

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

In the Matter of the Appeal
of:

MDB MANAGEMENT INC.
236 S. Los Angeles St.,
Los Angeles, CA 90012

Employer

DOCKETS 14-R4D1-2373
and 2374

DECISION

Statement of the Case

MDB Management, Inc. is a construction contractor. Beginning January 24, 2014, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer Victor Copelan¹ conducted a complaint inspection at a place of employment maintained by Employer at 236 S. Los Angeles Street, Los Angeles, California (the site). On July 21, 2014, the Division cited Employer for failure to provide a ladder to give safe access to an elevated work location² and for lack of fall protection³.

Employer filed timely appeals contesting the existence of the alleged violations, the classification of Citation 2, and the reasonableness of the proposed penalty for Citation 2. Employer alleged multiple affirmative defenses for each violation.

This matter came on regularly for hearing before Dale A. Raymond, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at West Covina, California on June 17, 2015. Ronald E. Medeiros, Attorney, Robert D. Peterson Law Corporation, represented Employer. Victor Copelan, Acting District Manager, represented the Division. The Division presented oral and documentary evidence. Employer did not

¹ Victor Copelan was promoted to Acting District Manager before the day of hearing.

² Citation 1, Item 1, an alleged general violation of section 1675, subdivision (a). Unless otherwise specified, all references are to Sections of California Code of Regulations, title 8.

³ Citation 2, Item 1, an alleged serious violation of section 1670, subdivision (a).

present any evidence.⁴ Leave to file briefs was requested and granted. The matter was submitted on July 7, 2015. The ALJ extended the submission date to November 30, 2015 on her own motion.

Issues

1. Did Employer's employee access an elevated location without the use of a ladder?
2. Were extent and likelihood for Citation 1 appropriate?
3. Did the top of the drywall stack have unprotected sides or edges?
4. Did the Division establish a rebuttable presumption that Citation 2 was properly classified as serious?
5. Were extent and likelihood for Citation 2 appropriate?

Findings of Fact

1. On January 24, 2014, Employer's employee Byron Xocoy (Xocoy) climbed to the top of a 12 foot high drywall stack.
2. Xocoy did not use a ladder to climb to the top of the stack.
3. The number of employees exposed to the hazard of lack of safe access to an elevated location is one.
4. Xocoy had a current certification from Employer as a rigger.
5. Xocoy did not have any kind of fall protection.
6. The penalties were calculated in accordance with the Division's policies and procedures except for the ratings for extent and likelihood.

Analysis

1. Did Employer's employee access an elevated location without the use of a ladder?

The Division cited Employer for a violation of section 1675, subdivision (a), which states as follows:

Article 25. Ladders.

Section 1675. General.

- (a) General requirements. Except where either permanent or temporary stairways or suitable ramps or runways are provided, ladders described in this section shall be used to give safe access to all elevations.

⁴ Exhibits received and testifying witnesses are listed on Appendix A. Certification of the Record is signed by the ALJ.

The alleged violation description for Citation 1 states as follows:

On and before January 24, 2014, employees of MDB Management climbed twelve foot high drywall bundles to perform rigging on these bundles. Employees did not use ladders for safe access to these elevated work locations. MDB Management is responsible for safety and health at the job site by contract and actual practice. MDB Management did not ensure that it's [sic] employees were provided with a safe means to access these drywall bundles.

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); *Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).) The phrase "preponderance of the evidence" is usually defined in terms of probability of truth, or of evidence that, when weighed with that opposed to it, has more convincing force and greater probability of truth. (*Lone Pine Nurseries*, Cal/OSHA App. 00-2817, Decision After Reconsideration (Oct. 30, 2001), citing *Leslie G.V. Perry & Associates* (1996) 43 Cal.App. 4th 472, 483, review denied.)

In order to establish a violation, the Division must prove 1) that Employer's employee climbed to an elevated location to access it, and that 2) the employee did not use a ladder.

It was undisputed that Associate Safety Engineer Victor Copelan (Copelan) saw Employer's employee Byron Xocoy (Xocoy)⁵ on top of a stack of drywall⁶ that was over 12 feet high⁷. Employer did not dispute that the top of the drywall stack was an elevated location. The first element is established.

