BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No.
L & S Framing, Inc. **33650 Cincinnati Avenue** **Rocklin, CA 95765** **Employer**	**1173183** **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken the Division of Occupational Safety and Health's (Division) Petition for Reconsideration under submission, renders the following Decision After Reconsideration.

Jurisdiction

On October 19, 2016, the Division issued L&S Framing, Inc. (Employer) two citations, alleging four violations of the California Code of Regulations, title 8.[1] Citation 1, Item 1 alleges a General violation of section 1509, subdivision (a) [failure to establish, implement, and maintain an effective IIPP[2] in accordance with section 3203, subdivision (a)(6)]. Citation 1, Item 2 alleges a General violation of section 1511, subdivision (b) [failure to make a survey of the site condition to determine the hazards and the necessary safeguards].[3] Citation 1, Item 3 alleges a General violation of section 3395, subdivision (h)(1)(I) [heat illness prevention regulation; failure to have procedures to assure clear directions to the work site can be provided to emergency responders]. Citation 2, Item 1 alleges a Serious violation of section 1626, subdivision (a)(5) [failure to provide railings on unprotected sides and edges of a stairway landing].

Employer appealed all of the citations and a Board administrative law judge (ALJ) held a four-day hearing on November 14 and 15, 2017 and September 5 and 6, 2018. After the hearing, the ALJ dismissed all violations. The Division petitioned the Board for reconsideration. In its Petition, the Division does not take issue with the ALJ's finding on Citation 1, Item 3. Therefore, the Division has waived any objections to the ALJ's finding on that violation and the Board need not further discuss it. (Lab. Code, § 6618.) The only violations at issue are Citation 1, Item 1 and Citation 2, Item 1. The Division contends the ALJ acted in excess of her powers, the evidence does not justify the findings of fact, and the findings of fact do not support the decision. (Lab. Code, § 6617, subds. (a), (c), (d).) Employer answered the Division's petition.

[1] All references are to the California Code of Regulations, title 8, unless specified otherwise.
[2] IIPP is an acronym for Injury and Illness Prevention Program.
[3] The Division withdrew Citation 1, Item 2. This citation is not at issue.

The Board took the Division's Petition for Reconsideration under submission.

Issues

1. Did the ALJ correctly conclude Employer's IIPP complied with section 1509, subdivision (a)'s requirements?

2. Did the ALJ correctly conclude section 1624, subdivision (b)(5), was not violated because the area the injured employee fell from was not the "unprotected sides and edges of stairway landings"?

3. Did the ALJ correctly deny the Division's requests to amend Citation 2, Item 1 to allege violations of section 1632, subdivision (b), and section 1626, subdivision (a)(2), respectively?

4. Was Citation 2 properly classified Serious?

5. Was Citation 2's proposed penalty reasonable?

Findings of Fact

1. Martin Mariano, Victor Santana, and two other employees were working on the second floor of a two-story building under construction.

2. Mr. Mariano and Mr. Santana were framing an exterior wall. Specifically, they were snapping the strapline.[4] To lay the wall flat on the ground, they took out an existing temporary railing—evidence in the record established a pony or half-wall was to be placed by the unprotected side or edge.

3. Sometime during this process, Mr. Mariano fell from the unprotected area to the ground below. The edge of the area he fell was more than 10 feet above the first floor.

4. The u-shaped stairway to the second floor had three sets of steps with two landings breaking each set. The top of the last step also constituted a stairway landing.

5. Employer's written IIPP has methods and/or procedures for correcting unsafe conditions and work practices or procedures.

6. Although Employer did not determine the root cause of the accident, it conducted investigation into the cause of the accident and took corrective measures.

[4] A strap is a long horizontal piece of metal. Snapping the strapline is the act of marking the plywood with a chalk box to make sure they draw a straight line where they would install the metal strap. It requires one employee to hold the chalk box and another to hold the other side of the chalk box (similar to a measuring tape).

Analysis

1. **Did the ALJ correctly conclude Employer's Injury and Illness Prevention Program did not violate section 1509, subdivision (a)?**

Citation 1, Item 1 alleges a General violation of section 1509, subdivision (a), which requires an Employer establish, implement, and maintain an effective Injury and Illness Prevention Program (IIPP), compliant with section 3203, subdivision (a)(6). Section 3203, subdivision (a)(6), in turn, states:

> (a) Effective July 1, 1991, every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program (Program). The Program shall be in writing and, shall, at a minimum:
>
> […]
>
> (6) Include methods and/or procedures for correcting unsafe or unhealthy conditions, work practices and work procedures in a timely manner based on the severity of the hazard:
> (A) When observed or discovered; and,
> (B) When an imminent hazard exists which cannot be immediately abated without endangering employee(s) and/or property, remove all exposed personnel from the area except those necessary to correct the existing condition. Employees necessary to correct the hazardous condition shall be provided the necessary safeguards.

The Division alleged in the citation,

> Prior to and during the course of the investigation including but not limited to, on 08/24/16, the employer's Injury and Illness Prevention Program is ineffective in that it did not include methods and procedures to correct unsafe and unhealthy conditions in a timely manner, despite incurring four serious injuries in a two year period.

To establish a section 3203, subdivision (a)(6), violation, the Division must either demonstrate the IIPP itself did not have written methods and/or procedures for correcting unsafe conditions, work practices, and procedures, or it must demonstrate Employer failed to implement such written procedures in the IIPP. Within its Petition for Reconsideration, the Division argues both deficiencies exist here. We first address the Division's arguments with regard to the written contents of the IIPP, then turn to the issue of implementation.

<u>The Division's Arguments as to the Contents of the IIPP:</u>

Within its petition, the Division broadly argues the IIPP did not contain any specific written methods or procedures for correcting unsafe or unhealthy conditions or work practices, noting "there is no topic or section heading addressing the procedures for correcting unsafe conditions."

(Petition, p. 7.) However, we decline to find a violation of the cited IIPP standard based on the written contents of the Employer's IIPP. As correctly noted in the ALJ's Decision, Employer's written IIPP does have provisions pertaining to correction of hazards. The Decision aptly notes, "Employer's Injury and Illness Prevention Program (IIPP) contains a section setting forth Employer's procedures for assessing and correcting hazards. When a hazard is identified, the section requires hazard reduction or abatement, safeguarding or restricting access, use of personal protective equipment, and training." (Decision, p. 4.)

Assuredly the contents of Employer's written IIPP pertaining to correction of hazards are not a paragon, and indeed could benefit from significant improvement, which is strongly encouraged. Nonetheless, an employer's IIPP need not mirror the regulation in every exact detail and we conclude that Employer's IIPP minimally meets the written requirements for the cited subsection.

Next, during the hearing, the Division's inspector, Mr. Aruejo, testified he issued the citation because Employer's written IIPP did not specifically address fall hazards in writing. We additionally decline to uphold a violation on this basis. The Board has long held that employer need not have a written procedure for each hazardous operation it undertakes. (*OC Communications,* Cal/OSHA App. 14-0120, Decision After Reconsideration (March 28, 2016).) Ultimately, while we are not impressed with the IIPP, like the ALJ, we are unpersuaded that there is any deficiency in the written contents of the IIPP that arises to the level of a violation. And absent more in the recitation of alleged deficiencies in the Division's Petition for Reconsideration, we will not inquire further. (§ 391.) We now turn to the question of implementation.

