BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1303471**
SSA TERMINALS (OAKLAND), LLC. **dba SSA MARINE TERMINAL** **1717 MIDDLE HARBOR ROAD** **OAKLAND, CA 94607** **Employer**	**DECISION**

Statement of the Case

SSA Terminals (Oakland) LLC ("the Employer") operates a marine terminal and stevedoring 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 operated by the Employer at 1999 Middle Harbor Road in Oakland, following an injury accident involving the Employer's employee on February 26, 2018, and another accident involving a different employee 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.[1] On the same date, as a result of inspection number 1303471, the Division issued three citations to the Employer. The "Citation 1" issued in the two inspections were identical to each other and the "Citation 2" in the two instances were identical to each other. Citation 3 in inspection number 1303471, set forth an allegation that was not among the allegations in inspection number 1303461. Before commencement of the hearing, the Division moved to consolidate the two cases, and to dismiss duplicative allegations, by withdrawing Citation 1 in case number 1303461 and withdrawing Citation 2 in case number 1303471. The Employer did not oppose the motions and the motions were granted by the undersigned Administrative Law Judge.

As a result of that Order, two citations remain in this case: Citation 1 alleges that the Employer violated regulation section 3277, subdivision (d), by using rubber tire gantry ("RTG") cranes that had fixed ladders on which the lowest rung on each ladder was improperly high above ground level. Citation 3 alleges two instances of a violation of section 3278, subdivision (a), by the Employer's failure to enforce ladder-climbing safety requirements.

[1] Unless otherwise indicated, all further references are to sections of California Code of Regulations, title 8.

Employer filed timely appeals of all the citations. Employer's appeals contest the existence of the alleged violations, and also asserts numerous affirmative defenses. (See Exhibit 1A). With respect to both citations, the Employer also appealed the classifications and the proposed penalties. In its post-hearing briefs, the Employer argued that it was relieved from liability for Citation 3 because of two affirmative defenses: the unforeseeability defense, also known as the Newbery defense, and the Independent Employee Action Defense.[2]

The consolidated appeals were 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. Corey Friedman, Esq., Staff Counsel, represented the Division. Attorney Joseph Galosic represented the Employer. The parties submitted post-hearing briefs on April 20 and May 15, 2020 and the matter was submitted for decision on June 14, 2020.

Issues

1. Did the Employer fail to ensure that the lowest rung on the fixed ladders of the rubber tire gantry cranes used by the Employer were no more than 14 inches above ground level?

2. Did the Employer ensure that on February 26, 2018, an employee was prohibited from carrying equipment or materials while ascending a ladder, which prevented safe use of the ladder on RTG #13?

3. Did the Employer ensure that on February 26, 2018, an employee was using both hands when climbing up the ladder on RTG #13?

4. Did the Employer establish all the elements of the Independent Employee Action Defense with respect to the employee who was climbing a ladder on RTG #13 on February 26, 2018?

5. Did the Division establish a rebuttable presumption that Citation 3 was properly classified as Serious?

6. Did the Employer rebut the presumption that Citation 3 was properly classified as Serious?

7. Did the violation describe in Citation 3 cause a serious injury?

8. Are the penalties proposed for Citations 1 and 3 reasonable?

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

Findings of Fact

1. The ladders attached to the Employer's RTG's are fixed ladders.

2. The first rung above the ground on RTG #13 was 16 inches above ground level.

3. The first rung above the ground on RTG #20 was 17 ¾ inches above ground level.

4. On February 26, 2018, employee Renard Berry (Berry) was climbing the ladder on RTG #13 while carrying two objects that prevented his safe use of the ladder.

5. On February 26, 2018, employee Renard Berry was climbing the ladder on RTG #13 while using both hands.

6. The training that the Employer provided to Berry with respect to operation of RTG's did not include training in safety matters respective to his particular job assignment.

7. At the time of his injury accident Berry caused a safety infraction but he was not aware that it was contrary to the employer's safety requirements.

8. The Employer did not assert in its appeal the "Newbery" affirmative defense.

9. There was a realistic possibility that death or serious physical form could result from the actual hazard created by the violation.

10. The Employer did not provide adequate RTG training to Berry.

11. No Employer foreman or supervisor made any effort to supervise or oversee Berry's ladder ascent on February 26, 2018.

12. The violation described in Citation 3 caused Berry's serious injury.

13. The penalty calculations for Citation 1 are reasonable.

14. There is sufficient evidence to support a "high" likelihood rating for Citation 3.

15. There is insufficient evidence to support a "high" extent rating for Citation 3.

Analysis

1. Did the Employer fail to ensure that the lowest rung on the fixed ladders on the rubber tire gantry cranes used by the Employer were no more than 14 inches above ground level?

Section 3277 applies to "Fixed Ladders." A fixed ladder is defined in subdivision (b): "A fixed ladder is a ladder permanently attached to a structure, building or equipment." Subdivision

(d)(2) provides: "The distance between the top surfaces of rungs, cleats and steps shall not exceed 12 inches and shall be uniform throughout the length of the ladder." There are two exceptions to this requirement. The second exception is relevant here: "2. The vertical distance of the first rung from ground level may be as high as 14 inches." Thus, with respect to the lowest rung on each rubber tire gantry crane ladder, the distance from ground level to the top of the first rung must be no more than 14 inches.

Citation 1 set out the following factual allegations:

> Prior to and during the course of the inspection, including but not limited to on March 20, 2018 the employer failed to ensure that the distance from ground level to the top surface of the first rung on the fixed ladder used by mechanics to access the elevator platform of the Rubber Tire Gantry Cranes has a height of no more than 14 inches.
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> Instance 1) RTG #20
> Instance 2) RTG #13
> Instance 3) Eleven other RTG's of same model and configuration at work at the yard.

