BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1362970**
CARIOSCIA CORPORATION **dba PRECISION STEEL ERECTORS** **13152 W. BUTLER DRIVE** **EL MIRAGE, AZ 85335** **Employer**	**DECISION**

Statement of the Case

Carioscia Corporation (Employer) is a structural steel erection company. On November 30, 2018, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Victor Reyes (Reyes), commenced an investigation of a project located at 852 Metcalf Street, Escondido, California (the job site), in response to an injury report.

On May 1, 2019, the Division issued three citations to Employer: (1) failure to report a serious injury; (2) failure to provide required training in the safe use of ladders; and (3) failure to place a ladder in a manner as to prevent slipping.

Employer timely appealed the citations, contesting the existence of the violations. Additionally, Employer asserted the Independent Employee Action Defense.[1]

This matter was heard by Mario L. Grimm, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, in West Covina, California, on April 22, 2021, and August 19, 2021, with the parties appearing remotely via the Zoom video platform. Kevin M. Brown, Attorney at Snell & Wilmer L.L.P., represented Employer. William C. Cregar, Staff Counsel, represented the Division. The matter was submitted on November 23, 2021.

Issues

1. Did Employer fail to report to the Division a serious injury suffered by its employee?

[1] Except as otherwise noted, Employer did not present evidence in support of its affirmative defenses, and said defenses are therefore deemed waived. (*RNR Construction, Inc.*, Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017).)

2. Did Employer provide its employee with all required ladder safety training?

3. Did Employer fail to place a ladder in a manner as to prevent slipping?

4. Did Employer establish the Independent Employee Action Defense?

5. Did the misplacement of the ladder create a realistic possibility of serious physical harm?

6. Did Employer know of the presence of the violation?

7. Is Employer entitled to recover its attorneys' fees?

Findings of Fact

1. On November 4, 2018, Robert Hernandez (Hernandez) was using an extension ladder on the second floor of a structural steel construction project. The deck of the second floor had grooves in which the feet of the ladder could be placed in order to stabilize the ladder.

2. Hernandez did not place the feet of the ladder in the groove. The ladder was not tied, blocked, held, or otherwise secured to prevent slipping.

3. The ladder slipped and fell as Hernandez climbed it to tie off. When Hernandez fell, he struck his head on the deck of the second floor.

4. Hernandez was hospitalized from November 4, 2021, to November 6, 2021. He received physical therapy while hospitalized.

5. Employer did not report Hernandez's injury to the Division.

6. Employer did not train Hernandez on all of the topics regarding the safe use of ladders listed in section 3276, subdivision (f).

Issues

1. **Did Employer fail to report to the Division a serious injury suffered by its employee?**

California Code of Regulations, title 8, section 342, subdivision (a),[2] under "Reporting Work-Connected Fatalities and Serious Injuries," provides:

> Every employer shall report immediately by telephone or telegraph to the nearest District Office of the Division of Occupational Safety and Health any serious injury or illness, or death, of an employee occurring in a place of employment or in connection with any employment.
>
> Immediately means as soon as practically possible but not longer than 8 hours after the employer knows or with diligent inquiry would have known of the death or serious injury or illness. If the employer can demonstrate that exigent circumstances exist, the time frame for the report may be made no longer than 24 hours after the incident.
>
> Serious injury or illness is defined in section 330(h), Title 8, California Administrative Code.

Section 330 defines "serious injury or illness," in relevant part, as:

> [A]ny injury or illness occurring in a place of employment or in connection with any employment which requires inpatient hospitalization for a period in excess of 24 hours for other than medical observation . . . .

Citation 1, Item 1, alleges:

> The employer failed to report to the Division a serious injury sustained by one employee who was working up on portable ladder, fell, and sustained a serious injury at the job site located at 852 Metcalf Street, Escondido, CA, on 11/4/2018.

The Division holds the burden of proving this violation by a preponderance of the evidence. (*Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).)

On November 4, 2018, Employer was erecting the steel frame of a five-story storage facility. Hernandez was installing bolts in steel beams on the second floor of the structure. He used an extension ladder to reach overhead beams. The deck of the second floor had grooves in which the feet of the ladder could be placed in order to stabilize the ladder. In addition to placing the feet of the ladder in a floor groove, the top of the ladder was supposed to be tied off, which required climbing the ladder.

[2] Unless otherwise specified, all references are to sections of California Code of Regulations, title 8.