The Division's Arguments as to Implementation of the IIPP:

An Employer's IIPP may be satisfactory as written, but still result in a violation if is not implemented, or through a failure to correct known hazards. (*National Distribution, supra,* Cal/OSHA App. 12-0391 [other citations omitted].) "Section 3203(a)(6) requires employers to have written procedures for correcting unsafe or unhealthy conditions, as well [as] to respond appropriately to correct the hazards." (*Ibid.,* citing *BHC Fremont Hospital, Inc*., Cal/OSHA App. 13-0204, Denial of Petition for Reconsideration, (May 30, 2014).) Implementation of an IIPP is a question of fact. (*Ibid*.) Therefore, the Board's findings on this issue are specific to the facts and the record of the instant case.

With regard to whether Employer actually implemented procedures to correct hazards, the Division's arguments focus heavily on whether the Employer satisfactorily conducted Job Hazard Assessments (JHA), as called for by its IIPP. The Division argues Employer failed to provide it with records of the JHAs called for by its IIPP. (Petition pp. 8-10.) The Division argues no JHAs were completed for the jobsite where the injury occurred. (*Ibid*.) Further, in response to Employer's arguments that it was in the process of replacing the JHA form with the "Daily Safety Awareness" sheets, the Division additionally raises concerns with those documents. (*Ibid*.) The Division takes issue with foremen filling out the "Daily safety Awareness" sheets versus supervisors (as required by Employer's IIPP), noting that foremen were not necessarily trained to conduct such inspections. (*Ibid*.) The Division additionally contends that the "Daily Safety Awareness" sheets were not an adequate substitute for a JHA. (*Ibid*.) The Division also points to

purported defects in the forms. (*Ibid*.)

However, while we are sympathetic to many of the arguments advanced by the Division, and have many concerns regarding Employer's assessments, we nonetheless are constrained from affirming a violation of the specific cited standard on the basis of the arguments advanced by the Division in its Petition for Reconsideration. When it comes to discussion of the JHAs and the "Daily Safety Awareness" sheets, the Division appears to have lost sight of the specific subdivision it cited. The allegations of the Division's petition for reconsideration, when it comes to these forms, do not predominantly concern implementation of corrective efforts, but rather are more appropriately construed to address the issue of whether Employer effectively implemented its duty to inspect, identify and evaluate hazards. Such allegations are more appropriately addressed by section 3203, subdivision (a)(4), not subdivision (a)(6). (See, e.g., *OC Communications*, Inc., Cal/OSHA App. 14-0120, Decision After Reconsideration (March 28, 2016).)

Section 3203, subdivision (a)(4), requires that an employer perform inspections to identify and evaluate hazards under specific circumstances. (*OC Communications*, Inc., *supra*, Cal/OSHA App. 14-0120.) To prove a violation of section 3203, subdivision (a)(4), based upon a failure of implementation, among other things, the Division must demonstrate Employer failed to effectively fulfill its duty to inspect, identify and evaluate the hazard. (*Ibid*.) Here, while the Board is certainly troubled by the Division's allegations and arguments within its petition pertaining to Employer's failure to properly fill out the forms and identify and evaluate workplace hazards, the Board declines to uphold a section 3203, subdivision (a)(6), violation on this basis. Subdivision (a)(6) is simply inapt to these specific allegations. As we have stated in other contexts, while the various subparts of many regulations all have a degree of interrelatedness, we note that "they should nonetheless be cited by the Division separately, particularly since the various subparts each contain different requirements and often contain different triggering provisions." (*Harris Rebar Northern California, Inc.*, Cal/OSHA App. 1086663, Decision After Reconsideration (September 22, 2017).) We also observe that unlike other Citations, Employer has not requested an amendment and we decline on this record to consider an amendment *sua sponte*.

With regard to whether Employer actually implemented procedures to correct hazards, the Division next argues that Employer's failure to establish the root cause of the accident demonstrates its failure to implement methods and/or procedures for correcting unsafe and unhealthy working conditions.

Here, once again, we question whether these allegations are more suitable for an assertion of a violation of another subdivision. Section 3203, subdivision (a)(5), requires Employer's IIPP establish, implement and maintain a "procedure to investigate occupational injury or occupational illness." The Division's Petition for Reconsideration appears to be questioning implementation of Employer's procedures to investigate occupational injury.

But even assuming these allegations concern a failure to correct a violation, while we would certainly prefer a root cause analysis be completed, we are satisfied, based on all other evidence pertaining to this issue, that this deficiency did not rise to the level of a violation of the specific cited standard, subdivision (a)(6). The evidence in the record demonstrates Employer did conduct an accident investigation, as called for by its IIPP. Employer conducted at least two rounds of

interviews for the three other employees who were working with Mr. Aruejo on the second floor. Evidence in the record also demonstrates after Mr. Aruejo's accident, Employer engaged in corrective measures: employees currently frame the walls on the ground and lift them up with a forklift.

Therefore, Employer's failure to fill out the root cause of the accident on the form does not necessarily mean, under these specific facts, it did not correct the unsafe or unhealthy working practice or condition at its worksite.

Ultimately, after considering the specific arguments in the Division's Petition for Reconsideration, the Board finds the Division failed to prove a section 3203, subdivision (a)(6), violation by a preponderance of the evidence. Further, we otherwise affirm the ALJ's other findings as to this citation to the extent no challenge is made to such findings within the Division's Petition for Reconsideration. (§ 391.) However, in reaching this holding, we observe that there were facts, many not specifically raised, nor discussed, in the Petition for Reconsideration, which in our mind, did indeed raise concerns with the adequacy of Employer's corrective efforts. While we vacate the citation, it is not a complete exoneration. It is merely an acknowledgment that in this specific proceeding, the Division's petition advanced arguments that did not prove a violation of the cited standard by a preponderance. Had different arguments been advanced, we could envision a different result. We strongly caution Employer that better care should be taken to establish, implement, and maintain all required elements of its IIPP, particularly as to the fall hazards involved here.

2. **Did the ALJ correctly conclude section 1624, subdivision (b)(5), was not violated because the area the injured employee fell from was not the "unprotected sides and edges of stairway landings"?**

Citation 2, Item 1 alleges a violation of section 1626, subdivision (b)(5)[5]. That section states: "Unprotected sides and edges of stairway landings shall be provided with railings. Design criteria for railings are prescribed in Section 1620 of these safety orders." (§ 1626, subd. (b)(5).)

Unprotected sides and edges are "Any side or edge (except at entrances to points of access) of a walking/working surface, e.g., floor, roof, ramp, or runway where there is no wall or standard guardrail or protection provided." (§ 1504, subd. (a).) A stairway is "A series of steps and landings having 2 or more risers leading from one level or floor to another." (*Ibid*.) Landing has been defined in the General Industry Safety Orders as "An extended step or platform breaking a continuous run of steps or ramps." (§ 3207, subd. (a).) The term platform mentioned in the landing definition means "An elevated working level for persons. Storage platforms, balconies and open-sided floors are considered platforms for the purpose of these orders." (*Ibid*.)