Employer alleged that the evidence was insufficient to establish the second element. At hearing, Employer made a hearsay objection. Employer contended that the only evidence that Xocoy accessed the location without the use of a ladder was from statements Xocoy made to Copelan. Xocoy was not a member of management⁸, and no other exception applies, so his statements

⁵ Exhibit 1

⁶ Exhibit 6

⁷ Exhibits 2, 4

⁸Statements by a foreman or member of management are attributed to Employer as authorized admissions under Evidence Code § 1221 since those persons are authorized to make statements on Employer's behalf. (See *Macco Construction*, Cal/OSHA App. 84-1106, Decision After Reconsideration (Aug. 20, 1986).)

are hearsay and are not attributed to Employer. Hearsay evidence by itself is insufficient to support a finding.⁹

However, hearsay statements may be used for the purpose of supplementing or explaining other evidence¹⁰. Xocoy's statement that he climbed up the drywall is corroborated by the photographs and Copelan's personal observations. There were no ladders, stairways, ramps or runways that could be used to access the top of the stack of drywall¹¹. Based on the photographs and Copelan's testimony, there was no way to get to the top of the stacks except by climbing. Xocoy's hearsay statements explain the photographic evidence that no ladder was used to access the top of the drywall bundle.

Employer did not rebut Xocoy's statement although it had the motive and opportunity to do so. A party's silence in the face of evidence that is contrary to its position may be considered when drawing inferences.¹² The Appeals Board has found that an employer's failure to offer evidence on an issue although production of the evidence was easily within the employer's power to do so raises the inference that the evidence, if produced, would have been adverse to their position. (*Shimmick-Obayashi*, Cal/OSHA App. 08-5023, Decision After Reconsideration (Dec. 30, 2013), citing *Shehtanian v. Kenny* (1958) 156 Cal. App. 2d 580).

Here, a preponderance of the evidence supports drawing the conclusion that Xocoy accessed the top of the drywall without using a ladder. Therefore, the second element was established.

Based on the above, it is found that the Division established a violation of section 1675, subdivision (a) by a preponderance of the evidence. Employer did not appeal the violation's classification of general.

2. Were extent and likelihood for Citation 1 appropriate?

Employer stipulated that the penalty for Citation 1 was calculated in accordance with the Division's policies and procedures except for the ratings for extent and likelihood.

⁹Section 376.2 provides: Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

¹⁰ Section 376.2

¹¹ Exhibits 4, 5, 6

¹² Evidence Code section 413 provides, "In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or to deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto, if such be the case.

Labor Code section 6319, subdivision (c), sets forth the factors which the Director of the Department of Industrial Relations must include when promulgating penalty regulations: size of the employer, good faith, gravity of the violation, and history of any previous violations. (§§333-336.)

Penalties proposed in accordance with the penalty setting regulations promulgated by the Director of the Department of Industrial Relations (§§333-336) are presumptively reasonable and will not be reduced absent evidence that the proposed penalty was miscalculated, the regulations were improperly applied or that the totality of the circumstances warrant a reduction. (*Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (May 27, 2006).)

Section 335, subdivision (a)(2)ii provides as follows:

When the safety order violated does not pertain to employee illness or disease, Extent shall be based upon the degree to which a safety order is violated. It is related to the ratio of the number of violations of a certain order to the number of possibilities for a violation on the premises or site. It is an indication of how widespread the violation is. Depending on the foregoing, Extent is rated as:

LOW—When an isolated violation of the standard occurs, or less than 15% of the units are in violation.

MEDIUM—When occasional violation of the standard occurs of 15 – 50% of the units are in violation.

HIGH—When numerous violations of the standard occur, or more than 50% of the units are in violation.

Likelihood is defined in section 335, subdivision (a)(3) as follows:

Likelihood is the probability that injury, illness or disease will occur as a result of the violation. Thus, Likelihood is based on (i) the number of employees exposed to the hazard created by the violation, and (ii) the extent to which the violation has in the past resulted in injury, illness or disease to the employees of the firm and/or industry in general, as shown by experience, available statistics or records. Depending on the above two criteria, Likelihood is rated as:

LOW, MODERATE OR HIGH

If the Division introduces the proposed penalty worksheet and testifies that the calculations were completed in accordance with the appropriate regulations and procedures, it has met its burden to show the penalties were

calculated correctly, absent rebuttal by the Employer. (*M1 Construction*, Cal/OSHA App. 12-0222, Decision After Reconsideration (July 31, 2014).)

