

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

In the Matter of the Appeal of:

**DPR CONSTRUCTION, INC., ET AL
dba DPR CONSTRUCTION
1450 Veterans Blvd.
Redwood City, CA 94063**

Employer

Inspection No.
1206788

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board or Appeals Board), acting pursuant to authority vested in it by the California Labor Code issues the following Decision After Reconsideration in the above-entitled matter.

JURISDICTION

DPR Construction, Inc. (Employer) is a construction contractor which was engaged in concrete work at 435 Harriet Street in San Francisco (the worksite)¹ on January 23, 2017, and at all times relevant hereto. Beginning on January 31, 2017, the Division of Occupational Safety and Health (Division), through Associate Safety Engineer Yalda Rassier (Rassier), conducted an accident inspection at the worksite.

On May 9, 2017, the Division cited Employer for three violations of California Code of Regulations, title 8² health and safety standards. Citation 1, Item 1, alleged a General violation of section 1509, subdivision (a) [failure to have a properly implemented effective Illness and Injury Prevention Plan]. Citation 1, Item 1, alleged two Instances: 1. Failure to enforce Employer's internal rule requiring workers to use fall protection when working at heights over six feet [referencing section 3203, subd. (a)(2)]; 2. Failure to identify the unsafe condition of workers standing on a ten inch wide scaffold plank when working at elevated heights [referencing section 3203, subd. (a)(4)]. Citation 1, Item 2, alleged a General violation of section 1637, subdivision (k)(1) [failure to provide proper supervision by a qualified person while erecting a framing shoring tower]. Citation 2, Item 1, alleged a Serious violation of section 1637, subdivision (a) [failure to provide a safe work platform while erecting a framing shoring tower].

¹ The "worksite" also refers to "510 Townsend" which is an alternate address of the project site.

² All references are to California Code of Regulations, title 8 unless otherwise specified.

The matter was heard by J. Kevin Elmendorf, Administrative Law Judge (ALJ) for the Board, in Oakland, California on April 27, 2018, and January 23 and 24, 2019. Deborah Bialosky, Staff Counsel, represented the Division. Fred Walter, of the law firm Conn Maciel Carey, LLP, represented Employer. On June 7, 2019, the ALJ issued a Decision affirming Citation 1, Items 1 and 2, and Citation 2, Item 1.

Employer timely filed a Petition for Reconsideration of the ALJ's Decision on July 11, 2019, and the Division filed a timely response. Employer's Petition does not contest the classification of the alleged violations. Issues not raised in the Petition for Reconsideration are deemed waived. (Lab. Code, § 6618).

In making this decision, the Board has engaged in an independent review of the entire record. The Board additionally considered the pleadings and arguments filed by the parties. The Board has taken no new evidence.

ISSUES

1. Was a violation of section 1509, subdivision (a), established by a preponderance of the evidence by the Division?
2. Was a violation of section 1637, subdivision (k)(1), established by a preponderance of the evidence by the Division?
3. Was a violation of section 1637, subdivision (a), established by a preponderance of the evidence by the Division?

FINDINGS OF FACT

1. On Monday, January 23, 2017, Michael Luckert (Luckert) was working his third workday at the worksite when he fell from a height of six feet, three inches, while not wearing any fall protection equipment.
2. On January 27, 2017, Cal/OSHA Associate Safety Engineer Rassier commenced an accident investigation at a place of employment maintained by Employer at 435 Harriet Street, San Francisco, California.
3. At the time of the accident, Employer's IIPP contained a rule that fall protection equipment must be worn at all times the worker is at a height of six feet or above.
4. Just before the accident, Manuel Garcia (Garcia), Luckert's supervisor, instructed Luckert not to climb onto the shoring tower. Then, Garcia walked away to check on other crews. Within fifteen minutes, Luckert climbed onto the shoring tower and fell off.
5. At the moment before his fall, Luckert was standing on a single wooden plank with measurements of 2" x 10" x 6.' The plank was placed between the rungs of the shoring tower at a height of six feet, three inches.