Hernandez testified that he successfully used the ladder more than 20 times on one row of overhead beams. However, when he moved to a subsequent row, he could not fit the feet of the ladder in the groove. Hernandez further testified that he attempted to climb and tie off the ladder. The ladder slipped and fell before Hernandez could tie off. Hernandez fell to the ground, struck his head, and lost consciousness.

Hernandez was taken by ambulance to a hospital. He was diagnosed with a concussion, a scalp laceration, and multiple contusions. In the emergency room, Hernandez received surgical staples. The emergency room physician determined:

> The patient is pretty anxious and his post-concussive state and does not appear suitable for an immediate discharge home from the trauma room. I proposed to him and he agrees and wishes to be admitted for overnight observation and repeat examination tomorrow morning. He is therefore admitted as an outpatient with observation services with the expectation that he can likely be discharged home tomorrow.

(Exhibit O, p. 62.) Hernandez was re-evaluated the next day. The physician then determined Hernandez was:

> Still dizzy, weak, and with too much pain to consider discharge home. Physical therapy was instituted and he progressed . . . .

(Exhibit O, p. 63.) Hernandez remained hospitalized for a second night, and was discharged on November 6, 2018.

Mary Kochie (Kochie) is a Nurse Consultant for the Division. She has held her position for 20 years. Kochie reviewed Hernandez's medical records (Exhibit O). She opined that Hernandez received medical treatment because the medical records indicate he received physical therapy.

Tony Carioscia (Carioscia) is Employer's President and owner. Carioscia testified that he spoke with Hernandez's wife on November 4, 2021, and she told him that Hernandez was being hospitalized for observation. Carioscia further testified that he spoke with her again on November 5, 2021, and she told him that Hernandez remained hospitalized. Carioscia did not attempt to contact Hernandez's wife after November 5, 2021. Employer never reported Hernandez's injury to the Division. Carioscia testified that Employer did not report Hernandez's injury because Hernandez's wife stated that the purpose of the hospitalization was observation and Employer was not aware of Hernandez receiving anything other than observation.

A. Did Hernandez suffer a serious injury?

Employer contends that section 342 did not require Employer to report Hernandez's injury because it was not a "serious injury." The Division may demonstrate the existence of a "serious injury" by showing the following elements: (1) an injury occurred in a place of employment; (2) the injury required inpatient hospitalization in excess of 24 hours; and (3) the hospitalization occurred for other than medical observation. (*Target Corporation*, Cal/OSHA App. 1251879, Decision After Reconsideration (July 22, 2021).)

Here, the parties do not dispute that Hernandez's injury occurred in a place of employment. Thus, the first element of "serious injury" is satisfied. With regard to the second element, the medical records show that Hernandez was admitted to the hospital on November 4, 2018 and was discharged on November 6, 2018. (Exhibit O, pp. 62-63.) This is a hospitalization in excess of 24 hours. Thus, the second element is satisfied.

With regard to the third element, the Appeals Board addressed the term "medical observation" in *Target Corporation*:

> The word 'observe' is defined to mean, relevant here, 'to watch carefully especially with attention to details or behavior for the purpose of arriving at a judgment' or 'to make a scientific observation on or of.' An 'observation' is defined to mean, relevant here, 'an act of recognizing and noting a fact or occurrence often involving measurement with instruments' or 'a judgment on or inference . . . from what one has observed.' For something to constitute 'other than medical observation,' it must not fit within the foregoing definitions; it must be other than.

(*Ibid.*) Here, the physician instituted physical therapy during Hernandez's hospitalization. Physical therapy is "therapy for the preservation, enhancement, or restoration of movement and physical function impaired or threatened by disease, injury, or disability that utilizes therapeutic exercise, physical modalities (such as massage and electrotherapy), assistive devices, and patient education and training."[3] Importantly, physical therapy is not an act of watching, recognizing, or noting a fact or occurrence. It is not a judgment or inference from what one has observed. Physical therapy does not fit within the definitions of "observe" or "observation." It is "other than medical observation." Thus, the third element is satisfied.

Employer further contends there was no serious injury because Hernandez was admitted as an outpatient rather than an inpatient: "He is therefore admitted as an outpatient with

[3] https://www.merriam-webster.com/dictionary/physical%20therapy <accessed December 8, 2021>

observation services with the expectation that he can likely be discharged home tomorrow." (Exhibit O, p. 62.) These expectations, however, did not come to pass. The day after Hernandez's admission to the hospital, the physician determined Hernandez was not fit for discharge and instituted physical therapy. The course of the hospitalization establishes the "serious injury" despite the expectations at the time of admission.