Where the Division does not provide evidence to support its proposed penalty, an employer must be given the maximum credits and adjustments allowable. (*Plantel Nurseries*, Cal/OSHA App. 01-2346, Decision After Reconsideration (Jan. 8, 2004); *RII Plastering, Inc.*, Cal/OSHA App. 00-4250, Decision After Reconsideration (Oct. 21, 2003).)

Opinions must be based on a valid evidentiary foundation, such as expertise on the subject, reasonably specific scientific evidence, experience-based rationale, or generally accepted empirical evidence. (*California Family Fitness*, Cal/OSHA App. 03-0096, Decision After Reconsideration (Mar. 20, 2009); *R. Wright & Associates, Inc. dba Wright Construction & Abatement*, Cal/OSHA App. 95-3649, Decision After Reconsideration (Nov. 29, 1999).)

Here, the Division introduced the Proposed Penalty Worksheet, and it was admitted as Exhibit 8. Copeland prepared and signed it. He rated extent and Likelihood as medium. However, he did not give testimony regarding his basis for either rating. His rating must be based on a valid evidentiary foundation, and it was not.

The evidence shows that only one employee, Xocoy, was exposed to the hazard. Employer had over 100 employees¹³. In such case, extent must be reduced to low. This causes a 25% reduction to the base penalty¹⁴.

Similarly, since, there was no evidence regarding the extent to which the violation had in the past resulted in injury, and only one employee was exposed, the rating for likelihood must also be reduced to low. This causes a 25% reduction in the base penalty.¹⁵

Recalculating the penalty with ratings of low for extent and likelihood results in a penalty of \$375¹⁶. This amount is found reasonable.

3. Did the top of the drywall stack have unprotected sides or edges?

Employer argued that although the sides and edges of the drywall stack were unprotected, section 1670, subdivision (a), did not apply because section

¹³ Exhibit 8

¹⁴ Section 336, subdivision (b)

¹⁵ Section 336, subdivision (b)

¹⁶ Based on the stipulated factors in Form C-10, the base penalty is \$2,000. This is reduced 25% for low extent and another 25% for low likelihood giving a gravity-based penalty of \$1,000. Penalty adjustment factors of 25% (15% for good faith and 10% for history) reduce the penalty to \$750. Applying the 50% abatement credit results in a penalty of \$375.

1670 is limited to points of access at a floor, roof, ramp, and runway – all locations which are present at a building.

The Division cited Employer for a violation of section 1670, subdivision (a), which states as follows:

Article 24. Fall Protection

Section 1670. Personal Fall Arrest Systems, Personal Fall Restraint Systems and Positioning Devices.

(a) Approved personal fall arrest, personal fall restraint or positioning systems shall be worn by those employees whose work exposes them to falling in excess of 7 ½ feet from the perimeter of a structure, unprotected sides and edges, leading edges, through shaftways and openings, sloped roof surfaces steeper than 7:12, or other sloped surfaces steeper than 40 degrees not otherwise adequately protected under the provisions of these Orders.

Section 1504, subdivision (a), defines “Unprotected Sides and Edges” as follows:

Any side or edge (except at entrances to points of access) of a walking/working surface, e.g., floor, roof, ramp, or runway where there is no wall or standard guardrail or protection provided.

The alleged violation description for Citation 2 states as follows:

On and before January 24, 2014 employees of MDB Management performed rigging of drywall bundles at twelve feet above grade without a fall arrest, fall restraint or positioning system. MDB Management did not ensure that it's [sic] employees used fall protection while rigging drywall bundles while standing on them.

Section 1670, subdivision (a), applies to unprotected sides and edges of a walking/working surface. The top of the stack of drywall was used as a work station where Xocoy walked and detached rigging. Section 1670, by its terms, is not limited to buildings, even though the examples of

walking/working surfaces are associated with buildings.¹⁷ Thus, the top of the drywall stack had unprotected sides and edges¹⁸.

