

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

In the Matter of the Appeal of:

**SSA TERMINALS (OAKLAND), LLC.  
dba SSA MARINE TERMINAL  
1717 MIDDLE HARBOR ROAD  
OAKLAND, CA 94607**

**Employer**

Inspection No.

**1303461**

**DECISION**

**Statement of the Case**

SSA Terminals (Oakland) LLC (“the Employer”), operates a marine terminal and longshore operation in Oakland, California. Beginning on March 22, 2018, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer Charles Rachlis (Rachlis) conducted two accident inspections at the marine terminal at 1999 Middle Harbor Road in Oakland, following an injury accident involving an Employer’s employee on February 26, 2018; and another accident involving a different employee of the Employer on March 22, 2018.

On August 24, 2018, as a result of inspection number 1303461, the Division issued two citations to the Employer, alleging violations of safety orders found in California Code of Regulations, title 8, and issued three citations in case number 1303471.<sup>1</sup> Before commencement of the hearing, the Division moved to consolidate the two cases, and to dismiss certain allegations, including Citation 1 in case number 1303461. The Employer did not oppose the motions, and the motions were granted by the undersigned Administrative Law Judge.

As a result of that Order, this case includes only Citation 2, which alleges that the Employer violated section 3212, subdivision (a)(2)(A), by failing to have proper guarding at the ladder openings adjacent to several platforms on the rubber tire gantry cranes used by the Employer.

The Employer filed a timely appeal of the citation. The appeal contests the existence of the alleged violation, the classification and the proposed penalty. It also asserted various affirmative defenses.<sup>2</sup>

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<sup>1</sup>Unless otherwise indicated, all further references are to sections of California Code of Regulations, title 8.

<sup>2</sup> Except where discussed in this Decision, the Employer did not present evidence in support of affirmative defenses, and said defenses are therefore deemed waived. (*RNR Construction Inc.*, Cal/OSHA App. 1092600, Denial of

The appeal was heard by Martin Fassler, Administrative Law Judge (ALJ) for the Occupational Safety and Health Appeals Board in Oakland, California, on April 11 and 12, 2019; August 22 and 23, 2019; December 19, 2019; and March 3, 2020.<sup>3</sup> Corey Friedman, Esq., Staff Counsel, represented the Division. Attorney Joseph Galosic from the Law Offices of Joseph Galosic represented the Employer. The parties submitted post-hearing briefs on April 20 and May 10, 2020 and the matter was submitted for decision on June 15, 2020.<sup>4</sup>

### **Issues**

1. Did Citation 2 provide adequate notice to the Employer of the factual allegations against it?
2. Is section 3212, subdivision (a)(2)(A), applicable to the openings through the railings at the rubber tire gantry (“RTG”) platforms at which access was provided by ladderway?
3. Is there another safety order applicable to the RTG platforms adjacent to the ladderways that should be applied here, thus preventing the application of section 3212, subdivision (a)(2)(A)?
4. Were the platforms that were the subject of the citation within the Title 8 definition of “platform”?
5. Were the access points from the platforms to the ladders properly protected, as required by section 3212, subdivision (a)(2)(A)?

### **Findings of Fact**

1. The citation identifies four specific platforms on the RTG cranes.
2. Each of the platforms referred to in the citation serves as a walkway that is used by employees of the Employer.
3. The passageway to the access of the ladderway opening at the elevator platform on the rubber tire gantry cranes had an offset sufficient to prevent an employee from walking directly into the opening.

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Petition for Reconsideration (May 6, 2017); see also *Western Paper Box. Co.*, Cal/OSHA App. 86-812, Denial of Petition for Reconsideration (Dec. 24, 1986).

<sup>3</sup> The hearing of this appeal was consolidated with the hearing of the appeal in case number 1303471.

<sup>4</sup> A Decision in case number 1303471 was issued separately.

4. The passageway to the access of the ladderway opening at the electrical house platform on the rubber tire gantry cranes had an offset sufficient to prevent an employee from walking directly into the opening.
5. The passageway to the access of the ladderway opening at the mechanical maintenance platform on the rubber tire gantry cranes had an offset sufficient to prevent an employee from walking directly into the opening.
6. The passageway to the access of the ladderway opening at the engine and generator room platform on the rubber tire gantry cranes had an offset sufficient to prevent an employee from walking directly into the opening.