When a citation alleges more than one instance of a violation of a safety order – as Citation 1 does here - if just one instance is proven, that is enough to sustain the citation. *Petersen Builders Inc.*, Cal/OSHA App. 91-052, Decision After Reconsideration (Jan. 24, 1992), footnote 4; *Gateway Pacific Contractors Inc.* Cal/OSHA App. 10-1502 (October 4, 2016), footnote 11. Thus, if the evidence here establishes that the distance from ground level to the top surface of the first rung on one fixed ladder, **on either** RTG #20, or RTG #13 is more than 14 inches, the citation will be sustained.

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.[3]

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 high. After stepping off the ladder, the operator then takes an elevator to ascend the remaining distance to the operating cab. The mechanics who service and maintain the crane and its various components ascend in the same way, as needed. The Employer has 13 RTG's at the Oakland International Terminal.

Rachlis, who was assigned to investigate the circumstances related to the two fall incidents, measured the distance from ground level to the lowest step of the RTG ladders on each of the two cranes from which the employees fell. On RTG #13, the distance from ground level to the top rung was 16 inches. At RTG #20, that distance was 17 ¾ inches.

[3] Transtainer is the name of the company that manufactures and sells the RTG's used by the Employer.

The ladders on the RTG leading from the ground to the elevator level are "fixed ladders" within the meaning of section 3277, subdivision (b), as they are permanently attached to equipment. Therefore, subdivision (d)(2) applies to these ladders. The relevant provisions of subsection (d), properly understood, require that the distance between the ground level and the lowest rung on a fixed ladder shall be no more than 14 inches. Here, the measured distance in each instance was more than 14 inches, and therefore each arrangement was a violation of section 3277, subdivision (d)(2).

The Employer did not dispute the accuracy of Rachlis' measurements of the key distances – that is, the distance from ground level to the top of the first rung on RTG #13 and RTG #20 - and presented no contrary evidence. Rather, the Employer's post-hearing argument against a finding of a violation with respect to these ladders misreads the language of the subdivision, and focusses, incorrectly, on the 12-inch distance required between rungs which applies to rungs *other than the first rung off the ground.* The Employer contends:

> In order to prevail, the Division must prove the distance between the top surfaces of rungs, cleats and steps on RTG #20, RTG #13 and eleven other RTG's exceeded 12 inches. . . . Since the allegation is that the top rungs do not exceed 14 inches, and fails to allege that the fixed ladder rungs exceeded 12 inches the citation must be dismissed.[4]

This argument fails for two reasons. First, it incorrectly ties together section 3277, subdivision (d)(2)'s *two separate requirements*. That is, the subdivision requires the distance between *most* pairs of rungs to be no more than 12 inches, measured from the top of one rung to the top of the other. *Separately*, it requires the distance from ground level to the top of the first (lowest) rung to be no more than 14 inches. The Citation alleges that the distance from ground level to the top of the lowest rung was more than 14 inches on each RTG. The Citation alleges nothing about the distances between the other rungs. The Division had no obligation to prove anything about these other rungs or the distances between them. Therefore, the evidence that establishes that the lowest rungs on RTG #13 and #20 were more than 14 inches above ground level is sufficient to establish that each ladder was in violation of the safety order.

However, the evidence is insufficient to establish that the other, unidentified, RTG's in use at the yard also had first rungs that were too high off the ground. Rachlis had been told by Employer representatives that the 13 RTG's in use by the Employer were purchased from a single manufacturer, and were identical in dimensions and operations. Rachlis did not measure ladder dimensions of these others. Significantly, the ground-to-rung distances on the two RTG's that Rachlis measured were different from each other - one was 16 inches above ground level, while the other was 17 ¾ inches above ground level. While this is not a large difference, it is a significant difference when the standard is defined in inches, and casts doubt on the general contention that the 13 cranes are identical in this respect. In addition, the Employer's Oakland terminal crane manager Ken Larson testified that over the years of the Employer's use of the RTG's, there have been occasional collisions between the RTG's and forklifts, resulting in some

[4] The references here to the size of the rungs are mistaken; the measurement that the safety order refers to is the distance between rungs, and perhaps that is what the Employer intended to refer to in this sentence.

damage to the fixed ladders. Although the Employer makes repairs pursuant to manufacturer's recommendations, it is not always possible or practical to repair the rungs to an exact height.

As the key distance was measured on only two RTG's, and there is some reason to believe this distance varies from one machine to another, there is insufficient evidence to find that cranes other than RTG #13 and RTG #20 had bottom rungs more than 14 inches above ground level.

However, since two of the instances referred to in Citation 1 were proven, the citation is upheld.

2. Did the Employer ensure that on February 26, 2018 an employee was prohibited from carrying equipment or materials while ascending a ladder, which prevented safe use of the ladder on RTG #13.

Section 3278 provides, in relevant part, as follows:

Use of Fixed Ladders.

(a) Employees shall:

(1) Be prohibited from carrying equipment or materials which prevent safe use of ladders.

(2) . . .

(3) Always use both hands when climbing up or down the ladder.

The factual allegations of Citation 3 are:

Prior to and during the course of the inspection, including, but not limited to, on March 22, 2018, the employer did not ensure that an employee climbing a fixed ladder on Rubber Tire Gantry (RTG) #13 complied with T8CCR 3278(a) in the following ways:

INSTANCE 1) the employee was not prohibited from carrying equipment or materials, which prevented safe use of the ladder;

INSTANCE 2) the employer did not ensure the employee was using both hands when climbing up the ladder.

As a result, the employee suffered a serious injury when he fell approximately 18 feet to the ground level below.

As noted above, the Appeals Board has consistently held that if a citation alleges two separate violations of a specific safety order by referring to two instances, the Division carries its burden of proof if it proves either of the two allegations. *Petersen Builders Inc., supra*, and *Gateway Pacific Contractors Inc. supra.* Therefore, to prove a violation of section 3278 as alleged by Citation 3, the Division had to prove that on March 22, 2018, an employee of the Employer was climbing a fixed ladder while carrying equipment or materials which prevented safe use of the ladder, thus violating subdivision (a)(1); **OR** that on that date the employee was not using both hands while climbing the ladder, thus violating subdivision (a)(3).