Interpreting the top of the drywall stack as a walking/working surface is consistent with the Board's directive to interpret safety orders in a manner that promotes employee safety in order to achieve the purposes of the California Occupational Safety and Health Act of 1973¹⁹.

Thus, it is found that the top of the drywall stack was a walking/working surface within the meaning of section 1670. It was undisputed that there was no guardrail or other fall protection.

Therefore, the Division established a violation of section 1670, subdivision (a), by a preponderance of the evidence.

4. Did the Division establish a rebuttable presumption that Citation 2 was properly classified as serious?

Labor Code § 6432, subdivision (a) 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 harm²⁰

¹⁷ *Vernon Melvin Antonsen & Colleen K. Antonsen, individually dba Antonsen Construction*, Cal/OSHA App. 06-1272, Decision After Reconsideration (July 19, 2012); *J.F. Shea*, Cal/OSHA App. 95-2070, Decision After Reconsideration (June 7, 2000).

¹⁸ Although the Construction Safety Orders do not define a "walking/working surface" a similar term, "working level or working area" is defined in the General Industry Safety Orders in section 3207. It is defined as "A platform, walkway, runway, floor or similar area fixed with reference to the hazard and used by employees in the course of their employment." The top of the drywall stack comes within the definition of a working level or area as it is a fixed area with reference to the fall hazard.

¹⁹ In *Carmona v. Division of Industrial Safety* (1975) 13 Cal 3d 303, at 313, the Supreme Court held that legislation intended to set standards for workplace safety should be interpreted liberally to promote a safe and healthful working environment. The Appeals Board has applied that principal in a number of decisions, including *Lusardi Construction Company*, Cal/OSHA App. 86-1400 (May 31, 1989), which was affirmed by the Court of Appeal in *Lusardi Construction v. Occupational Safety and Health Appeals Board* (1991), 1 Cal. App. 4th 639.¹⁹ The principle was applied by the Appeals Board more recently in *Anning-Johnson Company*, Cal/OSHA App. 06-1976, Decision After Reconsideration (Jan. 13, 2012).

²⁰ Labor Code section 6432, subdivision (e) provides as follows: "Serious physical harm" as used in this part, 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

could result from the actual hazard created by the violation. 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 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), citing *Oliver Wire & Plating Co., Inc.*, Cal/OSHA App. 77-693, Decision After Reconsideration (April 30, 1980).)

To meet its burden to establish the classification of a violation as serious, the Division must present evidence regarding the types of possible injuries and the probability of those types of injuries. (See *Findley Chemical Disposal, Inc.*, Cal/OSHA App. 91-0431, Decision After Reconsideration (May 7, 1992); *USC School of Pharmacy*, Cal/OSHA App. 91-042, Decision After Reconsideration (Nov. 21, 1991).) It cannot satisfy its burden of proving the possibility of serious physical harm with evidence consisting of only conjecture or subjective opinion testimony lacking foundation. (*A. Teichert & Son, Inc.*, Cal/OSHA App. 76-922, Decision After Reconsideration (Feb. 26, 1980); *The Purdy Company of Illinois*, Cal/OSHA App. 79-281, Decision After Reconsideration (Dec. 20, 1984) at p. 4.)²¹ Opinions must be based on a valid evidentiary foundation, such as expertise on the subject, reasonably specific scientific evidence, experience-based rationale, or generally accepted empirical evidence. (*California Family Fitness*, Cal/OSHA App. 03-0096, Decision After Reconsideration (Mar. 20, 2009); *R. Wright & Associates, Inc. dba Wright Construction & Abatement*, Cal/OSHA App. 95-3649, Decision After Reconsideration (Nov. 29, 1999).)

the severity, second-degree or worse burns, crushing injuries including internal injuries even though skin surface may be intact, respiratory illnesses, or broken bones.

²¹ The Appeals Board has consistently affirmed that falls from 18 or more feet were properly classified as serious because of the substantial probability of death or serious injuries from falling from such distances. (*Vernon Melvin Antonsen & Colleen K. Antonsen, individually dba Antonsen Construction*, Cal/OSHA App. 06-1272, Decision After Reconsideration (July 19, 2012); *Davis Brothers Framing*, Cal/OSHA App. 03-0114, Decision After Reconsideration (Jun. 10, 2010); *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).) However, there was evidence in the record in each of those cases to support the findings.