### **Analysis**

#### **1. Did Citation 2 provide adequate notice to the Employer of the factual allegations against it?**

Section 3212, subdivision (a)(2)(A), provides as follows:

Every ladderway floor opening or platform with access provided by ladderway . . . shall be protected by guardrails with toeboards meeting the requirements of General Industry Safety Orders, Section 3209, on all exposed sides except at entrance to the opening. The opening through the railing shall have either a swinging gate or equivalent protection, or the passageway to the opening shall be so offset that a person cannot walk directly into the opening.<sup>5</sup>

The factual allegations of Citation 2 are the following:

Prior to and during the course of the inspection including but not limited to on March 22, 2018, the employer failed to ensure that the opening through the railing at every platform on Rubber Tire Gantry Cranes (RTG) with access provided by ladderway had either a swinging gate or equivalent protection.

**INSTANCES:** Four platforms on each of the employer's thirteen RTG's did not have swinging gates or equivalent protection in fifty-two instances.

The Employer contends that "The AVD [factual allegation] is deficient in that it fails to specifically state with required particularity the specific locations on the RTG [that are] at issue."

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<sup>5</sup> There is one exception applicable to this requirement but it is not relevant here, as it applies to perimeter roof edges, and the allegation of the citation does not pertain to a perimeter roof edge.

The Employer explains in its post-hearing brief, “The AVD only makes vague reference to four platforms, leaving the Respondent to guess at which locations the Division claims a violation.”

Labor Code section 6317 provides the authority of the Division to issue citations to employers, and states in pertinent part:

Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the code, standard, rule, regulation, or order alleged to have been violated.

In *Gaehwiler Construction, Co.*, Cal/OSHA App. 78-651, Decision After Reconsideration (Jan. 7, 1985), the Board stated:

It is well settled that administrative proceedings are not bound by strict rules of pleading. As long as an employer is informed of the substance of the violation and the citation is sufficiently clear to give fair notice and to enable it to prepare a defense, the employer cannot complain of technical flaws.

More recently, in *Hypower Inc. dba Hypower Electric Services Inc.*, Cal/OSHA App 12-1498, Denial of Petition for Reconsideration (Sept. 11, 2013), the Board affirmed its view:

Due process requires general “notice” pleading. (*Cranston Steel Structures*, Cal/OSHA App. 98-3268, Decision After Reconsideration (Mar. 26, 2002). Administrative proceedings are not bound by strict civil rules of pleading. (*John T. Malloy Inc.* Cal/OSHA App. 81-790, Decision After Reconsideration (Mar. 31, 1983); see *Stearns v. Fair Employment Practices Commission* (1971) 6 Cal. 3d 205, 213. . . .

As long as employer is informed of the substance of the violation and the citation is sufficiently clear to give fair notice and to enable it to prepare a defense, the employer cannot complain of technical flaws. . . . Additionally an employer must show prejudice in order to sustain an allegation that the description in the citation was not sufficiently particular.

In *Hypower Inc.*, the Board upheld the citation, which alleged, in relevant part, “On and before October 28, 2011, the employer did not implement their IIPP in that the employer did not provide training to employees who were assigned the task of operating skid-steer loaders at the site.” The Appeals Board held that the allegations “were more than sufficient to notify employer that [a worker’s] training to operate the Skid Steer was lacking or inadequate. . . . It is apparent that the citation alleges that two employees were told to operate the Skid Steer without having been trained to do so . . . .”

In an earlier case considering the adequacy of a citation's allegations, *Adia Personnel Services*, Cal/OSHA App. 90-1015 Decisions After Reconsideration (Mar. 12, 1992), the Appeals Board granted an employer's appeal because the citation merely paraphrased the language of the safety order, without providing specifics, the Division did not clarify its allegations during pre-hearing discovery, and the Employer was not prepared to defend against the factual allegations, when they were set out in hearing testimony.

That is far from the case here.