There is no Appeals Board decision construing either of the two designated subdivisions of section 3278.

On February 26, 2018, Renard Berry (Berry) began his shift around 6:00 pm. On each shift at the OICT, the Employer assigns two longshoremen to work on each RTG. On each shift, one of the two workers assigned to an RTG begins the shift as the machine operator in the elevated cab, while the other employee works on the ground, acting as a safety lookout, communicating with the operator by radio and directing any truck traffic that is in the vicinity of the RTG. The two workers trade positions more than once during a shift - typically after lunch and after work breaks.

That night, Berry was assigned by foreman Robert Freitas to work on RTG #13, where he was paired with another longshoreman, Eric Villeggiante. Berry initially worked as the ground person for RTG #13.

At some point, Employer foreman Danny Moore directed Berry to move another RTG from one location to another. Berry left his ground position with RTG #13, went to the other RTG, moved it, and then took his regularly scheduled work break. After the break, driving his own vehicle, Berry returned to RTG #13. For this shift, he was scheduled to be the crane operator.

When Berry arrived at the RTG, he parked his vehicle, "grabbed a few things," and began climbing the ladder that led to the elevator platform. While climbing, he held in his left hand a radio, holding it by its antenna (which he described as being no thicker than a typical pen); and a water bottle, which he was holding under his left arm. He reached up for rungs with his right hand, reaching up two rungs each time. His statement to Rachlis seven weeks after the accident was, "I grab up two rungs at a time - grab with right [hand]; slide up the rail. . . That's three points of contact." His testimony at the hearing was:

> I had a radio in my left hand and it had a long antenna on it that was maybe the width of this little pen here, in which case I held the antenna in one hand and I had a bottle of water that was under my arms - my left arm, and I proceeded to climb accordingly . . .
>
> I always had, number one, two feet on the stairs. . . . and I always had one hand on the actual ladder as well.

One other person, Villeggiante, observed Berry climbing the ladder, but neither party called Villeggiante to testify.[5]

Berry testified that as he was taking his last steps on the ladder, approaching the elevator platform, he reached up (presumably with his right hand) to grip a rung two or three rungs up from where his right hand had gripped a lower rung. On cross-examination, he testified that he reached two rungs up. In his statement to Rachlis in May 2018, Berry said he "went past 2 rungs, grabbed for three rungs up." In explaining what happened next, leading to his fall, he said "My hand slipped off the rung like there was nothing there." He then fell to the ground.

With respect to his hand slipping off a rung, Berry testified that he believed there may have been a slippery substance of some kind on the rung that he reached for, which caused his hand to slip. In addition, Berry testified that just as he reached the last step of the ladder before the platform, he heard Villeggiante say something to him on the radio, and hearing this may have distracted him.

Berry's testimony is the only direct evidence about the manner in which he was climbing the ladder on February 26. That is, he was holding the radio antenna with his left hand, and had a water bottle under his left arm. As he climbed, he reached for higher rungs with his right hand, while sliding his left hand along the left rail of the ladder. On this point, his testimony during the hearing is generally consistent with his explanation to Rachlis during the Division investigation. Although the climbing method he describes was unconventional, his description is not inherently implausible, given that (as he acknowledged) he was holding a water bottle under his arm and gripping a radio antenna with his left hand.

Both Superintendent Taniela Maka (Maka) and foreman Robert Freitas (Freitas) arrived at the fall site within a few minutes after Berry's fall. Both inspected the rungs on the ladder and neither observed any slippery material on the rungs. In addition, the rungs had grip tape which prevented slipping.

The Employer casts doubt on Berry's credibility in his description of his actions because of the absence of any slippery material on the rungs, and because Maka and Freitas found on the ground near Berry a water bottle and a bag of chips, but no radio. None of this testimony however, would justify rejecting Berry's description of his climbing method. A bag of chips could have been discarded to the ground by any one of a number of employees or truck drivers, on the day of the fall or earlier; its presence does not require an inference that Berry was carrying it as he ascended. Berry's testimony that he was carrying a radio with him is consistent with other testimony that the Employer issues a radio to every RTG operator each shift. Its absence from the immediate fall area when the two supervisors arrived was not explained, but does not point to rejecting Berry's testimony on this point. Berry's testimony that he was holding a radio in the manner described does not cast him in a positive light, inasmuch as that was in violation of

[5] Berry testified at some length that he had repeated verbal conflicts with Villeggiante on the evening of February 26, 2018, before he fell from the ladder. As Villeggiante did not testify, any possible enmity between the two men is not relevant.

the Employer's safety rules, as explained below.[6] Thus, in the absence of other evidence, there is no reason to view this testimony as contrived and self-serving.

The Division's contention that Berry's actions when climbing the ladder on February 26, 2018, violated provisions of section 3278, subdivision (a) (carrying objects which prevent safe use of ladders) relies on opinion testimony given by Rachlis. Rachlis has extensive experience climbing ladders and overseeing other workers climbing ladders. He worked in the painting industry for many years, initially as an apprentice painter. He eventually became the co-owner and then sole owner of a painting company. For 20 years he held a C-33 license issued by the Contractors State Licensing Board as a painting and decorating contractor. During that period in the painting industry, he frequently used ladders and supervised workers using ladders, both fixed ladders and portable ladders. Rachlis' experience and knowledge are sufficient to establish his qualification to offer expert testimony about the safe way to climb fixed ladders.

