

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

In the Matter of the Appeal of:

**FOUNDATION BUILDING MATERIALS LLC
675 Emory Street
San Jose, CA 95110**

Employer

**DOCKETS 14-R1D2-3533
through 3535**

DECISION

Statement of the Case

Foundation Building Materials LLC (Employer) supplies construction materials including drywall to commercial and residential construction sites. Beginning May 21, 2014, the Division of Occupational Safety and Health (Division) through Associate Safety Engineer Aniceto Magro (Magro) conducted an accident investigation at a place of employment maintained by Employer at 1308 Bernoulli Place, Unit 7, San Jose, California (the site). On October 1, 2014, the Division issued Employer citations for failure to establish, implement and maintain an effective IIPP,¹ failure to guard a window with a drop of more than four feet,² and failure to provide personal fall arrest, restraint or positioning systems to employee working near an unprotected edge, which resulted in a twenty-five foot fall from a third story window.³

Employer filed a timely appeal contesting the existence of the violation, the reasonableness of the proposed penalty for all three citations, and the correctness of the classification of serious and accident-related serious for Citation 2 and Citation 3, respectively. Employer also raised an independent employee action defense (IEAD).

This matter came on regularly for hearing before Mary Dryovage, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at Oakland, California on October 15, 2015 and October 23, 2015. David Szwarczstehn, Esq., Carothers, Disante & Freudenberger, LLP, represented the Employer. David Santiago, Esq., Staff Counsel represented the Division. The matter was submitted on October 23, 2015. The Administrative Law Judge extended the submission date to March 30, 2016, on her own motion.

¹ Citation 1, Item 1 alleges a violation of section 1509, subdivision (a), referencing section 3203, subdivisions (a)(4), (a)(6) and (a)(7). Unless otherwise specified, all section references are to the California Code of Regulations, title 8.

² Citation 2, Item 1 alleges a violation of section 1632, subdivision (j)(1).

³ Citation 3, Item 1 alleges a violation of section 1670, subdivision (a).

Issues

- A. Did Employer violate section 1509, subdivision (a) and by reference section 3203, subdivision (a) (4), (6) and (7) by failing to establish, implement and maintain an effective IIPP?
- B. Was Employer required to guard a wall opening which was more than three feet above the working surface?
- C. Did Employer violate section 1670, subdivision (a) by failing to provide personal fall arrest, restraint or positioning systems to employee working near an unprotected edge, resulting in a twenty-five foot fall from a third story window?
- D. Did Employer carry its burden of proof on the issue of the Independent Employer Action Defense (IEAD) affirmative defense pursuant to *Mercury Service Inc.*?
- E. Did the Division establish a rebuttable presumption that the violation of section 1670, subdivision (a) is properly classified as a serious violation?
- F. Did Employer rebut the presumption of a serious violation by demonstrating that it did not and could not with the exercise of reasonable diligence know of the existence of the violation of section 1670, subdivision (a)?
- G. Did the Division establish a causal connection between the existence of the violation of section 1670, subdivision (a) and the fall?
- H. Did the Division establish that the proposed penalties were reasonable?

Findings of Fact

1. On May 21, 2013, Manual Licon (Lincon), driver of the forklift, was the supervisor of a team of three stackers, Eduardo Gonzalez (Gonzalez), Hector Campos-Rodriguez (Campos-Rodriguez) and Victor Campos-Tovar (Campos-Tovar), who delivered sheet rock (drywall) to 1308 Bernoulli Place, Unit 7, San Jose, California (the site) .⁴
2. The sheet rock was stacked on a forklift and raised to the third floor windows. The distance from the third floor window opening from which the employee fell to the ground below was twenty-five feet.

⁴ The parties stipulated to the fact that Victor Campos-Tovar, the decedent, was an employee of Foundation Building Materials LLC at the time of the accident.

3. The sheet rock was taken from the forklift, through the window opening and piled on the floor in the room.⁵
4. The window opening was more than three feet above the working surface of the room. Employer was not required to guard a wall opening because it was more than 36 inches above the working surface.
5. Campos-Tovar climbed over a two by four which was nailed across the frame of the window opening. He was not using fall protection at the time he stood on the window ledge before he fell.
6. After the sheet rock was loaded into room #1, Gonzalez and Campos-Rodriguez moved to room #2. While they were discussing the next steps in room #2, they heard a loud cry, turned around and Campos-Tovar was no longer in room #1. Campos-Tovar fell to his death from the window of room #1.
7. Death or serious physical harm caused by a fall of over twenty-five feet was a realistic possibility due to the hazard created by Employer's failure to provide fall protection.
8. Employer's violation of section 1670, subdivision (a), failure to provide personal fall arrest, restraint or positioning systems to employee working near an unprotected edge caused the death of Victor Campos-Tovar.
9. The proposed penalties for Citation 1, Item 1 and Citation 3, Item 1 were calculated in accordance with the Division's policies and procedures.