The Employer's working area at Oakland International Container Terminal ("OICT") includes a large outdoor yard in which the Employer stores shipping containers that have been delivered to Oakland by ship. Trucks arrive at the yard to pick up containers for transport elsewhere. The Employer uses rubber tire gantry cranes "RTG's" (also known as "Transtainers") to lift containers from the yard to the truck trailers.<sup>6</sup>

Each RTG crane is operated by a longshoreman, seated in a cab approximately 60 feet above ground level. To reach the cab, the operator climbs a ladder for approximately 19 feet. After stepping off the ladder on to a platform, the operator walks a few steps to an elevator entrance, and then takes an elevator to ascend the remaining distance to the operating cab. At the end of a shift, or when taking a work break, the operators descend via the same route – that is, the operator takes an elevator down from the cab, exits the elevator at a platform, then walks a few steps to the ladderway, steps onto the ladder, and descends the ladder to the ground.

Mechanics who service and maintain the crane and its various components as needed ascend on the same ladder, then move off the ladder at either one of two different platforms to perform their work. Details about these two platforms are set out below. There is a fourth platform adjacent to an engine and generator room, with access provided by a different ladder, on another side of the RTG. The Employer has 13 RTG's at the Oakland International Terminal, all essentially identical in structure and function.

The citation here refers to specific platforms, that is: "at every platform on Rubber Tire Gantry Cranes (RTG) with access provided by ladderway . . ." The RTG platforms that fall within this description are easily identified and were well known to the Employer. Ken Larson, the Employer's crane supervisor, testified at length about the structure and use of the four platforms on the RTG's. The Employer's yard foreman Robert Freitas testified about the structure and operation of the RTG's to a lesser extent. Three platforms – the first three that are described above - and the ladders which provide access to them are seen (from various camera positions) in multiple photographs within Exhibits 2 and 7, and in Exhibit 11, page 1. The fourth platform is seen in Exhibit 7, pages 22 and 23.

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<sup>6</sup> Transtainer is the name of the company that manufactures the RTG's used by the Employer.

Employer's post-hearing briefs do not state that there was another platform that might have been the subject of the citation, and there was no evidence that there was another platform with access via a ladder.<sup>7</sup> The Employer does not contend that the citation's failure to identify more specifically the four platforms at issue prejudiced the employer in its presentation of evidence. On the contrary, the Employer presented extensive evidence, through the testimony of its witnesses, about the location and use of the four platforms.

The citation here provides significant factual detail to the Employer about the platforms at issue, which allowed the Employer to defend against the charges with both testimony and legal argument. Therefore, in accordance with the precedent cited above, it is concluded that Citation 2 provided to the Employer adequate notice of the nature of the allegations.

**2. Is section 3212, subdivision (a)(2)(A), applicable to the openings through the railings at any of the rubber tire gantry platforms at which access was provided by ladderway?**

The Employer contends that section 3212, subdivision (a)(2)(A), is inapplicable to the "RTG landing platforms," that is, to the four platforms that the Division contends lack proper guarding. These platforms, the Employer contends, are "walkways," and are not "work areas," and therefore section 3212(a)(2)(A) does not apply.

Section 3212(a)(2)(A) applies to: "Every ladderway floor opening or platform with access provided by ladderway, . . ." (Emphasis added).

Section 3207 defines "platform" as "An elevated working level for persons. Storage platforms, balconies and open-sided floors are considered platforms for the purpose of these orders." The phrase "working level," which is part of the definition of "platform," is also defined by section 3207:

Working Level or Working Area. 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 Employer's description of the platforms at issue here as "walkways" is accurate (although there are occasions when the employees who use these walkways take actions on them in addition to walking). The platform which was the subject of the most testimony provides a path between the 19-foot ladder and the entrance to the elevator to the operator's cabin. A

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<sup>7</sup> Testimony suggested there was one other platform at the much higher level of the operator's cab, but there was no evidence that there was access to this platform via a ladderway; therefore, that platform would not have been the subject of the pending citation.

second platform, adjacent to the same ladder but a few feet lower, allows mechanics to gain access to the electrical room (“E-room”) as needed for adjustments or repairs. A third platform (a few steps above the elevator platform) provides access to mechanics who ascend the ladder and then walk to work on the brake resistors and air conditioning units that are placed at that platform. That work is done by employees standing on the platform. A fourth platform, on a different side of the RTG, provides access for mechanics who may have to work within the engine and generator room that is on the platform.