Rachlis' testimony on this point was the following:

> [H]e [Berry] was carrying equipment with the hand he was supposed to be using to climb the ladder.
>
> Because the safe way to climb this ladder is to grasp a rung and step up to the next one and grasp that rung. What he did was grasp the side rail – and – and not necessarily grasp it – I don't know if he grasped the side rail with four finger or if he grasped it with his thumb or if he reached his arm around it – like reached his fist around it to just hold him back. I don't know that. But that is not holding on to a rung
>
> [T]here's no safe way to climb a ladder with something in your hand, because it impedes your grip and in this case, it's demonstrated when . . . he said that he grabbed for that rung and his hand went through the rung. We know his hand didn't go through the metal, but it felt like it was going through metal because he said it was slippery. If he had maintained a grip on it, on the rung, the other hand, he would have had a chance to catch himself. .
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> For a safety person, three points of contact in a discussion of climbing ladders means maintaining grips, and I didn't believe he could maintain a grip while he had something in his hands.

The Employer argues that if Berry's description is accepted as accurate, then Rachlis' testimony should not be credited, because his analysis rejects Berry's description. However, that characterization of Rachlis' analysis is not accurate, because Rachlis accepted Berry's description of what he was holding and how he climbed. Rachlis concluded that was an unsafe method to climb the ladder, because carrying the two objects made it impossible to climb safely.

[6] The Employer terminated Berry's employment after the injury accident, for violating company rules.

Alternatively, the Employer contends that if Berry's testimony is to be "disregarded" on this point, his testimony cannot be accepted for any other purpose. Berry's testimony is not disregarded - it is credited.

The evidence - Berry's descriptive testimony and Rachlis' expert testimony - establishes that Berry was climbing the ladder while holding in his left hand and left arm equipment or materials which prevented safe use of the ladder, and thus his actions were in violation of section 3278, subdivision (a)(1).

Although Berry's testimony was that in his opinion he was climbing the ladder properly, Rachlis' opinion is more persuasive, is consistent with common sense (climbing a ladder while trying to hold one object in a hand, and another object under the same arm is inadvisable in all circumstances) and is borne out by the accident that befell Berry. Opinion testimony is sufficient to establish a violation of a safety order. *Capri Manufacturing Co., BAS Corporation, Cal/OSHA App.* 83-869, Decision After Reconsideration (May 17, 1985).

The evidence does not support a finding that Berry was climbing the ladder in a way that violated section 3278, subdivision (a)(3). To establish a violation of that safety standard, the Division would have to show that Berry did not "use both hands when climbing up . . . the ladder." The Appeals Board does not insert additional requirements into safety orders that the Standards Board has adopted. *Alpha Construction Company Incorporated,* Cal/OSHA App. 1180499, Decision After Reconsideration (May 29, 2019); *United Parcel Service,* Cal/OSHA App. 315347864, Decision After Reconsideration (Sept. 6, 2017). Berry's uncontradicted testimony was that he was using both his right hand and his left hand while climbing the ladder, although he was not using his left hand properly. But subdivision (a)(3) says nothing about a specific**,** proper use of both hands, and therefore no violation of this subdivision will be found.

Inasmuch as the Division has established one violation of section 3278, subdivision (a), the citation is sustained.

3. Did the Employer establish the Independent Employee Act Defense with respect to the alleged violation of section 3278?

The Employer asserted the Independent Employee Act Defense (IEAD) with respect to each alleged violation. To establish the IEAD, an employer must show: (1) the employee who acted in a way that was in violation of a safety order was experienced in the job being performed; (2) the employer has a well-devised safety program that includes training in safety matters respective to their particular job assignment; (3) the employer effectively enforces the safety program; (4) the employer enforces a policy of sanctioning employees who violate the safety program; and (5) the employee caused a safety infraction that he or she knew was contrary to the employee's safety requirement. *Home Depot USA, Inc.,* No. 1011071, Decision After Reconsideration (May 15, 2017), and cases cited therein.

IEA defense element 2:

The Employer, through the employer association Pacific Maritime Association (PMA), provides extensive training for employees who are assigned to work for longshoring companies in Oakland and elsewhere on the Pacific coast. Exhibit A is a lengthy list of training courses that Berry had been assigned to and attended, starting in November 2004, with the last course in August 2017. The list includes General Safety Training in December 2004, and four other dates, most recently July 2017. It includes specialized job training: lashing training in February 2005; semi-tractor training in December 2015 and semi-tractor re-evaluation in July 2007 and five other dates; ammunition handling training in February 2009 and three other dates. It includes no reference to training for the operation of RTG cranes.

Employer foreman Freitas testified that PMA has a three- or four-day training program for RTG operators, although he noted that it is not required of operators. Moreover, neither Freitas nor Samantha Fennell, Northern California Training and Accident Prevention Safety Manager, who testified at length about PMA training generally and Berry's training as reflected in Exhibit A, testified that Berry had attended or completed the course. There is no evidence that Berry began or completed the course.

Berry testified that he had been trained to operate the RTG's by Vernon Bardel (Bardel), who Berry described as a very experienced machine operator, and a member of ILWU (International Longshore and Warehouse Union) Local 10. Berry testified that Bardel trained him at the SSA facility, and that this training came about because Berry asked Bardel for the training. The training consisted of Berry observing Bardel operating a transtainer, and then Bardel watching while Berry operated the machine. Neither party called Bardel to testify. No other witness identified Bardel or described any training responsibility that he might have had on behalf of the Employer or PMA. Other than Berry's brief testimony, there is no evidence of the content or length of Bardel's training of Berry.

Ladder safety is one of numerous topics included in the one-day "General Safety Training" course provided for longshoremen. "Ladder safety" takes up one-half page of the 93 pages of instructions and quizzes in the General Safety Training book that accompanies the training. Safety rules applicable to longshore work at the Oakland terminal are set out in the "Pacific Coast Marine Safety Code," (PCMSC) a list of several hundred rules that are negotiated by the ILWU and the Pacific Maritime Association, representing the industry employers. The safety rule booklet is distributed to all workers assigned to work for SSA and the other employers at the Oakland terminal. The rules referring to ladder climbing are similar, although not identical to, the cited provisions of section 3278. These rules are considered below.