Analysis

A. Did Employer violate section 1509, subdivision (a) and by reference section 3203, subdivision (a) (4), (6) and (7) by failing to establish, implement and maintain an effective IIPP?

The Division cited Employer for a violation of section 1509, subdivision (a), which requires:

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

Section 3203, subdivision (a) (4), (6) and (7) provides:

⁵ Two piles of twenty sheets of sheet rock each were stacked one foot from the window. The sheet rock was twelve feet long and 5/8 inch thick. The room was approximately fourteen feet wide with sufficient space to walk around the sheet rock.

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

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

- (A) When the Program is first established;
- (B) Whenever new substances, processes, procedures, or equipment are introduced to the workplace that represent a new occupational safety and health hazard; and
- (C) Whenever the employer is made aware of a new or previously unrecognized hazard.

(6) Include methods and/or procedures for correcting unsafe or unhealthy conditions, work practices and work procedures in a timely manner based on the severity of the hazard:

- (A) When observed or discovered; and,
- (B) When an imminent hazard exists which cannot be immediately abated without endangering employee(s) and/or property, remove all exposed personnel from the area except those necessary to correct the existing condition. Employees necessary to correct the hazardous condition shall be provided the necessary safeguards.

(7) Provide training and instruction:

- (A) When the program is first established;
- (B) To all new employees;
- (C) To all employees given new job assignments for which training has not previously been received;
- (D) Whenever new substances, processes, procedures or equipment are introduced to the workplace and represent a new hazard;
- (E) Whenever the employer is made aware of a new or previously unrecognized hazard; and,
- (F) For supervisors to familiarize themselves with the safety and health hazards to which employees under their immediate direction and control may be exposed.

Citation 1, Item 1 alleges as follows:

On or before May 21, 2015, the employer failed to establish, implement and maintain an effective Injury and Illness Prevention Program in accordance with Section 3203 of the General Industry Safety Orders, such that the employer did not (a) identify and evaluate work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices; (b) correct unsafe

conditions and work practices and (c) provide training and instructions to employees performing activities while working near or around fall hazards.

The Division has the burden of proving a violation by a preponderance of the evidence, including the applicability of the safety order. (*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).) Preponderance of the evidence is defined in terms of probability of truth or of evidence that when weighed against that opposed to it, has more convincing force and greater probability of truth taking into account both direct and circumstantial evidence and all reasonable references. (*Webcor Builders*, Cal-OSHA App. 02-2834 (May 24, 2005).)

The Division must establish that Employer failed to establish, implement and maintain an effective written Injury and Illness Prevention Program (IIPP) which (a) identified and evaluated work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices; (b) corrected unsafe conditions and work practices and, (c) provided training and instructions to employees performing activities while working near or around fall hazards.

Employers are required to have written procedures for correcting unsafe or unhealthy conditions, as well as respond appropriately to correct the hazards. (BART, Cal/OSHA App. 09-1218, Decision After Reconsideration (Sept. 6, 2012); *Contra Costa Electric, Inc.*, Cal/OSHA App. 09-3271, Decision After Reconsideration (May 13, 2014); *BHC Fremont Hospital, Inc.*, Cal/OSHA App. 13-0204, Denial of Petition for Reconsideration, (May 30, 2014) (“The safety order requires employers to have procedures in place both to identify hazards as they arise, *and to take appropriate corrective action to abate the hazards.*”) [Emphasis added.]

In *National Distribution Center*, Cal/OSHA App. 12-0391 Decision After Reconsideration (Oct. 5, 2015), the Board recently held that the employer’s program must contain the elements enumerated in the regulation, including, *inter alia*, methods and/or procedures for correcting unsafe or unhealthy conditions, and it must provide for training and instruction, but rejected the argument that the general contractor’s IIPP satisfies its duties, noting:

There may be certain circumstances where one employer’s actual implementation of an IIPP on another employer’s behalf may satisfy both employers’ duties under section 3203. (*Ibid.*) Notwithstanding such cooperative efforts, each employer remains ultimately responsible to ensure implementation as to all employees subject to the IIPP requirements, and employers cannot escape liability for a violation of their duties, or for a failure of implementation, by arguing that they contracted or delegated away, or otherwise reassigned, their statutory and regulatory responsibilities. (See *e.g.*, *Manpower*, Cal/OSHA App. 98-4158, Decision After Reconsideration (May 14,