The evidence in the record is clear: the area Mr. Mariano fell from fits section 1504, subdivision (a)'s definition of "unprotected sides and edges." The main issue here is whether the area Mr. Mariano fell from fits the definition of a stairway landing defined in section 3207. In its petition,

[5] The original citation alleged a violation of section 1626, subdivision (a)(5). The Division sought to amend the citation to allege a violation of subdivision (b)(5), as subdivision (a)(5) is non-existent in section 1626. The ALJ granted the amendment.

the Division references Mr. Aruejo's testimony that the area abutting temporary railing three and the edge of the bonus room were part of the stairway landing. More specifically, he testified the hallway (area abutting temporary railing three) was an extended step and the open area to its right (the unprotected edge at issue) was an extended platform for the stairway. His rationale for identifying the area abutting temporary railing three and the unprotected edge as part of the stairway landing was "anything with stairway railing is part of a stairway landing" and "what matters is where railing is located."

The Division claims, "The floor area abutting temporary railings #3 and #4 meets the definition of a stairway landing in §3207 because it was a platform (elevated working level or open-sided floor) breaking a continuous run of steps." (Division's Petition, p. 13.) To further support its claim, the Division cites to Employer's Code of Safe Practices, which states, "Install guardrails at 21" and 42" at 2nd floor windows, doors, and stair wells [sic]." (Division's Petition, pp. 13-14, citing Exhibit 14.)

The record establishes there were three sets of steps leading from the first floor to the second. The parties do not dispute two landings broke the continuous run of the three sets of steps. The dispute turns on whether the area Mr. Mariano fell from constituted a stairway landing within the mentioned definitions. The Division's witness Ruben Hernandez, Employer's employee, testified the stairway did not extend to the unprotected edge. He explained when one reaches the top of the stairways, s/he gets on the second floor, i.e., stairway begins with the first step and ends with the last. He further testified the area abutting railing three was a hallway and the unprotected edge was in the bonus room. He identified the stairway landing as a small area located in between the stairs leading from the first floor and the second. (Exhibit 3B.)

Jon Wagner, the employee in charge of Employer's safety program, testified the area abutting railings three and the unprotected edge at issue were not part of the stairway landing. He testified railing three was part of a hallway and the edge of which Mr. Mariano fell from was part of a bonus room—an area built to support furniture and occupants, not to serve as access and egress to the second floor. He identified the stairway landing as the same area Mr. Hernandez had identified in Exhibit 3B.

Here, the Board concludes the top of the last step was a stairway landing as it broke a continuous run of steps. However, testimony as well as exhibits in the record demonstrate to reach the unprotected edge from which Mr. Mariano fell, one must go through the hallway, turn left, and walk a few more feet before reaching the unprotected edge at issue. The Board cannot agree that the landing extends all the way through a four- to six-foot long hallway and a couple more feet along the unprotected edge at issue. Section 3231, subdivision (f), provides guidance to the Board on a landing's measurements.[6] That section states:

> Every landing shall have a dimension measured in the direction of travel equal to the width of the stairway. Such dimension need not exceed 4 feet when the stair has a straight run. Landings, when

[6] In its Petition, the Division did not raise issue with ALJ's reliance on the General Industry Safety Orders when defining a term within the Construction Safety Orders. Therefore, the Board need not address this issue and treats the issue waived. (Lab. Code, § 6618.)

> provided, shall not reduce the width to less than one-half the required width at any position in the swing or by more than 7 inches by a door when fully open. There shall be not more than 12 feet vertically between landings.

While the record does not indicate the exact width of the stairway, the Board concludes the ALJ did not err by holding, "Based on photos taken during the investigation, a reasonable estimate of the width of the stairs at the job site is two to three feet. This further demonstrates the unreasonableness of the Division's argument that the landing at the top of the stairway at the job site extends four to six feet down a hallway, around a corner, and several feet into a room." (Decision, p. 10.)

The Board concludes that the stairway landing in this case could not extend four to six feet down the hallway and thereafter a couple more feet around the corner to the edge at issue. The Board holds Employer did not violate section 1624, subdivision (b)(5). The Board next analyzes the ALJ's denial of the Division's requests to amend this citation.

3. Did the ALJ correctly deny the Division's requests to amend Citation 2, Item 1 to allege violations of section 1632, subdivision (b), and section 1626, subdivision (a)(2), respectively?

A. <u>It is within the Board's discretion to grant or deny a moving party's amendment request.</u>

Labor Code section 6603 requires the Board to adopt rules of practice and procedure consistent with Government Code sections 11507 [pre- and mid-hearing amendments] and 11516 [post-hearing amendments]. According to Government Code section 11507, a statute on pre- and mid-hearing amendments,

> At any time before the matter is submitted for decision, the agency <u>may</u> file, or permit the filing of, an amended or supplemental accusation or District Statement of Reduction in Force. All parties shall be notified of the filing. If the amended or supplemental accusation or District Statement of Reduction in Force presents new charges, the agency shall afford the respondent a reasonable opportunity to prepare his or her defense to the new charges, but he or she shall not be entitled to file a further pleading unless the agency in its discretion so orders. Any new charges shall be deemed controverted, and any objections to the amended or supplemental accusation or District Statement of Reduction in Force may be made orally and shall be noted in the record. (Underline added.)

Pursuant to Government Code section 11516, a statute on post-hearing amendments,

> The agency <u>may</u> order amendment of the accusation or District Statement of Reduction in Force after submission of the case for decision. Each party shall be given notice of the intended

> amendment and opportunity to show that he or she will be prejudiced thereby unless the case is reopened to permit the introduction of additional evidence on his or her behalf. If such prejudice is shown, the agency shall reopen the case to permit the introduction of additional evidence. (Underline added.)

Both statutes use discretionary language: may. (Gov. Code, §§ 11507, 11516.) Based on these statutes, the Board promulgated section 371.2 (regulation on pre- and mid-hearing amendments) and section 386 (regulation on post-hearing amendments). "[A]s the Board has previously stated, a motion to amend is at the discretion of the Board." (*Calstrip Steel Corporation,* Cal/OSHA App. 312668825, Decision After Reconsideration (Jun. 30, 2017).) "Liberal construction and easy amendment of pleadings are accepted procedure in an administrative law context… '(t)he most important characteristic about pleadings in the administrative process is their unimportance.' 1 K. Davis, Administrative Law 523 (1958). (*Morgan & Culpeper, Inc. v. OSHRC* (5th Cir. 1982) 676 F.2d 1065, 1066.)" (*L & S Construction, Inc.,* Cal/OSHA App. 10-1821, Decision After Reconsideration (Oct. 7, 2016).) It is the policy of the state to "take a liberal view toward inartfully drawn complaints and other pleadings [citation] and routinely resolve variances between pleading and proof by allowing amendments before, during and after trial." (*Crop Production Services,* Cal/OSHA App. 09-4036, Decision After Reconsideration and Order of Remand (Mar. 28, 2016) [citations omitted].) A variance between the pleadings and proof is not deemed material unless it has misled a party to their prejudice in maintaining their action or defense. (*Ibid.*) "Nor is the Board required to 'impose rules of pleading and proof more stringent than those followed in civil actions.'" (*Ibid.*)

However, the policy of liberally granting amendments is not unbounded. (*Dole v. Arco Chemical Co.* (3d Cir. 1990) 921 F.2d 484, 487, citing *Foman v. Davis* (1962) 371 U.S. 178, 182.) The Board has previously listed some factors the courts, and the Board, consider when evaluating a party's request to amend: bad faith of parties, failure to cure deficiencies at prior allowances to amend, the futility of an amendment, and prejudice. (*Calstrip Steel Corporation, supra,* Cal/OSHA App. 312668825, citing *Dole v. Arco Chemical Co*. (3rd. Cir. 1990) 921 F.2d 484, 488.)