Ascending and descending the ladder that connects ground level and the elevator platform are integral elements of the RTG operator job. Taking into account routine work breaks during the work day and a break for lunch, each operator ascends and descends that 20-foot long ladder at least twice each work shift. Training about the proper way of climbing this ladder, with its unusual height, would normally be included in training for the operator position.

Based on the evidence summarized here, there is insufficient evidence to establish that the Employer completed adequate training of Berry for his transtainer operator position. Although the Employer provided to Berry and others basic ladder training as part of the General Safety Training course, in light of the use of this ladder, unique to the transtainer operator, presenting its own dangers because of its height, that training is not adequate to satisfy element 2 of the IEA defense.

IEA element 5:

There is insufficient evidence to establish that on the date of his injury accident Berry caused a safety infraction and that he knew that his actions were contrary to the employee's safety requirement.

The Employer's safety manual, the PCMSC booklet, includes two rules specifically about ladder climbing. PCMSC Section 6 is entitled, "Duties of Employees and General Safety Rules." Within section 6, Rule 654 says:

> Both hands shall be used when climbing all ladders. Articles which are too large to go into pockets or on belts shall be raised or lowered in a safe manner.

> Section 8, entitled "Duties of Crane Operators" begins: "The safety duties of crane operators are:"

Rule 806 provides:

> He shall keep both hands free when going up and down ladders. Articles which are too large to go into pockets or belts shall be lifted to or lowered from the crane by handline (except where stairways are provided).

These rules are included in the PMA general safety training book and discussed during the general safety training class.

Despite the inclusion of these rules in the training materials and the safety booklet, Berry testified that he had never seen either of those rules. According to Berry's testimony, his understanding of safe ladder climbing rules was that the worker climbing a ladder should always have three points of contact with the ladder - two feet and one hand or two hands and one foot.

In cross-examination, Berry was asked "when, if ever, were you told that it was not okay to carry things while climbing a ladder?" His answer was: "To my knowledge, I don't recall ever being told this." The following questions and answers were:

Q. And how often had you ascended ladders at SSA in this fashion?

A. All the time.

Q. And over how many years?

A. Over my entire time of operating which has been minimum one year but it could be going on two years.

Q. And how often did you see anyone else climb while . . . climb ladders at SSA while carrying things in their hands?

A. All the time as well.

Q. And over how many years did you observe that at SSA?

A. On many years, even previous to when I started operating

When asked what might have contributed to his fall, he referred to his RTG partner Villeggiante calling him on the radio shortly before his fall, and the (possible) slippery substance on one of the rungs.

Counsel for the Employer asked:

Q. Other than those two things, was there anything else that you could think of that contributed to your fall?

A. No

Q. Did you do anything wrong to cause the fall?

A. No

The Employer argues that Berry's testimony on this point cannot be credited; that because PMA, on behalf of SSA and other waterfront employers, had provided specific instruction about proper ladder-climbing methods, it must be inferred that Berry understood what the employer's ladder-climbing rules were and chose to violate the rules. But the more likely understanding of Berry's testimony is that Berry did not understand, or accept, or absorb the PCMSC ladder rules, or did not understand how to apply them correctly.[7] All that he took from the safety training was a basic understanding of a three-point rule - and he believed that by grasping one ladder rail with his left hand, and sliding it upward as he climbed was adequate safety compliance, even if he was holding objects with one hand or arm. This testimony does not support a finding that "the employee caused a safety infraction that he or she knew was contrary to the employee's safety requirement," as element 5 of the IEA defense requires.

[7] The safety booklet includes hundreds of rules, in 17 chapters, along with several Addenda and Memoranda of Understanding between the ILWU and the PMA. As the Division noted in its post hearing memo, the General Safety Training consisted of 11 modules in a one-day session, suggesting that each rule or group of rules receives a limited focus or explanation. Among the other subjects that are considered at greater length in the training book are back safety, heat stress, avoidance of drugs and alcohol, emergency responses, handling hazardous and dangerous materials, working in confined spaces, use of personal protective equipment, and vehicle operations.

In an Appeals Board decision cited by the Employer, the Board held there was sufficient evidence to find in an employer's favor on element 5 of the IEAD, despite the absence of an acknowledgement by an employee of incorrect conduct. *Marine Terminals Corporation*, Cal/OSHA App.95-0896, Decision After Reconsideration (Sept. 28, 1999) also involved a marine terminal longshore operation. In that case, a truck container was to be loaded onto a ship. The container was locked onto the truck by a locking pin. During the loading operation, one dockworker failed to fully release the locking pin at the front end of a container; another worker failed to notice that one of the lock pins was still engaged, and mistakenly signaled the crane operator to lift the container. The crane lifted the container, with the truck chassis still attached. The pin gave out, and the truck fell six feet onto the dock. The driver in the cab was seriously injured.

In *Marine Terminals Corporation,* the Board found that the Employer provided enough evidence to satisfy all the elements of the IEA defense, including element 5, despite the absence of direct evidence from the two employees who had been found to have violated safety standards. The two employees had not been called to testify as witnesses. The Board relied on this analysis:

> The connection between releasing the locks, loading the container and employee safety is apparent. The rule that the locks must be released is a fundamental, published rule. . . . The principal job of a swingman in chassis to ship loading operations is to release the locks. Loading crews regularly perform chassis-to-ship loading operations. Both swingmen had substantial loading operation experience. They could not have gained experience without learning and following the rule.
>
> More direct evidence might have simplified the task of determining if the swingmen knew of the rule. However, in the Board's view the accumulation of circumstantial evidence presented by Employer has sufficient probative effect to support the ALJ's finding that the swingmen, and the rest of the crew, knew that failing to release the locks was a violation of Employer's safety rules.

Here, on the other hand, the employee who violated a safety standard testified that he was not aware of the specific rules, that he did not believe he had violated a rule, and that he had acted in the same way in the recent past. Further, contrary to the circumstances in *Marine Terminals*, this was not a circumstance in which a violation of the rule would undoubtedly result in an immediate and obviously dangerous situation. Here, an employee's decision to climb a ladder while holding objects in his hand, even if done repeatedly, might not lead to an injury accident, or even to an obviously dangerous event.