B. Did Employer make a diligent inquiry into the serious injury?

The Appeals Board will uphold a citation for failure to report a serious injury where the Employer knew of the serious injury, or should have known that the injury was serious had it made a diligent inquiry into the matter. (*Burbank Recycling, Inc.*, Cal/OSHA App. 10-0562, Decision After Reconsideration (Jun. 30, 2014).)

Here, Employer was aware that Hernandez fell from a ladder, struck his head, and was taken by ambulance to a hospital. Employer learned that Hernandez was being hospitalized for overnight observation, and learned the next day that he remained hospitalized. Despite the continued hospitalization, Employer did not make further attempts to determine Hernandez's status thereafter. Employer assumed Hernandez did not receive anything other than medical observation. A diligent employer would not have ceased its inquiry into the matter given Employer's knowledge of the accident and the continued hospitalization. Thus, Employer did not make a diligent inquiry into the matter.

Accordingly, Employer violated the cited safety order. Citation 1, Item 1, is affirmed.

2. Did Employer provide its employee with all required ladder safety training?

Section 3276, subdivision (f), requires training in the safe use of ladders:

> Employee Training. Before an employee uses a ladder, the employee shall be provided training in the safe use of ladders, unless the employer can demonstrate that the employee is already trained in ladder safety as required by this subsection. Supervisors of employees who routinely use ladders shall also be provided ladder safety training, unless the employer can demonstrate that the supervisor is already trained in ladder safety as required by this subsection. The training may be provided as part of the employer's Injury and Illness Prevention Program required by Section 3203. The training shall address the following topics, unless the employer can demonstrate a topic is not applicable to the safe use of ladders in the employer's workplace.

(1) Importance of using ladders safely, including: frequency and severity of injuries related to falls from ladders.
(2) Selection, including: types of ladders, proper length, maximum working loads, and electrical hazards.
(3) Maintenance, inspection, and removal of damaged ladders from service.
(4) Erecting ladders, including: footing support, top support, securing, and angle of inclination.
(5) Climbing and working on ladders, including: user's position and points of contact with the ladder.
(6) Factors contributing to falls, including: haste, sudden movement, lack of attention, footwear, and user's physical condition.
(7) Prohibited uses, including: uses other than designed, climbing on cross bracing, maximum lengths, and minimum overlap of extension ladder sections.

Citation 2, Item 1, alleges:

> Prior to and during the course of the inspection, the employer did not ensure that before an employee used a portable ladder to access the 3rd floor at 852 Metcalf Street, Escondido, CA 92025, the employee was provided training in the safe use of ladders as required per this subsection.

In the present matter, Hernandez testified that Employer showed him a video on ladder safety training that covered foldout ladders, but not extension ladders. Employer used extension ladders at the job site. Hernandez further testified that morning tailgate trainings did not cover extension ladders.

Reyes testified that he interviewed Hernandez as part of the Division's investigation. According to Reyes, Hernandez indicated that he had not received training on extension ladders. Reyes further testified that the Division requested all health and safety training records for Hernandez, but did not receive ladder training records.

At hearing, Employer introduced its written Injury and Illness Prevention Program (IIPP), Code of Safe Practices (CSP), and Code of Safe Practices—Extension Ladders. (Exhibits K, L, and M.) The exhibits do not address all elements required by the cited safety order, such as the frequency and severity of injuries related to falls from ladders, factors contributing to falls, and prohibited uses.

Harley McCasland was Employer's Foreman at the job site. On direct examination, and with respect to each element of the safety order, McCasland was asked if he trained Hernandez

on the element. McCasland answered in the affirmative for each element. On cross-examination regarding the training provided to Hernandez, McCasland testified that he showed Hernandez how to set up an extension ladder; McCasland did not reference other elements of the safety order. McCasland further testified that Hernandez signed acknowledgments for the IIPP, CSP, and CSP—Extension Ladders.

Carioscia testified that Employer's foremen send training documents to Employer's headquarters on a weekly basis. According to Carioscia, he had a pre-planned trip to the job site that prompted him to direct McCasland to hold Hernandez's training acknowledgments for Carioscia to pick up in person. He received the acknowledgments but lost them at the job site.

