury, the violation is properly characterized as "accident-related." (*Duke Pacific, Inc.*, Cal/OSHA App. 06-5175, Decision After Reconsideration (Mar. 14, 2012), citing *K.V. Mart Company dba Valu Plus Food Warehouse*, Cal/OSHA App. 01-638, Decision After Reconsideration (Nov. 1, 2002).)

Gardner fell 12.5 feet through the attic floor opening and landed onto a cement driveway. The parties stipulated to Garner sustaining serious injuries when he fell through the unsecured opening in the floor. Because Garner suffered a serious injury resulting from the hazard created by the violative condition, the presumption of a Serious violation, pursuant to § 6432(a), applies. And the same evidence supports the accident-related characterization.

Kong classified the violation as accident related because Employer failed to identify the presence of a hatchway unsecured door, which created a hazard that could result in a serious injury. Since the serious violation caused a serious injury, the penalty may not be reduced by any of the adjustment factors except for size. Kong rated severity high, giving the statutory maximum. He rated extent as moderate, because two employees were assigned to the hazardous area; and likelihood as high because someone stepping on the unsecured hatchway created a high likelihood that an accident would occur as it did on November 1, 2012. Kong testified that Employer is a large employer with more than 100 employees, thus, an adjustment for size was not given, resulting in a penalty of \$22,500 (Exhibit 15, "C-10 Penalty Worksheet").

8. Did Employer demonstrate that it did not and could not with the exercise of reasonable diligence know of the existence of a violation to invalidate a serious classification?

Employer argues the serious violation under section 334, subdivision (c)(2), should not be upheld based on the Employer's lack of knowledge of the violation. Section 334(c)(2) states:

Notwithstanding subdivision (c)(1), a serious violation shall not be deemed to exist if the employer can demonstrate that it did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

Employer, by Armendariz's testimony, asserts that Garner and Courey as mobile engineers were required to do pre-job inspections and report any possible hazard⁵. Based upon the mobile engineers' failure to provide a pre-job inspection and report the hatchway hazard, Employer did not have knowledge or with the exercise of reasonable diligence, could not have known of the state of the conditions which existed regarding the hatchway.

⁵ Pursuant to Evidence Code section 1220, Armendariz's statement is an admission, which is a statement that is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity.

Lack of knowledge of a violation is an affirmative defense which requires that the Employer demonstrate that even with reasonable diligence, the Employer could not, and did not, know of the presence of the condition that violates the safety order. (*C.C. Myers, Inc.*, Cal/OSHA App. 08-952, Decision After Reconsideration (Dec. 6, 2013).) Employer is responsible for the safety of its employees, and cannot delegate those duties to another. Through the exercise of reasonable diligence, Employer should have been able to recognize the violation. Armendariz testified that the site, prior to the accident, had been inspected by the city inspectors numerous times, and that none of those inspections revealed issues with the opening. In *Southern California Gas Co.*, Cal/OSHA App. 81-0259, Decision After Reconsideration (Sept. 28, 1984) the Board held that the statutory duties relating to employee safety "cannot be delegated by an employer." Employer presented no evidence that it had conducted its own inspections of the work area. Reasonable diligence on Employer's part should have included Employer conducting its own inspection of the work site which would have made it aware of the unsecured hatchway opening in the floor. Employer failed to establish that, even if it acted with reasonable diligence, it could not, and did not, know that the cover over the opening in the attic floor's crawl space was not secured in place to prevent accidental removal or displacement.

To prove employer knowledge, the Division need not show that the employer's principals or owners were actually aware of an unsafe condition. Hazardous conditions, plainly visible to the naked eye, constitute serious violations since the employer could have discovered them through reasonable diligence. (*Fibreboard Box & Millwork Corp.*, Cal/OSHA App. 90-492, DAR (June 21, 1991).) In the instant matter, the covered opening was visible to the naked eye. A reasonably diligent Employer would have inspected the cover over the opening to make sure that it was secured in place to prevent accidental removal or displacement. A reasonably diligent Employer would have inspected the hatchway to make sure that it was secured or labeled "Opening - Do Not Remove," which is the specific warning language required by the regulation. Employer did not provide any evidence that it conducted any such inspection.

Failure to exercise supervision adequate to insure employee safety is equivalent to failing to exercise reasonable diligence, and will not excuse a violation on the claim of lack of employer knowledge. (*Stone Container Corporation*, Cal/OSHA App. 89-042, DAR (March 9, 1990).) Reasonable diligence includes the obligation by foremen or supervisors to oversee the entire work site where safety and health hazards are present if exposure to an unsafe condition exists (See *A. A. Portanova & Sons, Inc.*, Cal/OSHA App. 83-891, DAR (March 19, 1986), pp. 4-5). Likewise, a hazard that could have been discovered through periodic safety inspections is deemed discoverable through reasonable

diligence. (*Anheuser-Busch, Inc.*, Cal/OSHA App. 84-113, DAR (July 30, 1987); and *Sturgeon & Son, Inc.*, Cal/OSHA App. 91-1025, DAR (July 19, 1994).) A safety inspection would have revealed to Employer that the hatchway was not secured. Such an inspection would have revealed the hazard. Employer, therefore, failed to exercise reasonable diligence to ensure worker safety. As such, Employer may not assert that it lacked knowledge of the existence of the violation. Therefore the accident-related characterization of the serious violation is sustained.