Although the evidence in *Marine Terminals* was strong enough to support an inference that the employees who took the incorrect actions were aware of the relevant safety rule, in this case, the direct evidence from the employee is that he was not aware of the applicable rules. Although the Employer had offered training on this point, the evidence supports a finding that the employee did not understand it or absorb it. Therefore, there is insufficient evidence to

establish element 5 of the IEA defense. Accordingly, Employer did not meet its burden to establish the IEA defense.

4. Did the Employer establish the "Newbery" or "unforeseeability" defense with respect to the alleged violation of section 3278?

This judicially-created defense was first recognized by the Court of Appeal, in *Newbery Electric Corporation v. Occupational Safety and Health Appeals Board* (1981) 123 Cal. App.3d 641, and was later recognized and described succinctly by *Gaehwiler v. Occupational Safety and Health Appeals Bd.*, (1983) 141 Cal. App.3d 1041, 1045. That court described the "Newbery" or "unforeseeability" defense in this way:

> A violation is deemed unforeseeable, therefore not punishable, if none of the following four criteria exist:
>
> (1) that the employer knew or should have known of the potential danger to employees; (2) that the employer failed to exercise supervision adequate to assure safety; (3) that the employer failed to ensure employee compliance with its safety rules; and (4) that the violation was foreseeable.

Appeals Board Rule of Practice and Procedure section 361.3, "Issues on Appeal," provides in relevant part as follows:

> The issues on appeal shall be limited to those arising out of the facts set forth in the Division action, and the grounds set forth in the appeal.
>
> (a) . . . .
>
> (b) Affirmative defenses.
>
> (1) An affirmative defense is a justification or excuse that, if proved by appellant, relieves the cited employer of all or some of the responsibility for the alleged violation. An affirmative defense must be timely raised by appellant.

An issue that is not raised by an employer before or during a hearing is waived, and the Appeals Board need not rule on that issue. *Western Paper Box Company*, Cal/OSHA App. 86-812, Decision After Reconsideration (December 24, 1986); *California Erectors, Bay Area Inc.*, Cal/OSHA App. 93-503, Decision After Reconsideration (July 31, 1998).

Here, the Employer did not raise the affirmative defense in its appeal of this citation. The Employer's appeal listed 23 affirmative defenses, but none of them referred to "unforeseeable," or to *Newbery* or *Gaehwiler*, or to any other phrase that would convey the substance of the defense, as it has been understood by the Board, the Division, and the public since the 1981 *Newbery* decision. One affirmative defense contends that the citations "are barred on the grounds of lack of employer knowledge, in that it did not, and could not, with the exercise of

reasonable diligence, know of the existence of the alleged violation and/or the presence of the alleged violation." That language is taken directly from Labor Code section 6432, subdivision (c), which describes the kind of evidence that an employer would have to present to prevent a violation from being classified as Serious. Thus, inclusion of this wording in the list of affirmative defenses is not adequate to put the Division on notice that the Employer intended to present the "Newbery" or foreseeability defense.

For the reasons described above, the "Newbery" or "unforeseeability" defense was not asserted prior to the hearing and will not be considered here.

5. Did the Division establish a rebuttable presumption that Citation 3 was properly classified as Serious?

The Division classified the violation of section 3278, subdivision (a), as Serious. Labor Code section 6432 sets forth the framework for determining whether a citation has been properly classified as Serious. Labor Code section 6432, subdivision (a), provides, "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." As used therein, the term "realistic possibility" means that it is within the "bounds of reason," and "not purely speculative." (*Langer Farms, LLC.* Cal/OSHA App. 13-0231, Decision After Reconsideration (April 24, 2015).)

"Serious physical harm" is defined by the same Labor Code section to mean: "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. . . ."

To meet its burden of establishing that a violation is properly classified as Serious, the Division must introduce at least some satisfactory evidence demonstrating the types of injuries that could result and the possibility of those injuries occurring. (*MDB Management,* Cal/OSHA App. 14-2373, Decision After Reconsideration (April 25, 2016).)

Berry fell from near the top of a 19-foot ladder on to a roadway. He suffered several severe injuries, including fractures in his back, ribs, pelvis and one foot. He was hospitalized for three weeks. Rachlis testified credibly about the realistic possibility that death or serious injury could result from the actual hazard – falling approximately 19 feet from the ladder - posed by the violation, the improper climbing method. Clearly, there is a realistic possibility that death or serious physical harm would result from a violation of the safety order regarding ladder climbing, when climbing a ladder of this height. The evidence establishes the rebuttable presumption that the citation was properly classified as Serious.

6. Did the Employer rebut the presumption that Citation 3 was properly classified as Serious?

Labor Code section 6432 subdivision (c), provides that if the Division establishes a presumption that the violation was serious, pursuant to subdivision (a),

> [T]he 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. The employer may accomplish this by demonstrating both of the following:
>
> (1) The employer took all the steps a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation, taking into consideration the severity of the harm that could be expected to occur and the likelihood of that harm occurring in connection with the work activity during which the violation occurred. . . .
>
> (2) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered.

To rebut the presumption that the Serious classification is justified, the Employer is required to present evidence to establish that it has satisfied both element (1) and (2) of subdivision (c). *Mountain F. Enterprises,* Cal/OSHA App No. 1113595, Decision After Reconsideration (Feb. 14, 2018); *International Paper Company,* Cal/OSHA App. 14-1189, Decision After Reconsideration (May 29, 2015).