2001); *Staffchex*, Cal/OSHA App. 10-2456, Decision After Reconsideration (Aug. 28, 2014), *citing*, *Moran Constructors, Inc.*, Cal/OSH App. 74-381, Decision After Reconsideration (Jan. 28, 1975).) In other words, an employer cannot defend against a violation by arguing that it contracted away or otherwise reassigned the responsibilities imposed upon it by a safety order. (*Staffchex*, Cal/OSHA App. 10-2456, Decision After Reconsideration (Aug. 28, 2014).)

This argument was raised by Employer in response to Magro's request for the IIPP. He testified that he requested written documentation, including the IIPP from Employer on May 29, 2014. (Exhibit 6.) On June 12, 2014, Greg Wiedel, General Manager provided a response which stated:

In regard to the request for "Written building materials delivery procedures inside building units", be advised that because every project is different we follow the instructions of our customer or the general superintendent and stock product where they specify.

(Exhibit 7.) Exhibit 8, Employer's IIPP was missing elements required by section 3203, subdivision (a) (4), (6) and (7). The IIPP did not include any procedures for identifying workplace hazards. No methodology or procedures for correcting unsafe or unhealthy conditions were included in the IIPP. Employer did not provide any paperwork documenting what scheduled periodic inspections were done. Thus, Employer's IIPP was is not in compliance with sections 3203, subdivisions (a)(4) and (a)(6). There were no training and instruction provisions in the IIPP and no documents were provided which showed what training had been done. The IIPP was not in compliance with sections 3203, subdivisions (a)(7). The Division pointed out that the IIPP provided to the inspector consisted largely of quotes from the text of sections 1509, 1510, 1511 and 3203 of title 8, and from federal statutes, regulations and guidelines.⁶

The preponderance of the evidence established that the IIPP did not satisfy the requirements of section 3203, subdivision (a) (4), (6) and (7). Therefore, a violation is established and Employer's appeal of Citation 1, Item 1, is denied.

B. Was Employer required to guard a wall opening which was more than three feet above the working surface?

⁶ Exhibits E and F, portions of an updated IIPP, were introduced at the hearing. Exhibit E consisted of a six page document titled "Company Policy Statement and Program Components, Chapter 1" and Exhibit F is a one page document titled "Injury & Illness Prevention Program for Foundation Building Materials Assignment of Responsibility", dated April 5, 2012. However, these documents were not provided to Magro during the inspection or in response to the Division's document request and Employer presented no evidence that they were in effect at the time of the inspection. The new IIPP may be evidence of abatement, but does not establish that the IIPP in use at the time of the inspection complied with the safety order.

The Division cited Employer for a violation of section 1632, subdivision (j)(1), which requires:

(j) Wall openings, from which there is a drop of more than 4 feet, and the bottom of the opening is less than 3 feet above the working surface, shall be guarded as follows:

(1) When the height and placement of the opening in relation to the working surface is such that either a standard rail or intermediate rail will effectively reduce the danger of falling, one or both shall be provided;

Citation 2, Item 1 alleges as follows:

On or before May 21, 2015, the employer failed to guard a window and or wall openings with a drop of more than 4 feet and the bottom of the opening is less than 3 feet above the working surface with either a standard rail, intermediate rail or both. As a result, an employee fell approximately 25 feet from a third story window opening while unloading building materials and sustained fatal injuries.

In order to prove a violation of section 1632, subdivision (j)(1), the Division must establish 1) a wall opening existed from which there is a drop of more than 4 feet, 2) the bottom of the wall opening was less than three feet above the working surface, 3) a standard or intermediate rail was not provided, and 4) employee exposure existed.

The employees were loading sheet rock from a Gradall Telescopic Forklift into a third story window, which was six feet wide and five feet in length. During the investigation, Magro measured the distance from the wall opening (the bottom of the window frame) to the ground below. The distance from the ground to the window frame was 25 feet. Exhibits 10 and 12 are photos taken of the measuring tape from the window frame to the ground. The opening had a drop of over 25 feet, establishing the first prong.

There was considerable dispute whether the "working surface"⁷ should be measured from the floor in front of the window or from the surface of the stack of sheet rock. The sheet rock was on the floor of room #1 in two piles, measured at 18 inches from the floor. (Exhibit 9.) The window frame was 36 inches from the floor and was approximately 18 inches higher than the piles of sheet rock. (Exhibit 5.)