B. <u>In exercising its discretion, the Board concludes the ALJ erred in denying the Division's motion to amend Citation 2 to plead in the alternative a violation of section 1632, subdivision (b)(1).</u>

Under section 371.2, "a request for an amendment that does not cause prejudice to any party may be made by a party or the Appeals Board at any time." In cases where there is prejudice, subdivision (a)(2), sets forth different criteria to be evaluated when deciding whether to grant the motion depending on the timing of the motion. Thus, the threshold consideration under section 371.2 is whether allowing the amendment causes prejudice, as different criteria and considerations apply depending on whether the non-moving party demonstrates prejudice.

Here, the Division sought to amend the citation to allege a violation of section 1632, subdivision (b)(1), requiring "Floor, roof and skylight openings shall be guarded by either temporary railings and toeboards or by covers." In its Order on Motion to Amend Citation 2 (Order), the ALJ stated the Employer would be prejudiced since "the facts and arguments upon which Employer has relied

for nearly two years will need to be completely altered if the Division is permitted to assert that a different safety order may apply."[7] (Order, p. 3.) The ALJ concluded Employer suffered prejudice because it "evaluated its options and chose to proceed with its appeal" and the "prejudice that will result if an amendment is granted goes beyond simply granting Employer additional time to present evidence or arguments. It goes back to the initial filing of an appeal. Each decision Employer made, from the decision to file the appeal, to its discussions during settlement negotiations, its requests for discovery, to the preparation of its defense, revolved around defending against the citation as issued." (Order, p. 3.) Since the ALJ found prejudice, she analyzed the amendment under section 371.2, subdivision (a)(2)(B), which requires good cause for filing a mid-hearing amendment. However, the ALJ's analysis of prejudice is not in accord with the Board's prior decisions.

The Board has previously held, "As to claim of prejudice, the showing must demonstrate the party was 'unfairly disadvantaged or deprived of the opportunity to present facts or evidence it would have offered had the … amendments been timely.'" (*Calstrip Steel Corporation, supra,* Cal/OSHA App. 312668825.) The burden is on the non-moving party to establish prejudice through production of evidence; prejudice will not be presumed. (*Sierra Forest Products,* Cal/OSHA App. 09-3979, Decision After Reconsideration (Apr. 08, 2016).) While loss of evidence and loss of material witnesses may establish prejudice, generalized assertions of prejudice do not. (*Sierra Forest Products, supra* [rejecting as prejudice a party's argument that it failed to present witnesses on an issue because the record could be reopened to cure that prejudice].)

While not required to follow the rulings of the Occupational Safety and Health Review Commission, the Board concludes the federal agency's policy considerations when discussing prejudice in the context of amendments under federal worker safety regulations apply here as well. The *Dole* court explained, to make the required showing of prejudice, a party is required to demonstrate its ability to present its case would be seriously impaired were the amendment allowed. (*Dole v. Arco Chemical Co., supra,* 921 F.2d at p. 488.) And, "a mere claim of prejudice is not sufficient; there must be some showing that [the non-moving party] 'was unfairly disadvantaged or deprived of the opportunity to present facts or evidence which it would have offered had the . . . amendments been timely' [citations omitted]." (*Ibid.*; *Foman v. Davis, supra,* 371 U.S. at p. 488.)

Further, assuming a party successfully establishes prejudice as well as the other enumerated requirements under the Board's rules, the Board has specified the remedy is to remand the case back for further hearings. (§ 371.2, subd. (a)(2)(B)(iii); § 386, subd. (b); *Crop Production Services, supra,* Cal/OSHA App. 09-4036.) This allows the parties to engage in further discovery, present or subpoena witnesses, entertain potential settlement discussions, and any other mechanism they wish to proceed with before, during, or after the administrative hearing.

Here, Employer failed to establish loss of evidence or unavailability of specific witnesses that would have assisted it in proving its claims of prejudice. Instead, it only makes generalized claims

[7] The issue of whether the area Mr. Mariano fell from fit within section 1632, subdivision (b)(1) was litigated in the appeal proceeding below both during the hearing and in the parties' briefings. (Employer's Post Hearing brief, pp. 1, 7, 15-17; Division's Post Hearing brief, pp. 13-16; Division's Petition of Reconsideration, pp. 23-32; Employer's Answer to Division's Petition, pp. 17, 20-21.)

of prejudice such as its initial evaluation in deciding whether it wishes to appeal the citations, lapse of time, loss of discovery opportunities, general claims of faded witness memory and that "witnesses may [not] become available after the passage of time." (Employer's Opposition to Division's Motion to Amend, pp. 10-11.) Such general claims do not establish prejudice as they do not specifically demonstrate how Employer's case would be seriously impaired if the amendment is granted. Absent proof of prejudice, "amendments may be permitted at any point during the course of litigation. See *Foman v. Davis*, 371 U.S. at 181-182 ('in the interest of justice,' leave to amend may be necessary even at post-judgment stage)." (*Dole v. Arco Chemical Co., supra,* 921 F.2d at p. 488; § 371.2, subd. (a)(1).)

The Board concludes Employer has failed to establish prejudice; therefore, under section 371.2, subdivision (a)(1), the Board has discretion to grant the Division's request to amend the citation.

In her decision, the ALJ also concluded the amendment would have been futile on the merits. (ALJ's Decision, p. 14, fn. 5, citing *Webcor Builders, Inc*., Cal/OSHA App. 06-3030, Denial of Petition for Reconsideration (Jan. 11, 2010).) The Board finds, however, the facts and circumstances governing *Webcor Builders* are different from this case. In that case, the area at issue was the exterior end or edge of a building. In the context of that case, the Board reasoned, unlike here, beyond that end or edge, there was no floor in which an opening could exist. (*Ibid.*) In this case, however, the area at issue is an opening within the interior of the building; a crucial difference distinguishing this case from *Webcor Builders* that the ALJ relied on.

Section 1632, subdivision (b)(1), states, "floor, roof and skylight openings shall be guarded by either temporary railings and toeboards or by covers." Section 1504 defines opening as "an opening in any floor or platform, 12 inches or more in the least horizontal dimension. It includes: stairway floor openings, ladderway floor openings, hatchways and chute floor openings." The definition is ambiguous because it defines the term "opening" as an "opening in any floor or platform…" The Board finds this regulatory definition that repeats the defined term in its definition is ambiguous. The Board looks to the dictionary definition of the word to ascertain its ordinary and usual meaning. (*Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1122.) And, the Board advances an interpretation that promotes worker safety. (*Carmona v. Division of Industrial Safety* (1975) 13 Cal.3d 303, 313; *Department of Industrial Relations v. Occupational Safety & Health Appeals Bd.* (2018) 26 Cal.App.5th 93, 106-107.)