Each of these is a “walkway,” and thus each is included within the definition of “working level” set out above. Therefore, each is included within the definition of “platform.” And therefore each of these is subject to the requirement of section 3212, subdivision (a)(2)(A).

**3. Is there another safety order applicable to the RTG platforms adjacent to the ladderways that should be applied here, thus preventing the application of section 3212, subdivision (a)(2)(A)?**

The Employer contends that section 3277, subdivision (j)(2), applies to the platforms at issue; that section 3277, subdivisions (j)(2) and (j)(3), are the more specific safety regulations, as compared to section 3212, subdivision (a)(2)(A), and those two provisions of section 3277 should be applied to the RTG structures, rather than section 3212, subdivision (a)(2)(A).

To consider this argument, it is necessary to compare the provisions of sections 3212, subdivision (a) and 3277. The relevant provisions of section 3212, subdivision (a)(2)(A) are cited above.

Section 3277, subdivisions (j)(2) and (j)(3), provides as follows:

(j) Landing platforms:

(1) when ladders are used to ascend to heights exceeding 20 feet, landing platforms shall be provided as follows:

...

(2) Where an employee has to step a distance greater than 12 inches from the center line of the rung of a ladder to the nearest edge of a structure or equipment, a landing platform shall be provided. The minimum step-across distance shall be 2 ½ inches.

(3) All landing platforms shall be equipped with guardrails and toeboards, so arranged as to give safe access to the ladder. Platforms shall be not less than 24 inches in width and 30 inches in length.

In *Cabrillo Economic Development Corp.*, Cal/OSHA App. 11-3185, Decision After Reconsideration (October 16, 2014), the Board described its analytical approach in cases in which an employer asserts that it should not be found to have violated the safety order identified in a citation, because a different safety order is more applicable and should prevail. The Board wrote:

It is not uncommon for more than one safety order to apply to a particular set of facts. Applying principles of statutory construction, the Board will only find that a more specific safety order is controlling where there is an actual conflict between the two safety orders. . . . Where it is possible to read the safety orders so they are in harmony with one another, the Board will do so. . . . It is both possible and reasonable to give concurrent effect to both safety orders. Only where there is an actual conflict between the orders will a more specific order control over the more general. That not being shown in this instance, Employer’s defense therefore fails.

There is no Appeals Board precedent concerning possible overlap between safety orders 3212 subdivision (a) and 3277.

In this case, section 3212 is the safety order that applies more specifically than section 3277. Section 3212 includes numerous provisions designed to protect employees from the potential hazards of falling from or through floor openings, floor holes, skylight and roofs. The provision at issue here is written to protect employees who need to move from a platform to a ladderway; it is one of numerous provisions within this safety order that require an employer to take actions to prevent falls from working areas.

Section 3277, entitled “Fixed ladders,” includes numerous provisions regarding the safe design, construction, features, and use of fixed ladders. Subdivision (j) begins with a statement about condition in which landing platforms are required: “(1) When ladders are used to ascend to heights exceeding 20 feet, landing platforms shall be provided as follows: . . .” Subdivision (j)(2) sets out a second condition under which a ladder landing platform is required, and sets forth the minimum step-across distance when a landing platform is constructed. Subdivision (j)(3) then requires guardrails and toeboards on landing platforms, and sets some minimum dimensions for landing platforms.



The relevant provision of section 3212, subdivision (a)(2)(A) - that is, its last sentence - is focused on protecting an employee's approach to the access point to the ladderway: "The opening through the railing shall have either a swinging gate or equivalent protection, or the passageway to the opening shall be so offset that a person cannot walk directly into the opening." There is no conflict between this portion of the safety order, and section 3277, subdivision (j)(3) provisions about the design of the landing platform. Both are enforceable independently. Therefore, pursuant to the precedent set out in *Cabrillo Economic Development Corp., supra*, section 3277, subdivision (j)(3), does not prevail in this situation over section 3212, subdivision (2)(A)(2), or stand in the way of the enforcement here of that provision of section 3212.