⁷ Although the Construction Safety Orders do not define a "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. In this case, there was no evidence that the sheet rock was walked on by any employee. (Campos-Rodriguez)

The pile of sheet rock was approximately one foot from the wall with the window, with space to walk around the sheet rock. Campos-Rodriguez testified that he did not see Campos-Tovar stand on the sheetrock prior to the fall and there was no reason for him to stand on the sheet rock. There was no evidence that the employees walked on the sheet rock. The “working surface” was the floor, not the sheet rock. Since the “working surface” measured as at least 36 inches from the window frame, the second prong was not established.⁸

Division failed to establish that section 1632, subdivision (j)(1) applied, since the working surface was more than 36 inches from the window opening.

C. Did Employer violate section 1670, subdivision (a) by failing to provide personal fall arrest, restraint or positioning systems to employee working near an unprotected edge, resulting in a twenty-five foot fall from a third story window?

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

(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 1/2 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.

Citation 3, Item 1 alleges as follows:

On or about May 21, 2014, the employer failed to provide personal fall arrest, restraint or positioning systems to an employee working near an unprotected edge in excess of 7 ½ feet above the ground. As a result, an employee fell approximately 25 feet from a 3rd story window opening while unloading building material and sustained fatal injuries.

The Division must prove that 1) employee failed to wear an approved personal fall arrest, personal fall restraint or positioning systems, 2) when the work exposes them to falling in excess of 7 1/2 feet from the perimeter of a structure, unprotected sides and edges, leading edges, through shaftways and openings, sloped roof surfaces steeper than 7:12, and 3) the employee was not otherwise adequately protected. (*Vernon Melvin Antonsen & Colleen K. Antonsen*, Cal/OSHA App. 06-1272, Decision After Reconsideration (July 19, 2012); *Petersen Builders, Inc.*, Cal/OSHA App. 91-057, Decision After Reconsideration (Jan. 24, 1992).)

⁸ The fourth prong, “employee exposure” was established by the fact that there were three employees in room #1 when the drywall was unloaded and one employee fell to his death.

None of the workers were wearing an approved personal fall arrest, personal fall restraint or positioning system on the day of the accident, according to the forklift operator, Licon. Magro confirmed with Greg Wiedel, General Manager, that neither Campos-Tovar, Gonzalez, nor Campos-Rodriguez were wearing an approved personal fall arrest, personal fall restraint or positioning system prior to the accident. Exhibit 16, the Santa Clara County Medical Examiner's report, stated "the decedent was not wearing a harness or protective gear."⁹ The first prong is therefore established.

The three employees were delivering sheetrock to the third story of a building under construction through a window opening which was twenty-five feet from the ground.¹⁰ A wood two by four rail¹¹ was nailed across the window of room #1. The sheetrock was loaded onto the forklift and lifted up, and was moved from the forklift through the wall opening and placed in the room in a pile along the wall.

Campos-Tovar stayed in room #1 when the other two employees went into room #2. Prior to the accident, Campos-Tovar was standing on the window ledge and fell to the ground.¹² The second prong, exposure to a fall of twenty-five feet, which is well over seven and a half feet, was established. The Division met its burden of proof that section 1670, subdivision (a) was violated.

Employer argues that Section 1670, subdivision (a) does not apply because the window opening is not "an unprotected side or edge" in this case. It argues that Division failed to establish that 1) there was no wall or 2) standard guardrail or protection was not provided.

Employer argues that it should be excused from compliance with section 1670, subdivision (a) because the window opening in room #1 was part of a wall. This fact would be relevant if the employees were solely working in the room.

⁹ Hearsay statements 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. (Section 376.2.) Evidence Code section 1200, subdivision (a), defines hearsay evidence as evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated. The statement in the medical examiner's report that no fall protection equipment was in use by the decedent was corroborated by statements made by the witnesses at the hearing and although hearsay, are relevant and thus admissible. *Gaehwiler v. Occupational Safety and Health Appeals Board* (1983) 141 Cal.App.3d 1041 [where no contrary evidence is offered, mere fact that power line was marked "high voltage" was sufficient to sustain finding that line was energized.]

¹⁰ The scaffolding on the outside of the building made it difficult to load the sheet rock from the forklift through the window into room #1. To get the sheet rock in the window, Campos-Tovar lifted the planks on the scaffolding above the window opening by using blocks to raise them. The sheet rock was placed at an angle and was slid into the window.