Dictionaries define an "opening" broadly: "an opening is a hole or empty space through which things or people can pass"[8]; "a hole or space that something or someone can pass through"[9]; "a void in solid matter; a gap, hole, or aperture."[10] At the time of the accident, employees removed the temporary railing so they could finish framing the exterior wall, creating a hole or empty space from which people or things could fall through. Although the record does not establish the exact measurement of the floor opening in the least horizontal dimension, the Board infers the area at issue was more than 12 inches since it also encompassed the stairway. The record establishes at the time of the accident, Mr. Mariano fell through the opening, which was unguarded and

[8] Collins (Collins 2020) < https://www.dictionary.com/browse/opening> (as of June 23, 2020).
[9] Cambridge Dictionary (Cambridge University Press 2020 <https://dictionary.cambridge.org/us/dictionary/english /opening> (as of June 23, 2020).
[10] Dictionary.com (2020 Dictionary.com, LLC) < https://www.dictionary.com/browse/opening> (as of June 23, 2020).

unprotected contrary to section 1632, subdivision (b)(1)'s mandate.[11]

In conclusion, the Board overrules the ALJ's analysis on this issue, grants the amendment to plead in the alternative a violation of section 1632, subdivision (b), and upholds the violation on this basis.

C. In exercising its discretion and considering the relevant factors, the Board concludes the ALJ erred in denying the Division's post submission amendment.

The rule on post-submission amendments leaves broad discretion to the Board as to whether grant or deny the post-hearing amendment. It states, "The Appeals Board may amend the issues on appeal or the Division action after a proceeding is submitted for decision." (§ 386, subd. (a).) Subdivision (b) of the same section requires notice and an opportunity to show prejudice. If a party demonstrates prejudice, subdivision (b)'s remedy is to continue the proceeding to permit introduction of additional evidence. (§ 386, subd. (b).)

As mentioned before, when evaluating a party's request to amend, the Board considers the following factors: bad faith of parties, failure to cure deficiencies at prior allowances to amend, the futility of an amendment, and prejudice. (*Calstrip Steel Corporation, supra,* Cal/OSHA App. 312668825, citing *Dole v. Arco Chemical Co*. (3rd. Cir. 1990) 921 F.2d 484, 488.) None of the factors are dispositive and the Board gives the appropriate weight to each factor on a case-by-case basis.

a. Bad faith of the parties and the failure to cure deficiencies at prior allowances to amend factors

As to the bad faith factor, the Board does not have evidence of (and does not find) bad faith of the Division in seeking this amendment.

The Board next analyzes the failure to cure deficiency at prior allowances to amend. After inspecting Employer's worksite, the Division issued a Notice of Intent to Classify Citation as Serious (1BY) to Employer. The 1BY alleged the Division intends to cite Employer for a Serious violation of section 1626, subdivision (a)(2)—the same regulation to which it currently wishes to amend its citation. The alleged violative description (AVD) in the 1BY also mentioned the term "stairwell" several times. In her Decision, the ALJ also took note of the AVD language in the Division's citation and stated, "it appears this AVD was prepared based on an alleged violation of section 1626, subdivision (a)(2), which pertains to stairwell guarding, although the AVD does not reference stairwells either." (Decision, p. 8.)

[11] To the extent Employer argues section 1716.2, subdivision (f), is the more specific safety order the Division should have cited it under, the Board disagrees as it has rejected these arguments before. (*Cabrillo Economic Development Corp*., Cal/OSHA App. 11-3185, Decision After Reconsideration (Oct. 16, 2014).)

By the time the Division issued Citation 2, Item 1, it alleged a violation of section 1626, subdivision (b)(5).[12] After the first two days of the hearing, the Division filed a motion requesting to amend Citation 2, Item 1 to plead in the alternative a violation of section 1632, subdivision (b), a regulation concerning floor openings. The ALJ denied that motion. After the hearing ended, the Division requested a post-hearing amendment for the citation to allege a violation of section 1626, subdivision (a)(2), the same regulation it had alleged in its 1BY. The ALJ denied this motion as well.

One of the purposes behind the Board regulating post-hearing amendments is to prevent the non-moving party from suffering surprise or not having enough notice of the moving party's newly alleged arguments. That is not the case here. As the Division correctly points out in its Petition to the Board, Employer fully litigated whether the area Mr. Mariano fell from was within a stairwell. During the hearing, Employer litigated this issue extensively by questioning witnesses and introducing evidence. In fact, in its opening statement, Employer's counsel argued it would prove that the area Mr. Mariano fell from was not part of a stairwell; a statement demonstrating Employer's knowledge and preparedness to defend itself against this allegation from the beginning of the hearing. Further, Employer fully briefed the ALJ on this issue in its post-hearing brief. As mentioned before, the Division's 1BY asserted a violation of this same regulation, which also demonstrates Employer's notice. The issue of whether the area Mr. Mariano fell from was within a stairwell was actively litigated by the Employer and the Board finds Employer used its opportunity to demonstrate through testimony, evidence, and briefing why the Division's stairwell arguments should not stand. All these facts, in aggregate, demonstrate the issue of fair notice and preventing surprise to the non-moving party is not at issue in this case.

As explained above, this factor is one of the four factors the Board considers in exercising its discretion. Even if the Board were to agree that this factor weighs in favor of Employer, in light of the Board's conclusion on the remaining two factors explained below, the Board grants the post-hearing amendment.

b. *Prejudice factor: as discussed before, the Board finds the Employer failed to establish prejudice. The Board overrules its prior case law to the extent it could be read to state undue delay on its own may be sufficient to deny a moving party's request to amend.*

The Board incorporates by reference its analysis of the prejudice factor mentioned above in the mid-hearing amendment analysis. The Board concludes Employer did not meet its burden to establish prejudice as to this request for amendment as well.

Amendments to conform to proof, if not prejudicial, are favored since their purpose is to do justice and avoid useless litigation. (*Garcia v. Roberts* (2009) 173 Cal.App.4th 900, 909; *Groover v. Belmont* (1952) 114 Cal.App.2d 623, 627.) As discussed above, Employer's litigation strategy from day one of this hearing was to rebut the Division's arguments that the unprotected area the injured employee fell from was not part of the stairwell. Throughout the four-day hearing,

[12] As a result of typographical error, the citation alleged a violation of subdivision (a)(5). On the first day of the hearing, the Division amended the citation to allege a violation of subdivision (b)(5), since subdivision (a)(5) does not exist in the regulation. The ALJ properly permitted the amendment to correct the typographical error.

Employer had the chance to, and did, introduce evidence and testimony to defend itself against the Division's claims on this point. The Board would not be promoting justice, i.e., determining whether Employer's violation of a worker safety regulation led to the employee's injuries, and avoiding useless litigation when the issue has been fully exhausted by the parties.

In its decision, the ALJ declined to allow the amendment to conform to proof due to the undue delay in seeking the post-hearing amendment. The ALJ cited Board's case law quoting "'We deny the amendment in this instance: although no prejudice to Employer has been demonstrated, the initial burden is on the Division to describe the cause of the delay in bringing its motion.'" (Decision, p. 13, citing *Sierra Forest Products, supra,* Cal/OSHA App. 09-3979.) The Board had previously denied a moving party's request to amend, absent a finding of prejudice, based on undue delay and the moving party's failure to explain that delay. (*Calstrip Steel Corporation, supra,* Cal/OSHA App. 312668825; *Sierra Forest Products, supra*.) However, after further evaluation and consideration, the Board concludes dismissal of a matter solely for undue delay runs contrary to the Board's procedural framework established in its own regulations.