6. At the time of the accident, there was no permanent or solid construction footing at least 20 inches wide on which to stand while adding additional framework. There was only the single 10-inch wide plank.
7. Garcia failed to ensure that Luckert did not climb onto the shoring tower without fall protection.
8. The plank on which Luckert stood was a platform.
9. The use of a plank that was less than 20 inches wide was a contributing cause of the accident.

REASONS FOR DECISION AFTER RECONSIDERATION

- 1. Was a violation of section 1509, subdivision (a), established by a preponderance of the evidence by the Division?**

Citation 1, Item 1 alleges a violation of section 1509, subdivision (a), which states: “Every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program in accordance with section 3203 of the General Industry Safety Orders.” The citation references violations of section 3203, subdivisions (a)(2) and (a)(4), which provide:

(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:
[...]

(2) Include a system for ensuring that employees comply with safe and healthy work practices. Substantial compliance with this provision includes recognition of employees who follow safe and healthful work practices, training and retraining programs, disciplinary actions, or any other such means that ensures employee compliance with safe and healthful work practices.
[...]

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

The Division alleged in Citation 1, Item 1:

Prior to and during the Cal/OSHA inspection, including, but not limited to 1/31/2017, the employer; DPR Construction

INC ET AL [sic] failed to implement their Injury and Illness Prevention Program in the following instances:

1. Not ensuring their own 100% tie off rule at 6'. 9 (T8 CCR 3203(a)(2))
2. Not identifying the unsafe condition of standing on a 2x10x6 scaffold plank to erect shoring towers (T8 CCR 3203(a)(4)).

The Division has the burden of proving a violation of the cited safety order by a preponderance of the evidence. (*Howard J. White, Inc., Howard J. White Construction, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (Jun. 16, 1983).) “Preponderance of the evidence” is usually defined in terms of “probability of truth, or of evidence that when weighed with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence.” (*Timberworks Construction, Inc.*, Cal/OSHA App. 1097751, Decision After Reconsideration (Mar. 12, 2019).) The Division need only demonstrate that one of the instances charged by the citation is violative of the safety order. (*National Distribution Center, LP*, Cal/OSHA App. 12-0391, Decision After Reconsideration (Oct 5, 2015).)

Instance 1: Did Employer take adequate actions to ensure compliance with its six foot tie-off rule?

Citation 1, Item 1, Instance 1 alleged that Employer failed to implement its injury and illness prevention program (IIPP) “by not ensuring their own tie off rule at 6’,” referencing a violation of section 3203, subdivision (a)(2). Section 3203, subdivision (a)(2), requires employers to have in place “a system for ensuring that employees comply with safe and healthy work practices.”

The ALJ affirmed this violation because Luckert climbed to a height of six feet, three inches on the shoring tower without fall protection. The ALJ reasoned that Employer failed to appropriately monitor and supervise Luckert to ensure that the IIPP’s six-foot rule was not violated. (Decision, p. 6.)

In its petition, Employer argued that the Division lacked jurisdiction to issue a citation based on a violation of Employer’s own safety rules, when those rules are stricter than those adopted by the Occupational Safety and Health Standards Board (Standards Board). California’s construction fall protection regulation, section 1670, subdivision (a), mandates fall protection at heights of seven and a half feet and over. However, as the citation here alleged only that Employer failed to effectively implement its own IIPP with regard to the six-foot rule, and not a violation of section 1670, subdivision (a), this argument has little merit.

Employer further argues that the ALJ erred in focusing on DPR’s failure to enforce its six-foot rule in this single instance, without analyzing whether DPR actually had a system in place for ensuring employee compliance with safe work practices. This argument

has merit. “Substantial compliance” with section 3203, subdivision (a)(2), can be accomplished by any of four methods: recognition of employees for good safety habits; or, safety training and re-training programs for employees; or, disciplinary actions for employees who violate safety rules; or, “any other such means that ensures employee compliance.”