McCasland's testimony that he trained Hernandez on each topic in the safety order is not persuasive. Because the testimony was given in response to leading questions, McCasland merely answered in the affirmative. He was not required to recall and supply the topics of training. Additionally, McCasland did not explain what led him to train Hernandez on each element of the safety order. This is significant because Employer's policy documents (Exhibits K, L, and M) do not cover all elements of the safety order, and, on cross-examination, McCasland referenced only showing Hernandez how to set up an extension ladder.

Employer's explanation of the loss of the training acknowledgments is not persuasive because the policy documents (Exhibits K, L, and M) do not address all elements of the safety order. Thus, the training requirements would not be satisfied even if Hernandez reviewed the policy documents.

In sum, McCasland's testimony and the absence of training records are consistent with the credible testimony of Hernandez and Reyes. The preponderance of the evidence indicates Employer did not train Hernandez on all topics required by the safety order. Accordingly, Citation 2, Item 1, is affirmed.

3. Did Employer fail to place a ladder in a manner as to prevent slipping?

Section 3276, subdivision (e)(9), provides:

> Angle of Inclination. Non-self-supporting ladders such as single ladders and extension ladders shall, where possible, be used at such a pitch that the horizontal distance from the top support to the foot of the ladder is one-quarter of the working length of the ladder (the length along the ladder between the foot and the top support). The ladder shall be so placed as to prevent slipping, or it shall be tied, blocked, held, or otherwise secured to prevent slipping. Ladders shall not be

used in a horizontal position as platforms, runways, or scaffolds unless designed for such use.

Citation 3, Item 1, alleges:

> Prior to and during the course of the inspection, where an employee was using a portable ladder to access the 3rd floor at 852 Metcalf Street, Escondido, CA 92025, the ladder was not placed as to prevent slipping, or it was not tied, blocked, held, or otherwise secured to prevent slipping. As a result, on or about November 4, 2018, an employee who was climbing the unsecured ladder sustained a fall, after the ladder slipped, which caused him serious injuries.

Here, Hernandez was using an extension ladder in order to reach a series of overhead beams. He came to a floor groove in which he was not able to secure the feet of the ladder. The ladder slipped as Hernandez attempted to tie off. Employer does not argue that the ladder was placed in a manner as to prevent slipping, or that the ladder was tied, blocked, held, or otherwise secured to prevent slipping. Accordingly, Citation 3, Item 1, is affirmed.

4. Did Employer establish the Independent Employee Action Defense?

Employer contends the Independent Employee Action Defense (IEAD) applies to the violation in Citation 3, Item 1. The IEAD relieves an employer of responsibility for a violation. There are five elements to this affirmative defense, all of which must be proved by an employer in order for the defense to succeed: 1) the employee was experienced in the job being performed; 2) the employer has a well-devised safety program that includes training in matters of safety respective to their particular job assignments; 3) the employer effectively enforces the safety program; 4) the employer has a policy of sanctions which it enforces against those employees who violate its safety program; and 5) the employee caused a safety infraction which he knew was contra to the employer's safety requirements. (*Timberworks Construction, Inc.*, Cal/OSHA App. 1097751, Decision After Reconsideration (Mar. 12, 2019).)

Here, Employer has a safety program that includes its IIPP, CSP, and CSP—Extension Ladders. (Exhibits K, L, and M.) Additionally, Employer sanctions employees for violations of its safety program. (Exhibit P.)

However, Employer does not meet the second element of the IEAD because it failed to train Hernandez on all of the required topics in the safe use of ladders. The lack of ladder safety training is significant because Employer assigned Hernandez to use a ladder and because Citation 3, Item 1, relates to the use of ladders and preventing slipping. Thus, Employer's safety

program did not ensure Hernandez received training in matters of safety respective to his particular job assignment. Accordingly, Employer did not establish the IEAD.

5. Did the misplacement of the ladder create a realistic possibility of serious physical harm?

Although Employer did not contest the classification of Citation 3, Item 1, in its appeal forms, it asserted the lack of employer knowledge affirmative defense in a pre-hearing brief. At the subsequent hearing, both parties introduced evidence concerning the merits of the classification. In light of Employer's pre-hearing brief and the full litigation of the issue, the appeal is amended to include the appropriateness of the classification of Citation 3, Item 1. (*Marine Terminals Corp.*, Cal/OSHA App. 08-1920, Decision After Reconsideration (Mar. 5, 2013) (citing sections 371 and 386 regarding pre-hearing and post-submission amendments.)

The Division classified Citation 3, Item 1, as a "serious violation." Labor Code section 6432, subdivision (a), defines a serious violation as follows:

> 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.