In both *United Parcel Service,* Cal/OSHA App. No 1158285, Decision After Reconsideration (Nov. 15, 2018) and *Mountain F. Enterprises, supra,* the Appeals Board held that the employer had provided insufficient evidence to rebut the presumption that the Serious classification was justified because of the employer's failure to train employees about one specific aspect of the employee's job. In *Mountain F. Enterprises,* the employer had failed to train employees, including one employee who was new, about communication methods on a particular day. In *United Parcel Service,* the employer had failed to train employees who loaded and unloaded heavy cargo containers from aircraft to avoid trying to loosen certain locks that held down the containers while in transit.

Here, the Employer did not require or provide systematic, structured training for Berry with respect to operating RTG's. An employee cannot operate the crane until after he first ascends the ladder, then boards the elevator to the cab. That is, safe climbing of the ladder (and descent on the ladder to the ground) several times each shift are essential elements of the assignment. Inasmuch as the two operators assigned to each RTG on each shift exchange positions more than once each shift, each operator must ascend the ladder at least twice each shift, and descend the same ladder at least twice each shift. Thus, comprehensive training with respect to operation of the RTG would have included instruction on climbing the specific RTG 19-foot ladders from the ground to the first elevated level.

Although the PMA general safety training class includes a brief mention of ladder use, there is no evidence that either the general safety training or any specialized training offered by either PMA or the Employer focused on safety precautions to be taken with the unusually long ladders on the RTG's. Therefore, the Employer has not proven that it "took all the steps a reasonable and responsible employer in like circumstances should be expected to take, before the

violation occurred, to anticipate and prevent the violation, taking into consideration the severity of the harm that could be expected to occur," as required by Labor Code section 6432 subdivision (c), paragraph (1).

In other cases, the Board has found that an employer's failure "to exercise supervision adequate to ensure employee safety is equivalent to failing to exercise reasonable diligence." *RNR Construction Inc.*, Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017). In that case, although the Employer presented evidence of its regular supervision practices, at the time of the violation both the relevant supervisor and the foreman were otherwise occupied, and were not present to exercise the supervision and oversight that was needed. The Board held that it was incumbent upon the employer to provide adequate supervision, or to delay the activities that presented potential hazards.

Here, Freitas and Maka both testified that foremen and superintendents circulate regularly through the Employer's yard, in assigned vehicles, to observe the work taking place. In this instance, Freitas, who initially assigned Berry to work with Villeggiante, knew Berry was relatively inexperienced in operating RTG's. Freitas, in fact, had removed Berry from the operator position soon after he was initially assigned to it, because he had observed Berry's shortcoming in operating the machine. He later returned Berry to the operator position although he did not testify about what he had seen to reassure himself of Berry's improved ability.

Berry testified that during the first portion of the night shift on February 26, he observed his "partner" assigned to RTG #13, Eric Villeggiante, ignoring Berry's instructions from the ground and operating "recklessly," in Berry's view. Berry informed the supervisor Danny Moore, who was parked in his vehicle near the RTG, that Villeggiante was ignoring Berry's instruction and operating recklessly. Moore told Berry he would speak to Villeggiante about these problems. Berry testified Villeggiante continued to operate unsafely after his conversation with Moore.

There is no evidence that Freitas and Moore, the two foreman on duty that evening, spoke to each other about the Berry-Villeggiante pairing or about any problems the two were having. Moore was not called to testify.

Freitas testified that if operators who are assigned to work together are not getting along, this would normally require more supervision than most RTG assignments. Also, when a worker has made safety complaints to a foreman, more supervision is likely to be needed, Freitas testified.

Ladder accidents among RTG operators are not common, but are not unknown either. Samantha Fennel, the Northern California Training and Accident Prevention Safety Manager for PMA, testified that the PMA Northern California members report five to ten ladder accidents per year among their RTG operators.

It is impractical and unreasonable for an employer to watch each employee taking each possibly hazardous action. Given the number of RTG's operated on each shift, it would be difficult, although not impossible, for a foreman or supervisor to observe each operator's ladder

climbing. Here, though, there were a number of factors, described above, that pointed to the need for a supervisor's personal observation of the start of Berry's turn as the TRG operator. Neither Freitas nor Moore, nor Taniela Maka, a higher-ranking superintendent on that shift, was present at the RTG as Berry began climbing at the beginning of the second portion of the shift. Any supervisor present at the time would have observed the ladder-climbing problem and could have taken steps to prevent the violation and the injury that followed.

In light of all these circumstances, it cannot be said that the employer proved that it "took all the steps a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation. . . ."

The Employer contends that it has satisfied the requirement of subdivision (c), and rebutted the presumption that the violation was Serious. It cites the provision in regulation 334 that echoes the provision of Labor Code section 6432, but cites only the initial portion of the requirement: "[T]he 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." The Employer does not take account of the provisions that follow, in paragraphs (1) and (2), which must be proven, according to Appeals Board precedent cited above.

As the Employer failed to satisfy the requirement of subdivision (c) (1), it is not necessary to consider whether the Employer satisfied subdivision (c)(2). Accordingly, the Serious classification is sustained.

7. Did the violation described in Citation 3 cause a serious injury?

In Citation 3, the Division alleged that "As a result [of the violation] the employee suffered a serious injury when he fell approximately 18 feet to the ground level below."

Regulation section 336, subdivision (c)(2) provides that "If the employer commits a Serious violation and the Division has determined that the violation caused death or serious injury. . . 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 subdivision (d)(1) of this section." Labor Code section 6302, subdivision (h) provides, in pertinent part:

> "Serious injury or illness" means any injury or illness occurring in a place of employment which requires inpatient hospitalization for a period of in excess of 24 hours for other than medical observation or in which an employee suffers a loss of any member of the body or suffers any serious degree of permanent disfigurement.