9. Did Employer establish that the alleged violation was the result of independent employee action?

Employer asserts the independent employee act defense. The Board has held that the independent employee act defense enunciated in *Mercury Service, Inc.*, Cal/OSHA App. 77-1133, Decision After Reconsideration, (October 16, 1980) is unavailable in failure to guard cases because "such [an] administrative policy cannot substitute for mechanical protection [required by the safety order]." *City of Los Angeles, Dept. of Public Works*, Cal/OSHA App. 85-958, Decision After Reconsideration, (Dec. 31, 1986).

Guarding requirements are designed to protect employees who have a lapse of common sense, engage in horseplay, or otherwise may not know or may forget the apparent danger. (*Sierra Pacific Industries*, Cal/OSHA App. 77-891, Decision After Reconsideration (Aug. 30, 1984).) Here, there was a cover over the opening, but it was not secured in place to prevent accidental removal or displacement. Employer failed to ensure that the opening through which Garner fell was properly covered (guarded). Section 3212, subdivision (b) has a positive guarding requirement. As a result, the independent employee action defense is not available to employer.

Conclusions

The evidence shows Employer failed to report a serious injury to the Division as a result of Garner's accident that occurred on November 1, 2012, which resulted in serious injuries justifying accessing the proposed \$5,000 penalty.

The evidence further supports the Division established Employer's failure to implement and maintain a program that met the IIPP requirements by conducting and recording safety inspections to identify and evaluate work place hazards prior to allowing employees to perform building maintenance. The proposed penalty of \$375 is assessed.

The evidence supports a finding that Employer violated section 3212, subdivision (b), by failing to secure a cover in place to prevent accidental

removal or displacement, which exposed its employees to hazards Section 3212, subdivision (b), was designed to address. The Serious classification is supported by the evidence and is upheld. Therefore, a total penalty of \$ 22,500 is assessed for the reasons described herein, and as set forth in the attached Summary Table.

ORDER

It is hereby ordered that the citations are established as indicated above and as set forth in the attached Summary Table.

It is further ordered that the penalties indicated above and set forth in the attached Summary Table are assessed.

IT IS SO ORDERED.

Dated: June 23, 2015

CLARA HILL WILLIAMS
Administrative Law Judge

CHW: ao

SUMMARY TABLE DECISION

In the Matter of the Appeal of:

JONES LANG LASALLE
Docket 13-R3D1-0608 and 0609

Abbreviation Key: Reg=Regulatory
 G=General W=Willful
 S=Serious R=Repeat
 Er=Employer DOSH=Division

IMIS No. 315531582

DOCKET	C	I	T	I	SECTION	T	Y	P	E	MODIFICATION OR WITHDRAWAL	A	V	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT HEARING	FINAL PENALTY ASSESSED BY BOARD
13-R3D1-0608	1	1			342(a)	Reg				Citation is sustained	X		\$5,000	\$5,000	\$5,000
		2			3203(a)(3)	G				Citation is sustained	X		\$375	\$375	\$375
13-R3D1-0609	2	1			3212(b)	S				Citation is sustained	X		\$22,500	\$22,500	\$22,500
Sub-Total													\$27,875	\$27,875	\$27,875

Total Amount Due*

(INCLUDES APPEALED CITATIONS ONLY)

\$27,875

NOTE: Please do not mail 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

*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: CHW/ao
 POS: 06/23/2015

APPENDIX A

SUMMARY OF EVIDENTIARY RECORD

**JONES LANG LASALLE
13-R3D1-0608-0609**

Date of Hearing: April 17, 2014 & July 30, 2014

Division's Exhibits

Exhibit Number	Exhibit Description	Admitted
1	Jurisdictional documents	X
2	Photo	X
3	Photo	X
4	Photo	X
5	Photo	X
6	Cal/OSHA 36 – First Responder	X
7	C-10 Penalty Worksheet	X

Employer's Exhibits

Exhibit Letter	Exhibit Description	Admitted
A	Orientation to Safety/Major Program Points	X
B	Policies & Procedures – General Safety Rules	X
C	Acknowledgement	X
D	2012 Safety Training	X

E	Avoiding Slip, Trips & Falls/ Major Program Points	X
F	Email – Safety Corner August 27, 2012	X
G	Safety Corner/Message from Don Bruhn, September 28, 2011	X
H	Records of Safety Meetings	X
I	Workplace Accident Incident Questionnaire	X
J	IB Documentation Worksheet	X

Witnesses Testifying at Hearing

1. David Garner
2. Andrew Kong
3. Steve Armendariz

CERTIFICATION OF RECORDING

I, Clara Hill-Williams, 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.

Signature

Date