**4. Were the access points from the platforms to the ladders properly guarded, as required by section 3212, subdivision (a)(2)(A)?**

When a safety order describes requirements in the disjunctive, an employer may satisfy the safety order by complying with any one of the stated methods. *Yeager Construction Company*, Cal/OSHA App. 01-3261, Decision After Reconsideration (Nov. 2, 2007); *Delta Excavating Inc.*, Cal/OSHA App. 94-2389, Decisions After Reconsideration (Aug. 10, 1999).

Section 3212, subdivision (a)(2)(A) sets out three alternative methods to provide safe access to a ladderway from a working platform. The safety order states: "The opening through the railing shall have either a swinging gate or equivalent protection, or the passageway to the opening shall be so offset that a person cannot walk directly into the opening." That is, an employer will satisfy the requirement if the opening leading to a ladderway (1) has a swinging gate, **or** (2) has a protection "equivalent" to a swinging gate; **or** (3) if "the passageway to the opening is so offset that a person cannot walk directly into the opening."

The Division has the burden of proving a violation by a preponderance of the evidence. (*ACCO Engineered Systems*, Cal/OSHA App. 1195414, Decision After Reconsideration (Oct. 1, 2019).) "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 with consideration of both direct and circumstantial evidence and all reasonable inference to be drawn from both kinds of evidence. (*Timberworks Construction, Inc.*, Cal/OSHA App. 1097751, Decision After Reconsideration (Mar. 12, 2019).) Here, the Division would have to prove, with respect to each of the four platforms, that the Employer did not satisfy any one of the three possible requirements of section 3212, subdivision (a)(2)(A), any of which would protect an employee who is walking to the ladder from falling into a ladderway.

There was no swinging gate at the ladder access point at any of the four platforms. Nor were there were any structures that provided protection equivalent to a swinging gate. Therefore,

the issue to be decided is whether there were any “offsets” at or near any of the ladder access points that would prevent a worker from walking directly into the opening.

The word “offset” is not defined by either section 3212 or by any other safety order. There is no Appeals Board precedent construing the term. One dictionary offers a definition that may not be directly applicable, but may be useful by analogy: “A sharp bend (as in a pipe) by which one part is turned aside out of line.”<sup>8</sup>

The Division’s post hearing brief says “An offset, in this context is [a] method of making a person navigate a barrier or barriers, so that the person must *consciously and intentionally* access the ladderway and therefore cannot *inadvertently step into the unguarded fall hazard.*” [emphasis in original]. No source is cited for this definition of “offset.” This proffered definition refers to the presence of a physical barrier; but the safety order, by offering a third way to satisfy the requirement other than a physical barrier, indicates that some other method of preventing an employee from walking directly into an opening would be acceptable.

The word “offset” here will be taken to mean some arrangement that requires an employee to change the direction of his movement, while walking toward the ladderway, in order to gain access to the ladder for his descent.

As the safety order does not set out a precise requirement, this provision of the safety standard is a “performance standard.” The Appeals Board described a “performance standard” in *Estenson Logistics*, Cal/OSHA App. 05-1755, Decision After Reconsideration (Dec. 29, 2011):

Its goal is to protect against fall hazards, and it states the way to achieve that goal - providing fall protection - while leaving it to employers to select an appropriate means of doing so, so that the employer can choose the means best suited to the nature of the hazard and the working conditions.

The concept is recognized by the Government Code, as applicable in various administrative law settings. Government Code section 11342.570 defines “performance standard” to mean “a regulation that describes an objective with the criteria stated for achieving the objective.”