Under the Board's post-submission amendment regulation, "the Appeals Board may amend the issues on appeal or the Division action after a proceeding is submitted for decision. (§ 386, subd. (a).) As evident, the text of the Board's rule on post-submission amendments does not encompass "undue delay" considerations.

Contrary to section 386, in certain circumstances, undue delay may be a consideration under section 371.2: the Board's rule governing pre or mid-hearing amendments. Under section 371.2, subdivision (a)(1), "a request for an amendment that does not cause prejudice to any party may be made by a party or the Appeals Board at any time." Therefore, if the non-moving party does not establish prejudice, the Board has discretion to grant the amendment and as the text of the Board's regulation demonstrates, the Board need not consider "undue delay."

This is not the case if the non-moving party demonstrates prejudice and fails to bring its amendment within a specified timeframe. Under section 371.2, subdivision (a)(2), the concept of "undue delay" may become relevant. Specifically, parties who request an amendment either during the hearing or less than 20 days before the hearing, the Board's rule requires the moving party to establish good cause for the failure to request the amendment before the mentioned timeframe, i.e., the moving party needs to justify the so called "undue delay" and the failure to request an amendment earlier. (Compare subd. (a)(2)(A) [no good cause discussion necessary when analyzing amendment requests brought at least 20 days before the hearing) with subd. (a)(2)(B) [must show good cause for amendment requests that were not brought at least 20 days before the hearing].) But, the Board's rules do not make a failure to establish good cause a sufficient basis to deny an amendment by itself absent the predicate determination of prejudice and a failure to bring the motion at least 20 days before the hearing.

The reason behind the distinction in Board rules for undue delay considerations under pre- and mid-hearing amendments (under the circumstances explained above) versus post-hearing amendments is because the party that requests a post-submission amendment does not seek to put on new evidence but seeks to assert a claim under the already submitted evidence in the record. For example, here, the Division's post-submission amendment request is based on the evidence

already presented at the hearing and does not require the Division to put on new evidence. To respond, in this case, the Employer was also not required to put forth new evidence after the Division's request to amend the citation post-hearing since Employer fully litigated the issue during the hearing and the record contains its arguments against the merits of the Division's post-hearing amendment request. (*Ante*, at pp. 10-11 [heading 3.C.a.].) This crucial difference explains why the Board rules, under certain circumstances, allow undue delay considerations in pre- and mid-hearing amendment requests but they do not encompass such considerations in post-hearing amendment requests.

As explained above, under the Board's rules, undue delay does not play a role when analyzing post-submission amendments in section 386. The Board overrules any part of its prior case law to the extent they may be read contrary to the principles established here.
This factor also weighs in favor of granting the amendment.

c. Futility factor: the ALJ erred in concluding the amendment would have been futile.

In its post-hearing amendment, the Division sought to amend the citation to conform to proof, alleging a violation of section 1626, subdivision (a)(2), requiring "Railings and toeboards meeting the requirements of Article 16 of these safety orders shall be installed around stairwells." The issue here is whether the unprotected edge was part of the stairwell.

The Division's main argument is "the space in which stairs were placed is a 'stairwell.' The stairwell had two exposed sides that needed to be guarded… The sides were guarded by railings #3 and #4 until Employer allowed an employee to remove railing #4." (Division's Petition, p. 23.) The difference between the Division's theory of the stairwell and the Employer's is how many sides the stairwell has. The Division claims the stairwell had four sides and the fourth side was where the edge of the bonus room was located, while Employer claims the stairwell did not stretch all the way to the edge of the bonus room. Both arguments assume the stairway was part of or within a stairwell, disputing only how far the dimensions of the stairwell extended.

The ALJ disagreed with the parties' argument that the stairway was within a stairwell and held,

> Both parties have misconstrued the meaning of stairwell in this situation. There is no evidence that every building has a stairwell for every stairway. Certainly, there are obvious situations where a stairwell exists as a column or compartment extending vertically through the building, such as office buildings with emergency stairways located within a vertical column. However, there are also common situations where a stairway in a residence or other building is not enclosed within a stairwell. The stairway in the residence being constructed at the time of the accident was precisely this situation. The stairway was located in a vaulted-ceiling foyer, not encompassed within a stairwell.

The Division takes issue with the ALJ's holding that the stairway was within a "vaulted-ceiling foyer" and claims a foyer, by definition, does not "contemplate a space where a stairway is placed." (Petition, p. 22.) Nor does a foyer's definition "include any reference to the vertical space that extends upwards to the second floor through which Mariano fell." (*Ibid.*) The argument goes, "A foyer, does not, by definition, need to have a vaulted ceiling or be two stories in height to accommodate a stairway." (*Ibid.*)

The Board now addresses the merits of the post-submission amendment. The issue here is whether the area Mr. Mariano fell from was part of the stairwell. During the hearing, Employer entered into evidence the definition of stairwell in the Construction dictionary: "A compartment extending vertically through a building in which stairs are placed." (Exhibit T.) Employer argues a compartment does not encompass the area where Mr. Mariano fell from. During the hearing, the Division's witness, Mr. Foss, agreed with the definition but also testified stairwell was a compartment or shaft that contains the stairs.

Title 8, worker safety regulations do not define the term "stairwell." It is a well-established rule of statutory construction that "'the words of the statute should be given their ordinary and usual meaning and should be construed in their regulatory context.'" (*People v. Toney* (2004) 32 Cal.4th 228, 232.) The Board looks to dictionary definitions of a term to ascertain its ordinary and usual meaning. (*Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1122.) In construing a regulation, the Board reads that clause in harmony with other clauses and in context of the regulatory framework as a whole. (*Heritage Residential Care, Inc. v. Division of Labor Standards Enforcement* (2011) 192 Cal.App.4th 75, 82.)

The issue in need of the Board's resolution lies within the definition of the term stairwell; a term not defined in worker safety regulations but defined in potentially two different ways under different dictionaries. Employer advocates for the potentially narrower definition of the term found in the Construction Dictionary: "a compartment extending vertically through a building in which stairs are placed."[13] However, there are other dictionaries that define "stairwell" more broadly as "a long, vertical passage through a building around which a set of stairs is built"[14]; "the vertical shaft[15] or opening containing a stairway"[16].

The Board takes note that Employer's definition of stairwell, which is supported by the Construction Dictionary, is too narrow an interpretation of the term since other dictionaries define stairwell more broadly as a vertical shaft or opening that contains the stairway. When faced with two possible interpretations where one is narrower than the other, the California Supreme Court has directed the Board to favor the more liberal interpretation that is more protective of worker safety. (*Carmona v. Division of Industrial Safety* (1975) 13 Cal.3d 303, 313; *Department of Industrial Relations v. Occupational Safety & Health Appeals Bd.* (2018) 26 Cal.App.5th 93, 106-107.) In *Carmona*, the Division of Industrial Safety issued a decision narrowly interpreting a

[13] Construction Dict. (25th Anniversary Ed.) p. 518, col. 1.