Although Citation 3 is not specifically designated as "accident-related" (which is the usual designation on citations issued in cases in which the Division believes the violation resulted in a serious injury or illness), Appeals Board decisions which analyze "accident-related" allegations provide useful precedent. In *United Parcel Service*, Cal/OSHA App. 1158285, Decision After Reconsideration (Nov. 15, 2018), the Appeals Board held:

> In order to sustain an accident-related classification, the Division must demonstrate a "causal nexus between the violation and the serious injury." (*Sherwood Mechanical, Inc.*, Cal/OSHA App. 08-4692, Decision After Reconsideration (June 28, 2012) [other citations omitted]).) In other words, where the evidence indicates that a serious violation caused a serious injury the violation is properly characterized as accident-related. (*HHS Construction*, Cal/OSHA App. 12-0492, Decision After Reconsideration (Feb 26, 2015); *MCM Construction*, Cal/OSHA App. 13-3851, Decision After Reconsideration (Feb 22, 2016).) The Division must make a "showing [that] the violation more likely than not was a cause of the injury." (*Ibid.)* But the Division need not show that the violation was the only cause of the injury. (*Ibid.)*

In this case, as a result of his fall to the pavement, Berry suffered several injuries: he broke two vertebrae, the left side of his pelvis and his right foot. He was hospitalized for three weeks. The lengthy hospitalization brings his injuries within the definition of "serious injury." The injuries and hospitalization occurred as an immediate result of his fall from a position near the top of a 19 foot ladder.

Berry testified that there may have been some slippery substance on rungs of the ladder, and he may have been distracted momentarily by hearing his ground-based partner call him on the radio. Rachlis, however, testified credibly that Berry's fall was a result of his carrying objects in his left hand and under his left arm; by carrying these, Rachlis testified, Berry compromised his ability to hold on to the ladder, even if some other factor were to interfere with his grip on the ladder with his right hand. Berry's testimony that there may have been some slippery substance on rungs was undermined by the testimony of Maka and Freitas, that no such substance was found on rungs shortly after Berry's fall. In any event, the evidence supports a finding that the violation was at least one of the causes of the fall and injury, even if not the only cause. Therefore, it is found that the violation caused Berry's serious injury within the meaning of regulation section 336, subdivision (c)(2).

7. Are penalties proposed for Citation 1 and Citation 3 reasonable?

Penalties calculated in accordance with the penalty-setting regulations set forth in sections 333 through 336 are presumptively reasonable and will not be reduced absent evidence 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 asserted in its initial appeals that the proposed penalty for Citations 1 and 3 were unreasonable.

Rachlis and District Manager Wendy Hogle-Lui testified in some detail about the penalty calculations. In addition, the Division submitted Exhibit 12, the proposed penalty worksheet to describe the calculations. The Employer presented no evidence or argument with respect to the penalties.

Citation 1

The Division proposed a penalty of $700 for Violation 1. Citation 1 alleged that the violation – excessive height of the first rung above ground level – was present on all 13 RTG's, but there was evidence only with respect to two of these 13. Therefore, the "extent" rating for this violation will be modified from "high" to "low," (pursuant to regulation section 335, subdivision (a)(1)(A)) and as a consequence, the additional penalty of $375 for the high rating will be removed, and the proposed penalty will be reduced by 25 % of the base penalty of $1,500 (regulation section 336, subdivision (b), resulting in a penalty of $420.

Citation 3

Regulation section 336, subdivision (c)(1) provides, in relevant part: "Because of the extreme gravity of a Serious violation an initial base penalty of $18,000 shall be assessed." The same regulation permits upward or downward adjustments for "likelihood" and "extent," both of which are defined in section 335.

For Citation 3, the Division proposed a penalty of $25,000. The Division contends that the likelihood rating of the violation is "high" because of the likelihood that an injury would result from the violation, as it occurred on a ladder almost 20 feet high. That rating is supported by Rachlis's testimony about the likelihood of injury resulting from a fall in the given circumstances.

Regulation section 335, subdivision (a)(1)(B)(2) defines "extent." A "high" rating would be justified "when numerous violations of the standard occur. . ." The Division contends the "extent" rating should be high. Rachlis testified that this rating is supported by the statements that Berry made to Rachlis during the investigation, to the effect that both he and others had previously climbed ladders while holding objects in their hands. But Rachlis observed no violations, uncovered no other violations during his investigation, and both Berry's statements to Rachlis and Berry's testimony during the hearing lacked specific dates and names. The evidence is too weak to support a "high" rating and an additional $4,500 penalty. Therefore, there will be no additional amount added to the base penalty of $18,000. Where the Division presents insufficient evidence to support its penalty calculations, the Appeals Board may recalculate the penalties. *Ventura Coastal LLC,* Cal/OSHA App. 317808970, Decision After Reconsideration, (Sept. 22, 2017).

Regulation section 336 allows for penalty reductions in some circumstances, but subdivision (c)(2) provides, in relevant part: "If the employer commits a "Serious" violation and the Division has determined that the violation caused death or serious injury. . . 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." Here, as the violation resulted in a serious injury, and as the Employer employs more than 100 persons, no downward adjustment is available, pursuant to subdivision (d)(1).

In sum, the penalty to be assessed for the violation will be $22,500, the sum of the starting point amount of $18,000 and the additional $4,500 for a high "likelihood" rating.

Conclusion

For Citation 1, the Division established by a preponderance of the evidence that Employer violated section 3277, subdivision (d), by using ladders with first rungs excessively high off the ground. The penalty is reduced as set out above.

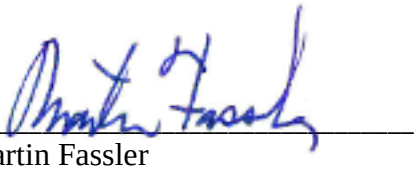
For Citation 3, the Division established that Employer violated section 3278, subdivision (a)(1), by failing to ensure that an employee was prohibited from carrying equipment or materials which prevented safe use of a ladder on one occasion. The Division established the Serious classification and the accident-related character. The penalty is reduced as set out above.

Order

It is hereby ordered that Citation 1 is affirmed and the penalty is reduced to $420.

It is further ordered that Citation 3 is affirmed and the penalty is reduced to $22,500.

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



Dated: 07/13/2020

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.**