Applying that approach to this setting, the question to be decided is: are the platform arrangements adjacent to the ladderway access points such that, on each platform, the path taken to the ladder access point would prevent an employee, after completing his assignment or leaving

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<sup>8</sup> *Merriam-Webster’s Dictionary and Thesaurus* (2007). The definition in Merriam-Webster.com/dictionary is essentially the same: “an abrupt bend in an object (such as a pipe or a rod) by which one part is turned aside out of line.”

his work position, from walking directly into the opening? By referring to the “opening in the railing,” the safety order itself recognizes that there cannot be a barrier immediately in front of the ladder access point. And by using the phrase “that a person cannot walk directly into the opening,” it is clear that the regulation is designed to protect an employee working on the platform or walking toward the ladder - not a person who has ascended the ladder and is walking away from the ladder.

Each of the platforms at issue will be considered in turn.

#### *The elevator platform*

An employee who leaves the operating cab intending to return to ground level, who first descends in the elevator to the elevator platform, and who then steps straight out of the elevator, would be facing a guard rail, as shown in Exhibit 2, pages 4 and 5, and Exhibit 7, page 7. To move toward the ladder, that employee would then turn right, at a 90 degree angle, and walk two or three steps to the ladderway access. That employee is not able to walk directly from the elevator on to the ladder; the enforced right turn provides an offset sufficient to avoid the possible hazard.

#### *The “E house” (electrical room) platform*

An employee leaving the “E house” after making adjustments or repairs, moving toward the ladder to descend, would be facing the structure of the RTG as he walks straight out of the electrical room. He would then have to turn right and walk one or two steps to the ladderway access, and then turn to his left to get on to the ladder. One view of this area is seen in Exhibit 7, page 10. A door handle on the entrance to the “E house” is seen in this photo. Portions of the platform are seen from below in Exhibit 7, pages 4, 5, and 6. Thus, access to the ladderway from this platform also includes an offset – two turns - sufficient to avoid the possible hazard.

#### *The mechanics’ platform*

Above the electrical room is another platform, the location of “brake resistors” and accumulators, and air conditioning units for the E house below it.<sup>9</sup> Mechanics and electricians are sometimes called upon to clean or repair the brake resistors or service the air conditioning unit at this level.

Access from the ground to this platform is via two ladders in succession, as seen in Exhibit 7, pages 5 and 19. From ground level, an employee would ascend the ladder with black

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<sup>9</sup> The terms were explained in the testimony of Ken Larson, the Employer’s crane manager, on the last day of the hearing.

rungs that leads to the two other platforms previously described. At the “E room” platform, another ladder, with yellow rungs, leads upward. An employee would ascend this ladder to gain access to the third platform. After working on the brake resistors or air-conditioning units, to return to ground level, the employee would descend this yellow-rung ladder to the E-house level, to then transfer to the black-rung ladder and descend on this to ground level.

There is no photograph in evidence that provides a close-up, detailed view of this platform and its ladder access. Exhibit 7, page 20 is a photo of the access point, taken from below, from the elevator platform. Because this view is from below and to the side, it provides a very limited view of the route that a worker would take to move from a position at which he worked on the equipment on the platform to the ladder. The photo at Exhibit 7, page 5, and another photo at Exhibit 7, page 19, were taken from below the elevator platform, and provide less information about the access point. Neither depicts access to the ladder from the platform.

Employer’s crane manager Ken Larson testified about this platform, the equipment that stood on the platform, the work done by employees on the platform, and the route between the nearest ladder and the equipment that mechanics would work on. In his testimony he referred to Exhibit 7, page 5, and marked various features of the platform. Larson testified that after ascending to the platform on the yellow-rung ladder, and stepping off the ladder, the employee would be facing the RTG structure. Then, to reach the point at which he could make repairs or maintenance work on the mechanical equipment, the worker would have to make a series of left and right turns on the platform. Then, with the work done, to return to the ladder and to return to ground level, the worker have to make the same sequence of turns, in reverse.

Rachlis did not ascend the ladder with yellow rungs, and did not go on to this platform. As Rachlis testified, and as shown in Exhibit 2, pages 4, 5, and 8, there is neither a swinging gate nor any other comparable barrier immediately in front of the ladder access point on this platform.

The Division presented no specific testimony that described a worker’s route from the position at which he would be working on equipment, to the ladder access point that a worker would use to descend to ground level. The only testimony that touches on this point was the following testimony by the Division’s inspector Rachlis, in response to a question from Division counsel:

Q. Of all the platforms that we have discussed over the course of this hearing, did any of them have offsets that prevented a person from walking directly into the ladderway opening?