¹¹ The parties disputed whether the wood two by four which was nailed across the window opening met the requirements of a guardrail and whether it was taken off in order to fit the sheetrock through the window opening.

¹² Licon, the supervisor, repeated at the hearing the same facts he told the Medical Examiner: that he saw the decedent standing at the window from which he fell, prior to the accident. (Exhibit 16.)

The employees were engaged in moving the sheet rock from the platform of the forklift to the third story room through the window opening. Exhibits 19 and A depict the forklift and window opening for room #1. The safety order requires that fall protection be used when employees are exposed to the hazard of falling twenty-five feet from the third floor. Employer's attempt to exempt itself from the requirements of section 1670, subdivision (a) because the window opening was in a wall is at odds with the directive of the California Supreme Court in *Carmona v. Division of Industrial Safety* (1975) 13 Cal. 3d. 303, 313, which held that safety orders are to be liberally interpreted for the purpose of achieving a safe working environment. The focus must be whether a job places an employee in danger of exposure to falling in excess of 7-1/2 feet from the perimeter of a structure or unprotected sides or edges. (*Caldwell-Roland Roofing, Inc.*, Cal/OSHA App. 03-2905, Decision After Reconsideration (June 9, 2010).)

Similarly, the employees could not move the sheet rock from the forklift into the room without lifting the scaffolding planks installed on the exterior of the buildings. There were problems getting the sheetrock into the room, so Campos-Tovar lifted the planks up, by standing on the ledge of the window. Licon testified that the scaffold got in the way of the delivery of the sheetrock on other occasions. Employer admitted that the provisions taken to prevent a fall from room #1 were circumvented when "Campos-Tovar made a unilateral decision to circumvent the safety measures in place and decided to climb over the guardrail without wearing a safety harness", including standing on the window ledge immediately prior to his fall. (Employer's Post-Hearing Brief, 9:9-10.)¹³ Therefore, Campos-Tovar was not "otherwise adequately protected" when he fell from the window ledge. Prong three was established.

D. Did Employer carry its burden of proof on the issue of the IEAD affirmative defense pursuant to *Mercury Service Inc.*?

Employer asserted the independent employee action defense (IEAD). Employer must establish all five of the elements set forth in *Mercury Service, Inc.*¹⁴ The IEAD is premised upon an employer's compliance with non-delegable statutory and regulatory duties. (*Pierce Enterprises*, Cal/OSHA App. 00-1951, Decision After Reconsideration (March 20, 2002).) An employer must show it has taken all reasonable steps to avoid employee exposure to a hazard, but the

¹³ The Appeals Board held that "[b]riefs and arguments are reliable indications of a party's position on the facts as well as on the law, and a reviewing court may make use of statements therein as admissions against the party." (*Davey Tree Service*, Cal/OSHA App. 08-2708, Denial of Petition for Reconsideration (Nov. 15, 2012), fn. 3.)

¹⁴ The five elements in *Mercury Service* Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980) are: 1) the employee was experienced in the job being performed; (2) the employer has a well-devised safety program that includes training employees in matters of safety respective to their particular job assignments; (3) the employer effectively enforces the safety program; (4) the employer has a sanctions policy which it enforces against employees who violate the safety program, and; (5) the employee caused a safety infraction which s/he knew was against employer's safety requirement.

employee's actions serve to circumvent or frustrate the employer's best efforts. (*Paramount Farms, King Facility*, Cal/OSHA App. 09-864, Decision After Reconsideration (March 27, 2014); *Lights of America*, Cal/OSHA App. 89-400, Decision After Reconsideration (Feb. 19, 1991).)

The first element requires that the employee be experienced in the job performed. This requires proof that the worker had done the specific task "enough times in the past to become reasonably proficient". (*Solar Turbines, Inc.*, Cal/OSHA App. 90-1367, Decision After Reconsideration (July 13, 1992).) Campos-Tovar was employed as a stacker by Employer for almost 14 years. (Exhibit C.) This first element was established.

The second element requires the employer to have a well-devised safety program that includes training employees in matters of safety respective to their particular job assignments. (*Mercury Service, Inc.*, Cal/OSHA App. 77-1133, *supra*.) The well devised safety program must contain specific procedures. (*Blue Diamond Growers*, Cal/OSHA App. 10-1281, Decision After Reconsideration (July 30, 2012).) As discussed on pages 3 to 6 regarding Citation 1, Item 1, Employer did not have a well-devised safety program. Element two was not established.