[14] Cambridge Dictionary (Cambridge University Press 2020) <https://dictionary.cambridge.org/us/dictionary/english/stairwell> (as of July 13, 2020).

[15] A shaft is "a vertical opening passing through a building, as for an elevator." Webster's New World Dict. (2d ed. 2002) p. 585, col. 1.

[16] The Random House College dict. (Revised ed.) p. 1278, col. 1; dictionary.com (2020 dictionary.com, LLC) <https://www.dictionary.com/browse/stairwell> (as of June 13, 2020).

worker safety regulation stating, in part, "Unsafe hand tools shall not be used." (*Carmona* at p. 307.) In that decision, the agency held because the alleged injuries only occurred as a result of the manner employees used the tool, not any intrinsic flaw in the tool itself, employer did not violate the worker safety regulation at issue. (*Id.* at p. 305.) After considering the statutory framework governing these proceedings, the state's high court explained to the agency its role in interpreting regulations is to interpret them liberally in a manner that promotes worker safety. (*Id.* at p. 313.)

Only four years later, the state's high court reaffirmed the principle it established in *Carmona* in a separate decision: *Bendix Forest Prods. Corp. v. Div. of Occupational Safety & Health* (1979) 25 Cal.3d 465, 469-471. In a unanimous decision, the California Supreme Court once again held, the Labor Code's statutory provisions relevant to these proceedings "'make clear that the terms of the legislation are to be given a liberal interpretation for the purpose of achieving a safe working environment.'" (*Id.* at p. 470.)

Since the high court's mandate, California lower courts have relied on this principle and have considered the comprehensive sweep of these worker safety regulations when reviewing the Board's regulatory interpretations. (*United Air Lines, Inc. v. Occupational Safety & Health Appeals Bd.* (1982) 32 Cal.3d 762, 771; *Lusardi Construction Co. v. California Occupational Safety & Health Appeals Bd.* (1991) 1 Cal.App.4th 639, 645; *Rick's Elec. v. Occupational Safety & Health Appeals Bd.* (2000) 80 Cal.App.4th 1023, 1037; *Department of Industrial Relations v. Occupational Safety & Health Appeals Bd.* (2018) 26 Cal.App.5th 93, 106-107.)

Most recently, in *Department of Industrial Relations, supra,* the California Court of Appeal overruled the Board's narrow interpretation of the terms "outdoor places of employment" within the regulation at issue. (26 Cal.App.5th at p. 99.) The Board had held bus interiors were not outdoor places of employment within the language of the regulation. In reversing the Board, the court once again reminded the Board of the comprehensive sweep of these worker safety regulations and the high court's rationale in *Carmona*. (*Id.* at pp. 106-109.) The Court of Appeal reiterated the guiding interpretive principle and steps to take to implement the *Carmona* mandate. As it relates to this case, the Board must determine whether the word(s) at issue are susceptible to more than one interpretation. If so, the Board must determine what other reasonable definitions could apply to the words in question, and adopt that which most promotes worker safety.

In addition to the mentioned principles, in construing a particular clause of a statute, the Board reads that clause in harmony with other clauses and in context of the statutory framework as a whole. (*Heritage Residential Care, Inc. v. Division of Labor Standards Enforcement* (2011) 192 Cal.App.4th 75, 82.) Title 8 regulations are enacted under the statutory mandate in the Labor Code. (*Southern California Edison*, Cal/OSHA App. 81-663, Decision After Reconsideration (Aug. 26, 1985) [everything the Standards Board and the Division do are "bottomed upon authority in the Labor Code"].) The California Legislature declared its distinct state interest when it enacted Labor Code section 6300, prescribing the Occupational Safety and Health Act of 1973 for the purpose of assuring safe and healthful working conditions for all California workers.

The Board's acceptance of the Division's more liberal interpretation, as opposed to Employer's potentially narrower definition, not only comports with the statutory framework as a whole, but it is also consistent with the principles the California Supreme Court established in *Carmona* and *Bendix* mentioned above and followed within the past four decades by California's lower courts.

The Board also upholds the violation on a separate basis. Most of section 1626's text specifically refers to "stairways"; subdivision (a)(2) is the only subdivision that mentions the term "stairwells." In light of the Standard Board's sole use of the term in the subdivision at issue, the Board concludes the Standards Board intended for toeboards and railings to be installed around a bigger area than the term stairway encompasses. Otherwise, the Standards Board would have employed the term stairway in subdivision (a)(2) by requiring railings and toeboards be installed "around stairways." However, the Standards Board chose to employ the terms "around stairwells." The Board should give significance to every word, phrase, sentence, and part of an act and must avoid a construction which makes some words surplusage. (*Donley v. Davi* (2009) 180 Cal.App.4th 447, 465 [holding general rules of construction prevent an interpretation that renders any part of a regulation superfluous]; *Sully-Miller Contracting Company v. California Occupational Safety and Health Appeals Board* (2006) 138 Cal.App.4th 684, 695 [holding in interpreting regulations, every word must be given meaning and a construction that would render a word surplusage must be avoided].)

During the hearing, Jon Wagner, the employee in charge of Employer's safety program, testified a stairwell is only the vertical space the stairs occupy and marked Exhibit 3B to demonstrate that area. The Board concludes this is too narrow of an interpretation as one would be hard-pressed to distinguish the area around the stairway that leads from one floor to another from the area "around stairwell," which the Standards Board has employed in section 1626, subdivision (a)(2). (§ 1504, subd. (a) [stairway is "a series of steps and landings having 2 or more risers leading from one level or floor to another"].) As mentioned, by choosing to use the term "stairwell" only once within the text of section 1626—in comparison to using "stairway" 20 times—the Board concludes the Standards Board intended to cover a wider area than the Employer asserts.

The Board concludes the area Mr. Mariano fell from was part of the vertical opening passing through the building. Section 1626, subdivision (a)(2) requires installation of railings and toeboards meeting the requirements of Article 16 around stairwells. It is undisputed that Employer failed to have the mentioned railings and toeboards before Mr. Mariano fell from the edge of the stairwell.

Finally, the Board is not persuaded by the ALJ's determination that the area in question was a "foyer," and not a "stairwell," thereby making the regulation inapplicable. The Board concludes the ALJ erroneously focused on finding a single, most appropriate definition that she believed described the feature of the house being built where the accident occurred. This is not a poll of dictionaries—indeed, we have a wide variation as discussed above. Nor is it not a search for a perfect definition, or a quest for a single word, to the exclusion of all others. Indeed, this part of the house could well be called a "foyer", and calling it such would not be an incorrect English usage. However, that is not what the Board is required to do by *Carmona, supra,* 13 Cal.3d at p. 313 and *Department of Industrial Relations*, *supra,* 26 Cal.App.5th at pp. 106-108, and it declines to do so here.

Thus, this factor weighs in favor of granting the amendment. All in all, the Board overrules the ALJ's analysis on this issue, grants the amendment, and upholds the violation on this basis as well. The Board concludes the Division proved Employer violated Citation 2, Item 1 based on both section 1632, subdivision (b), and section 1626, subdivision (a)(2).