"Serious physical harm" is any injury or illness occurring in the place of employment that results in, among other possibilities, "inpatient hospitalization for purposes other than medical observation." (Lab. Code § 6432, subd. (e).)

Reyes is an Associate Safety Engineer with the Division. He has been employed by the Division since 2016. He estimated that he has performed approximately 25 inspections regarding ladder incidents, including approximately 15 ladder accidents involving serious injuries. Reyes is current with his Division-mandated training. He is, therefore, qualified to provide competent testimony on the elements of a serious violation, as well as the custom and practice of injury and illness prevention in the workplace. (Lab. Code § 6432, subd. (g).)

Reyes testified that an employee can fall from a ladder if it slips or slides. He further testified that a fall from a ladder at the elevation involved in the present matter can result in hospitalization, fractures, head injuries, and even death. In fact, serious physical harm resulted in the present case. Accordingly, the Division established the rebuttable presumption that Citation 3, Item 1, was properly classified as a serious violation.

6. Did Employer know of the presence of the violation?

An employer may rebut the presumption that a violation is serious. Labor Code section 6432, subdivision (c), provides:

> 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:
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> > (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.

The reference to subdivision (b), of Labor Code section 6432, incorporates the following factors: (A) Training for employees and supervisors relevant to preventing employee exposure to the hazard or to similar hazards; (B) Procedures for discovering, controlling access to, and correcting the hazard or similar hazards; (C) Supervision of employees exposed or potentially exposed to the hazard; and (D) Procedures for communicating to employees about the employer's health and safety rules and programs.

A supervisor's knowledge of a hazard is imputed to the employer if the supervisor is responsible for the safety of employees. (*City of Sacramento, Dept. of Public Works*, Cal/OSHA App. 93-1947, Decision After Reconsideration (Feb. 5, 1998)).

Here, Employer contends it lacked actual and constructive knowledge of the violation because the ladder was misplaced by only a few inches and occurred within a matter of minutes or possibly seconds. Additionally, McCasland testified that he had observed Hernandez properly use a ladder prior to the accident.

However, McCasland did not train Hernandez on all of the required topics of ladder safety. As a supervisor responsible for safety training, McCasland's knowledge is imputed to Employer. The lack of ladder safety training is significant because Citation 3, Item 1, relates to the use of ladders and preventing slipping. Employer assigned Hernandez to use a ladder but did not train him on the required ladder safety topics. Therefore, Employer did not take all the steps a reasonable and responsible employer in like circumstances should be expected to take. Accordingly, Employer did not rebut the presumption that the violation is a serious violation.

7. Is Employer entitled to recover its attorneys' fees?

Section 397 authorizes an employer to file a petition for costs: "If an employer who appeals a citation prevails . . . and the employer wishes to claim reimbursement for reasonable costs . . . , the employer shall file a petition for costs together with a memorandum of items of cost with the Appeals Board." A petition for costs shall set forth specifically and in full detail the grounds upon which the employer's claim is made and identify the particular item or items of the citation for which the petition for costs is being filed. A petition for costs shall be verified upon oath in the manner required for verified pleadings in courts of record.

In its post-hearing brief, Employer asserts that the Appeals Board should dismiss Citation 1, Item 1, and grant Employer's "request (which it hereby makes) for its reasonable attorneys' fees related to the defense of this baseless Citation because the Division's decision to prosecute the Citation was arbitrary and capricious." However, Employer did not follow the procedure provided in section 397 by filing a petition for costs together with a memorandum of items of cost. Additionally, Employer did not prevail in its appeal of the citation. Accordingly, the request for an award of attorneys' fees is denied.

Conclusion

The evidence supports a finding that Employer violated section 342, subdivision (a), for failure to report a serious injury.

The evidence supports a finding that Employer violated section 3276, subdivision (f), for failure to provide required training in the safe use of ladders.

The evidence supports a finding that Employer violated section 3276, subdivision (e)(9), for failure to place a ladder in a manner as to prevent slipping. The violation was properly classified as serious.

ORDER

It is hereby ordered that Citation 1, Item 1, is affirmed and a penalty of $5,000 is sustained.

It is hereby ordered that Citation 2, Item 1, is affirmed and a penalty of $8,100 is sustained.

It is hereby ordered that Citation 3, Item 1, is affirmed and a penalty of $12,600 is sustained.

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

Dated: 12/17/2021

MARIO L. GRIMM
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.**