The third element of the IEAD defense requires proof that Employer effectively enforces its safety program. Proof that Employer's safety program is effectively enforced requires evidence of meaningful, consistent enforcement. (*Glass Pak*, Cal/OSHA App. 03-0750, Decision After Reconsideration (November 4, 2010) quoting *Tri-Valley Growers*, Cal/OSHA App. 94-3355, Decision After Reconsideration (September. 15, 1999).) Employer presented no evidence on this issue and failed to meet the burden of establishing element three.

Element four requires Employer to establish that it has a sanctions policy which it enforces against employees who violate the safety program. As discussed above, no employee had been disciplined for failure to use fall protection equipment when required and Employer did not discipline Campos-Tovar for his actions. Accordingly, it failed to prove the fourth element of the IEAD.

Element five requires Employer to prove that Nations caused a safety infraction which he knew was against Employer's safety requirement. No evidence was presented regarding this issue.

Employer failed to prove the second, third, fourth and fifth elements of the IEAD. A violation of section 1670, subdivision (a) has been established.

E. Did the Division establish a rebuttable presumption that the violation is properly classified as a serious violation?

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 harm

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).)

Associate Safety Engineer Magro testified that the distance from the third floor window to the concrete ground below was twenty-five feet. He issued the citation alleging a violation of section 1670, subdivision (a), which is designed to protect workers from falls. The types of injuries which result if a worker falls from twenty-five feet include multiple fractures, broken bones, or even death. Magro’s un rebutted opinion that death or serious injury from a fall of twenty-five feet is a realistic possibility is found credible and is accepted.

Death or serious physical harm was established to be a realistic possibility, based on Employer’s failure to protect employees from falls of twenty-five feet. In fact, the failure to use fall protection was the cause of Campos-Tovar’s death, as discussed below. Division established a rebuttable presumption that the violation was properly classified as serious, as required by section 6432.

E. Did Employer rebut the presumption of a serious violation by demonstrating that it did not and could not with the exercise of reasonable diligence know of the existence of the violation?

Once the Division produces enough evidence to create a presumption of a serious violation, the burden of proof shifts to Employer to rebut the presumption. Section 6432, subdivision (c), provides as follows:

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, with the exercise of reasonable diligence, have known of the presence of the violation.

To establish that it could not have known of the violative condition by exercising reasonable diligence, an employer must establish that the violation occurred at time and under circumstances which could not provide the employer with a reasonable opportunity to have detected it. (*Vance Brown, Inc.*, Cal/OSHA App. 00-3318, Decision After Reconsideration (April. 1, 2003).) Reasonable diligence includes the obligation of foremen or supervisors to oversee the entire work site where safety and health hazards are present if exposure to an unsafe

condition exists. (*A. A. Portonova & Sons, Inc.*, Cal/OSHA App. 83-891, Decision After Reconsideration (March 19, 1986).)

Licon, the supervisor, testified that he knew that the scaffolding caused difficulties and interfered with getting the sheetrock into the room. He was operating the forklift when the employees were moving the sheetrock from the forklift to room #1. Knowledge of a foreman is imputed to the employer. (See, *Greene and Hemly, Inc.*, Cal/OSHA App. 76-435, Decision After Reconsideration (Apr. 7, 1978).) Employer's argument that Employer had no actual or constructive knowledge of any actual hazard is rejected.

Employer therefore failed to rebut the presumption of serious violation and the classification of "serious" stands.

G. Did the Division establish a causal connection between the existence of the violation of section 1670, subdivision (a) and the fall?

The Division must establish a causal nexus between the violation of the safety order and injury in order to classify a citation as "injury related". (*MCM Construction, Inc.* Cal/OSHA App. 13-3851, Decision After Reconsideration (Feb. 22, 2016).) California Code of Regulations, section 336, subdivision (c)(3), based on Labor Code section 6319, subdivision (d) states:

336(c)(3) Serious Violation Causing Death or Serious Injury, Illness or Exposure - If the employer commits a Serious violation and the Division has determined that the violation caused death or serious injury, illness or exposure as defined pursuant to Labor Code section 6302, the penalty shall not be reduced pursuant to this subsection, except the penalty may be reduced for Size as set forth in subsection (d)(1) of this section. The penalty shall not exceed \$25,000.

The Appeals Board recently held in *MCM Construction, Inc.*, *supra*: "The violation need not be the only cause of the accident, but the Division must make a "showing [that] the violation more likely than not was a cause of the injury. (*Mascon, Inc.*, Cal/OSHA App. 08-4278, Denial of Petition for Reconsideration (Mar. 4, 2011); *Siskiyou Forest Products*, Cal/OSHA App. 01-1418, Decision After Reconsideration (Mar. 17, 2003); *Davey Tree Surgery Company*, Cal/OSHA App. 99-2906, Decision After Reconsideration (Oct. 4, 2002).)"