4. Was Citation 2 properly classified Serious?

The Division classified Citation 2 as Serious. Employer's appeal disputed the Serious classification of this citation. 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 in Labor Code section 6432, subdivision (e), which states,

> "Serious physical harm," as used in this part, means any injury or illness, specific or cumulative, occurring in the place of employment or in connection with any employment, that results in any of the following:
>
> (1) Inpatient hospitalization for purposes other than medical observation.
> (2) The loss of any member of the body.
> (3) Any serious degree of permanent disfigurement.
> (4) Impairment sufficient to cause a part of the body or the function of an organ to become permanently and significantly reduced in efficiency on or off the job, including, but not limited to, depending on the severity, second-degree or worse burns, crushing injuries including internal injuries even though skin surface may be intact, respiratory illnesses, or broken bones.

Here, inspector Aruejo testified his Division-mandated training is current; therefore, he is "deemed competent to offer testimony to establish each element of a serious violation." (Lab. Code, § 6432, subd. (g).) He further testified there was a realistic possibility of death or serious physical injury if an employee were to fall from the unprotected edge at issue. Further, employee Mariano did suffer serious physical harm as a result of the fall and the parties stipulated he suffered "serious physical harm" as the term is defined above. The Board finds the Division established a rebuttable presumption that a Serious violation existed. Next, the Board decides whether Employer rebutted this presumption.

Labor Code section 6432, subdivision (c), provides a mechanism for Employer to rebut the presumption of a Serious violation. It states:

> If the division establishes a presumption pursuant to subdivision (a) that a violation is serious, the employer may rebut the presumption

> and establish that a violation is not serious by demonstrating that the employer did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation. 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. Factors relevant to this determination include, but are not limited to, those listed in subdivision (b).
> (2) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered.

Here, Employer failed to rebut the presumption as it cannot be said it "did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation." (Lab. Code, § 6432, subd. (c).) The evidence demonstrates Employer knew the framers were exposed to the hazard of falling off the unprotected edge. Mr. Hernandez testified he and his crew had framed exterior walls on a building's second floor using the same method the framers used on the day of the accident, indicating he knew a fall hazard would be created. The dimensions of the wall along with the absence of a crane demonstrate employees needed to finish framing the exterior wall by laying it on the second floor and take out the temporary railing to fit that exterior wall on the floor. Mr. Hernandez testified Employer's written plan established the dimensions of the exterior wall; therefore, Employer knew the dimensions of the exterior wall employees had to frame, as well as the second floor's dimensions. Knowing the dimensions of the exterior wall were larger than the dimensions of the second floor, employees' lack of access to a crane to lay the wall on the first floor's ground, and Mr. Hernandez's testimony on using the same method to frame exterior walls on prior occasions, the Board concludes Employer knew or could have known of the violative condition with the exercise of reasonable diligence.

Moreover, Employer's use of spray paint on the floor to mark the six feet edge and the instructions it provided to its employees were neither effective nor sufficient to rebut the Serious violation presumption and prove "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." (Lab. Code, § 6432, subd. (c)(1); Exhibit 3B [depicting a thinly-lined orange spray paint marking].) The record establishes, on the day of the accident, the framers had to finish building the exterior wall by laying it flat on the second floor and they needed to lay the wall on that same spray-painted floor for 30 minutes to an hour and it is unclear how much of that spray paint, if any, was visible to the framers after they laid down a nearly-finished exterior wall on the floor.

The Board affirms the Serious classification.

5. Was Citation 2's proposed penalty 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. (*RNR Construction, Inc*., Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017), citing *Stockton Tri Industries, Inc*., Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).) The Division must provide proof that a proposed penalty is, in fact, calculated in accordance with the penalty-setting regulations. (*Plantel Nurseries*, Cal/OSHA App. 01-2346, Decision After Reconsideration (Jan. 8, 2004); *RII Plastering, Inc. dba Quality Plastering Company*, Cal/OSHA App. 00-4250, Decision After Reconsideration (Oct. 21, 2003).) Generally, the Division, by introducing its proposed penalty worksheet and testifying to the calculations being completed in accordance with the appropriate penalties and procedures, will be found to have met its burden of showing the penalties were calculated correctly. (*M1 Construction, Inc*., Cal/OSHA App. 12-0222, Decision After Reconsideration (Jul. 31, 2014).)

Here, Employer's appeal asserted Citation 2's proposed penalty was unreasonable. During the hearing, the Division introduced its proposed penalty worksheet and inspector Aruejo testified how he calculated the penalties for Citations 2 and 3. (Exhibit 17.) The Division proposed a penalty of $22,500 for the citation.

Section 335, subdivision (a)(1)(B), provides that the severity of a Serious violation is high. Section 336, subdivision (c)(1), provides that the initial base penalty of a Serious violation is $18,000. Therefore, $18,000 is the correct base penalty for the citation. The Board will next analyze other relevant factors in penalty calculations.

Section 336, subdivision (c)(1), provides that Likelihood for a Serious violation is rated under section 335, subdivision (a)(3). Here, inspector Aruejo testified he rated likelihood high because the probability of an employee suffering serious physical harm as a result of the violative condition was high. Section 336, subdivision (c)(1), states for a rating of "HIGH," 25 percent of the base penalty shall be added. Therefore, the Division correctly adjusted the penalty to $22,500.
Section 336, subdivision (c)(2) states, in part, "If the employer commits a Serious violation and the Division has determined that the violation caused death or serious injury, illness or exposure as defined pursuant to Labor Code section 6302, the penalty shall not be reduced pursuant to this subsection, except the penalty may be reduced for Size as set forth in subsection (d)(1) of this section." (See also § 336, subdivision (d)(7).) Mr. Aruejo testified on this issue and the Division calculated the penalty accordingly. According to the quoted regulation mentioned above, the penalty here can only be reduced for size.

As to size, inspector Aruejo testified he did not adjust the penalty because Employer had more than 100 employees. This comports with section 336, subdivision (d)(1). No downward adjustment of the penalty is appropriate in the instant matter. The Board upholds the $22,500 penalty.

Decision

The Board vacates Citation 1, Item 1, and upholds Citation 2, Item 1 for the reasons explained above.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

/s/ Ed Lowry, Chair
/s/ Judith S. Freyman, Board Member
/s/ Marvin Kropke, Board Member

FILED ON: 04/02/2021

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No.
L & S FRAMING, INC. **33650 CINCINNATI AVENUE** **ROCKLIN, CA 95765** **Employer**	**1173183** **ERRATA TO THE DECISION AFTER RECONSIDERATION**

On April 2, 2021, the Occupational Safety and Health Appeals Board issued a Decision after Reconsideration (DAR) in this matter. The DAR contains two errors on top of page six where there are references to Mr. Aruejo instead of Mr. Mariano. By this Errata to the DAR, the Board corrects the references as indicated by the underscores below:

> …interviews for the three other employees who were working with Mr. Mariano on the second floor. Evidence in the record also demonstrates after Mr. Mariano's accident, Employer engaged in corrective measures: employees currently frame the walls on the ground and lift them up with a forklift.

This Errata to the DAR relates back to the issuance date of April 2, 2021.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

/s/ Ed Lowry, Chair
/s/ Judith S. Freyman, Board Member
/s/ Marvin Kropke, Board Member

FILED ON: 04/09/2021