The existence of facts not in evidence may not be assumed. (*Kenyon Plastering Inc.*, Cal/OSHA App. 10-2710, Denial of Petition for Reconsideration (Aug. 13, 2012), citing *California Family Fitness*, Cal/OSHA App. 03-0096, Decision After Reconsideration (Mar. 20, 2009) and *Steve P. Rados*, Cal/OSHA App. 79-1444, Decision After Reconsideration (Oct. 31, 1984).)

Here, the fall distance was about 12 feet. However, the Division did not present any evidence regarding the types of injuries that may result or the probability of those injuries in the event of a fall. It may not be presumed that serious harm is a realistic possibility in the event of an accident caused by the violation.

Therefore, the Division not having met its burden of proof, the rebuttable presumption that the violation was serious was not established. The classification of the violation must be reduced to general.

5. Were extent and likelihood for Citation 2 appropriate?

Employer stipulated that the penalty for Citation 2 was calculated in accordance with the Division's policies and procedures except for the ratings for extent and likelihood.

If the Division introduces the proposed penalty worksheet and testifies that the calculations were completed in accordance with the appropriate regulations and procedures, it has met its burden to show the penalties were calculated correctly, absent rebuttal by the Employer. (*M1 Construction*, Cal/OSHA App. 12-0222, Decision After Reconsideration (July 31, 2014).)

Here, the proposed penalty worksheet was admitted into evidence. (Exhibit 8) Copelan rated extent and likelihood as medium. As discussed above, only one employee out of over 100 was exposed to the hazard, so extent must be reduced to low. No evidence was given about the history of accidents in the industry as a result of the violation, and only one employee was exposed, so likelihood must be reduced to low as well.

Employer stipulated to the correctness of the Division's ratings for severity²², good faith, size, history, and application of the abatement credit. Recalculating the penalty accordingly and reducing the ratings for extent and likelihood to low, results in a penalty of \$375²³. This amount is found reasonable.

²² Severity of all alleged serious violations is high. (§335(a)(1)(B)) A rating of high severity for a general violation gives a \$2,000 base penalty. (§§ 335(a)(1)(A), 336(b))

²³ The penalty is calculated in the same way as the penalty for Citation 1.

Conclusion

Employer's employee climbed to an elevated location without the use of a ladder or other safe means of access. Citation 1, alleging a general violation of section 1675, subdivision (a) is affirmed. The ratings for extent and likelihood are reduced to low, reducing the penalty to \$375. A penalty of \$375, reflecting low extent and likelihood, is found reasonable.

The top of the drywall stack was a walking/working area over 7 ½ feet high. There was no fall protection. Citation 2 is affirmed. The classification is reduced to general due to insufficient evidence of realistic possibility of serious physical harm or death from the actual hazard. The ratings for extent and likelihood are rated low. A penalty of \$375, reflecting a general violation with low extent and likelihood is found reasonable.

Order

Citation 1 is affirmed. A penalty of \$375 is assessed for Citation 1.

Citation 2 is affirmed. A penalty of \$375 is assessed for Citation 2.

DALE A. RAYMOND
Administrative Law Judge

Dated: December 9, 2015
DAR:ml

APPENDIX A

**SUMMARY OF EVIDENTIARY RECORD
MDB MANAGEMENT, INC.
Dockets 14-R4D1-2373 and 2374**

Date of Hearing: June 17, 2015

Division's Exhibits—Admitted

Exhibit Number	Exhibit Description
1	Rigger Certification by Employer for Byron Xocoy
2	Photo—height of stack of drywall measured at 145.5”
3	Photo—two stacks of drywall
4	Photo—top of tape measure at top of stack of drywall
5	Photo—location of stack of drywall involved in citations
6	Photo—Xocoy standing on top of stack of drywall
7	Jurisdictional Documents
8	Proposed Penalty Worksheet, Form C-10

Employer's Exhibits

Exhibit Letter	Exhibit Description
	No exhibits offered

Witnesses Testifying at Hearing

1. Victor Copelan

CERTIFICATION OF RECORDING

I, Dale A. Raymond, 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.

December 9, 2015

DALE A. RAYMOND