The evidence establishes that Campos-Tovar was not wearing any personal fall arrest system and fell twenty-five feet. (Lincon, Campos-Rodriguez, Magro.) Gonzalez and Campos-Rodriguez saw him in room #1 by himself just prior to falling from the window opening. (Campos-Rodriguez) If he had been wearing fall protection equipment, he would not have fallen to his death. The Division established that the serious violation of Section 1670, subdivision (a) was the cause of Campos-Tovar's death, and, therefore, it is found that the violation was accident-related.

H. Did the Division establish that the proposed penalties were reasonable?

Penalties proposed by the Division in accordance with the penalty setting regulations promulgated by the Director of the Department of Industrial Relations pursuant to legislative mandate (Cal. Code Regs., tit. 8, §§ 333-336) are presumptively reasonable and will not be reduced absent evidence by Employer that the amount of the proposed civil 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 (Mar. 27, 2006).)

Employer appealed the reasonableness of the penalty for all citations.

Division's Proposed Penalty Worksheet (Exhibit 21) shows calculation of the proposed penalty. Citation 1, Item 1 was classified as "general". Magro explained that he calculated the penalties in accordance with the Division's procedures. The violation was given a rating of high severity, which has a penalty of \$2,000. The extent and likelihood were rated medium. The gravity based penalty was \$2,000. He reduced the penalty by 25%, based on the penalty adjustment factors of 15% good faith and 10% history. No credit was given for size, due to the fact that Employer had over 100 employees.¹⁵ This is calculated as: \$2,000 minus \$500 (25%) equals \$1,500. The penalty was further reduced by 50%, due to abatement credit given and rounded down to \$750. Employer did not rebut this analysis. The proposed penalty for Citation 1, Item 1 of \$750 is found reasonable and is assessed.

Citation 3, Item 1 was classified as "accident-related serious". The evidence is that Campos-Tovar died as a result of not having on fall protection when he fell twenty-five feet. The severity of this injury was correctly rated as "high".¹⁶ The Division proved the classification of serious was correct by demonstrating that there was a reasonable possibility of death as defined by Labor Code section 6432, subdivision (e).

Magro calculated the proposed penalty by beginning with a base of \$18,000 for severity¹⁷ and making no other adjustments.¹⁸ Here, since a serious violation caused a serious injury, the only downward adjustment possible is for size. Since Employer has over 100 employees, no adjustment for size is allowable. The base penalty of \$18,000 complies with the regulations.¹⁹ The ratings for extent and likelihood may not be given a lower rating than medium. As Magro rated extent and likelihood as medium, it is found that his ratings are appropriate. The

¹⁵ Section 336, subdivision (d).

¹⁶ Section 335, subdivision (a)(1)(B). (*Sherwood Mechanical, Inc.*, Cal/OSHA App. 08-4692, Decision After Reconsideration (June 28, 2012).)

¹⁷ Section 335, subdivision (a)(1)(B).

¹⁸ Exhibit 21, Proposed Penalty Worksheet, Form C-10.

¹⁹ Section 336, subdivisions (c)(1) and (d)(7).

proposed penalty of \$18,000 for Citation 3, Item 1 is found reasonable and is affirmed and is assessed.

Conclusion

Citation 1, Item 1 and the proposed \$750 penalty is affirmed. Employer's appeal of Citation 2 is granted, because section 1632, subdivision (j)(1) does not apply if the wall opening was three feet or more above the working surface. Citation 3, Item 1 and the proposed \$18,000 penalty is affirmed. Division properly classified the violation of section 1670, subdivision (a) in Citation 3 as serious and properly characterized it as accident-related. The Division's proposed penalty calculations were reasonable and are assessed.

Decision

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

It is further ordered that the penalties as set forth in the attached Summary Table be assessed, for the reasons stated above.

DATED: April 28, 2016
MD:sp

MARY DRYOVAGE
Administrative Law Judge

The attached decision was issued on the date indicated therein. If you are dissatisfied with the decision, you have thirty days from the date of service of the decision in which to petition for reconsideration.

Your petition for reconsideration must fully comply with the requirements of Labor Code Section 6616, 6617, 6618 and 6619, and with Title 8, California Code of Regulations, Section 390.1.

For further information, call: (916) 274-5751.