A. No.

Larson's testimony about the route to be followed between the ladder and the point at which mechanics carry out their duties on this platform is credited. This sequence of changes of direction immediately prior to reaching the ladder access point constitutes an "offset" for this ladder access point. The Division did not present any evidence on the point, other than Rachlis's brief general answer, cited above. Although there is neither a swinging gate nor a comparable physical barrier adjacent to this access point, Larson's testimony is evidence of an offset, which the safety order recognizes as the third possible way to satisfy the safety requirement. Therefore, there is insufficient evidence to support the contention that the access to the ladderway from this platform was in violation of the safety order.

In its post-hearing reply brief, the Division contends that the need to change the direction of walking between a worker's starting point and a ladderway access point is not a sufficient "offset" to satisfy the regulation. The brief emphasizes the phrase "so offset that a person cannot walk directly into the opening." The contention is not persuasive. The useful understanding of "offset" here is that it is an arrangement or structure that requires at least one change of direction between a worker's starting point and the ladderway access – because a change of direction would mean that the employee is intentionally approaching and gaining access to the ladderway, and is not doing so inadvertently (these being criteria for proper "offset" which the Division adopted in its initial post-hearing brief). At the elevator platform, one change of direction is required. On the two other platforms adjacent to the same ladder, more than one change of direction is needed. Applying the definition of "offset" that is adopted here, these are sufficient to satisfy the requirement.

#### *The engine room platform*

This platform, and the engine and generator room that stands on it, are seen in Exhibit 7, pages 22 and 23. A ladder ascends from ground level to the platform. A fence-like barrier with two parallel rails, one of which appears to be approximately waist-high, runs the length of the platform, adjacent to the engine-generator room. This barrier extends beyond the left end of the engine room, continues to the corner at the end of the platform that is nearest the ladder access point, and then extends a short distance along the short dimension of the platform, as seen on page 23. The barrier appears to end at the point where a worker may gain access to the ladder leading to the ground (or to a different ladder that extends upward).

The Division presented no evidence concerning access to the ladder from this platform, other than Rachlis's brief general answer cited above, which is too weak in itself to support a finding.<sup>10</sup> It appears that in order for a worker who worked at the engine room to gain access to

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<sup>10</sup> It is not clear from the evidence that the Division examined the platform and ladderway access from a position on the platform, or above it, or from any point above ground level. Examining the ladderway access from either on the platform or from above it would be necessary to provide to a viewer, including a photographer, a clear view of the access conditions.

the ladder leading to ground level, the worker would walk to the “left” end of the platform, and then take a right turn for one or two steps, and then turn to his left, to gain access to the ladder. There is no photograph in evidence that provides a clear view of the access point. In the absence of a useful photograph of the key area, and in the absence of specific testimony about a worker’s means of access to the ladder, there is insufficient evidence to support the Citation 2 contention with respect to the engine room platform.

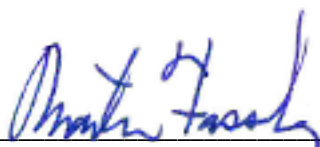
### Conclusion

There is insufficient evidence that the Employer violated section 3212, subdivision (a)(2)(A), with respect to any one of the four platforms that were the subject of the citations.<sup>11</sup>

### Order

Citation 2 is vacated, and no penalty is to be assessed against the Employer.

Dated: 07/13/2020

  
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Martin Fassler  
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 sections 6616, 6617, 6618 and 6619, and with California Code of Regulations, title 8, section 390.1. **For further information, call: (916) 274-5751.**

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<sup>11</sup> In its post-hearing briefs, the Employer offered several additional arguments in opposition to the citation – e.g. that the Division failed to prove employee exposure to the cited conditions, and that compliance with the safety order was impracticable. Those arguments were not considered here. In addition, the Employer’s post hearing brief referred to the history of the adoption of an amendment of section 3212. As that evidence was not presented during the hearing, it was not considered here.