APPENDIX A

SUMMARY OF EVIDENTIARY RECORD FOUNDATION BUILDING MATERIALS LLC DOCKETS 14-R1D2-3533 through 3535

Dates of Hearing: October 15, 2015 and October 23, 2015

Division's Exhibits—Admitted

Exhibit Number	Exhibit Description	
1	Jurisdictional Documents	X
2	I-B-Y Letters for Citation 2-1 and 3-1, 8/5/3025	X
3	Photo of site, 3 rd floor of Unit 7, windows of rooms #1 and #2 taken 5/21/2015 @ 15:30	X
4	Photo of window in room #2, with scaffold and 2 x 4 wood bar across window taken 5/21/2015 @ 15:27	X
5	Photo of person standing on sheetrock in room #2 taken 5/21/2015 @ 15:27	X
6	Document Request Sheet, 5/29/2014	X
7	Response to I-B-Y letter from Greg Wiedel, 7/12/2014	X
8	FPM IIPP (8 pages)	X
9	Photo of 18 inches of sheet rock in front of window in room #2 taken 5/21/2015 @ 16:06	X
10	Photo of tape measure showing 25 foot from ground to window sill taken 5/22/2015 @ 10:31	X
11	Photo of tape measure showing 26 foot from ground to wood 2 x 4 bar, taken 5/22/2015 @ 10:31	X
12	Photo of view from window in room #2 to ground taken 5/22/2015 @ 10:32	X
13	Business cards provided by employer, contractor, subcontractor, police, and coroner, during inspection	X
14	Accident Report by Greg Wiedel, 5/21/2014 (3 pages)	X

15	OSHA Form 300 Log for 2014	X
16	Santa Clara County Medical Examiner Report of Investigation, 10/17/2014 (4 pages)	X
17	Photo of stack of drywall in front of completed buildings near site taken 5/21/2015 @ 16:22	X
18	Photo of deceased taken 5/21/2015 @ 15:48 – <u>UNDER SEAL</u>	X
19	Photo of scaffold outside of windows to rooms #1 and #2, taken 5/21/2015 @ 15:02	X
20	Photo close up of windows to rooms #1 and #2, taken 5/21/2015 @ 15:02	X
21	Proposed Penalty Worksheet	X

Employer's Exhibits—Admitted

Exhibit Letter	Exhibit Description	
A	Photo of site showing forklift and windows to rooms 1 & 2	X
B	Cal/OSHA 1-B, Documentation Worksheet - Citations 1, 2 & 3	X
C	Cal/OSHA 170 Investigation Summary	X
D	FBM Standup Safety Meeting handouts (in Spanish & English) (Bates FBM OSHA 00056 – 00071)	X
E	FBM Safety & Health Policy Statement (6 pages)	X
F	FBM - IIPP Assignment of Responsibility, 4/5/2012 (1 page)	X
G	Draft IIPP (4 pages)	X

Witnesses Testifying at Hearing

1. Manuel Lincon
2. Jose Eduardo Gonzalez
3. Hector Campos-Rodriquez
4. Aniceto Magro
5. Diana J. Rich

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.

April 28, 2016

Signature

Date

SUMMARY TABLE ORDER

In the Matter of the Appeal of:
FOUNDATION BUILDING MATERIALS LLC
DOCKETS 14-R1D2-3533 - 3535

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

Site: 1308 Bernoullii Place, Unit-7, San Jose, CA 95132

IMIS No. 317587384

Date of Inspection: 05/21/14 - 10/01/14

Date of Citation: 10/01/14

DOCKET	C	I	SECTION	T	ALLEGED VIOLATION DESCRIPTION MODIFICATION OR WITHDRAWAL AND REASON	A	V	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT PRE- HEARING	FINAL PENALTY ASSESSED BY BOARD	
	I	T		E		F	A				
	T	E		P		F	C				
	A	M		E		I	A				
	T					R	T				
	I					M	E				
	O					E	D				
	N										
14-R1D2-3533	1	1	1509(a)	G	ALJ affirmed violation.	X		\$750	\$750	\$750	
14-R1D2-3534	2	1	1632(j)(1)	S	ALJ vacated violation.		X	\$9,000	\$9,000	\$0	
14-R1D2-3535	3	1	1670(a)	S	ALJ affirmed violation.	X		\$18,000	\$18,000	\$18,000	
Sub-Total											
									\$27,750	\$27,750	\$18,750
Total Amount Due*										\$18,750	

(INCLUDES APPEALED CITATIONS ONLY)

NOTE: 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: 4/28/16