In order to show a violation of section 3203, subdivision (a)(2), the Division must demonstrate that the Employer did not comply with any of the listed methods. To rebut the Division’s showing, the Employer may demonstrate compliance by establishing that it implemented any one of the four listed methods. (*Coast Waste Management, Inc.*, Cal/OSHA App. 11-2385, Decision After Reconsideration (Oct. 7, 2016); *Marine Terminals Corp. dba Evergreen Terminals*, Cal/OSHA App. 08-1920, Decision After Reconsideration (Mar. 5, 2013).) The Board has previously found that compliance with “at least one of the four listed methods” was sufficient to rebut the Division’s showing. (*Coast Waste Management, Inc.*, *supra*.)

The Board has held that violation of an employer’s internal safety rules alone cannot be the basis for a violation of section 3203, subdivision (a)(2). In *Marine Terminals Corp. dba Evergreen Terminals*, *supra*, Cal/OSHA App. 08-1920, the Board found that the ALJ exceeded her authority in concluding, “without further analysis on the issue,” that the employer violated section 3203, subdivision (a)(2), based “on the accident’s occurrence itself.”

Employer’s IIPP (Exhibit 8) includes provisions for recognition of employees with good safety habits, disciplinary protocols for employees who violate safety rules which include zero tolerance for actions including “Fall protection violations,” employee safety training, and specific requirements for fall protection. Of course, merely having a written IIPP is insufficient to establish implementation. (*Los Angeles County Department of Public Works*, Cal/OSHA App., 96-2470, Decision After Reconsideration (Apr. 5, 2002).)

A review of the record indicates that Employer did comply with at least two of the methods listed in section 3203, subdivision (a)(2). First, Employer conducted regular safety instruction and training. Luckert attended two separate safety meetings on fall protection mere hours before the accident. (Exhibits C, D, and 21.) Second, Garcia and Wynne both had, and exercised, the authority to discipline workers who violated safety rules. (1/27/19 Hearing Transcript pp. 79-80; 4/27/18 Hearing Transcript, p.142.) Luckert himself was summarily fired for his disregard of Employer’s safe work practices, in accordance with Employer’s IIPP.

The ALJ did not analyze these factors. Instead, the ALJ focused only on Luckert’s violation of Employer’s six-foot rule, and ruled that this breach in itself was sufficient to establish the violation. Based on the record, it appears that Employer did what it was required to do to establish substantial compliance with the regulation.

The Board finds that Employer satisfied its duties to implement its IIPP as to the specific requirements set forth in section 3203, subdivision (a)(2). The fact that Luckert unexpectedly violated Employer’s internal six-foot rule, despite having been specifically

told, and trained, not to climb the shoring tower without fall protection, does not alone establish a violation of section 3203, subdivision (a)(2). The Division did not establish Employer's alleged violation in Instance 1 of Citation 1, Item 1.

Instance 2: Did Employer fail to identify the unsafe condition of standing on a single 10" wide scaffold plank while working at elevated heights?

Citation 1, Item 1, Instance 2 alleged that Employer failed to identify "the unsafe condition of standing on a 2 [inch] x 10 [inch] x 6 [foot] scaffold plank to erect shoring towers," referencing a violation of section 3203, subdivision (a)(4). Section 3203, subdivision (a)(4), provides that an effective IIPP must include "procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices."

While an employer may have a comprehensive IIPP, the Division may still demonstrate an IIPP violation by showing that the employer failed to implement that plan. To prove a violation of section 3203, subdivision (a)(4), based upon a failure of implementation, the Division must establish that the employer failed to effectively implement its duty to inspect, identify, and evaluate the hazard. (*OC Communications, Inc.*, Cal/OSHA App. 14-0120, Decision After Reconsideration (Mar. 28, 2016).) To prevail as to this instance, the Division must show that Employer did not conduct an inspection and hazard analysis of the worksite with respect to employees standing on a single 2" x 10" x 6' scaffold plank to complete the erection of the shoring towers.

Employer's safety manager, Benham, concluded the use of the single ten inch plank was a root cause of the accident. (Exhibit 7.) The ALJ found that "having only one plank on the tower constituted a risk that should have been identified and discussed, particularly to inexperienced workers." (Decision, p. 7.) Employer contends the single plank was intended to be used only by Luckert's crewmate, German Rodriguez (Rodriguez), and thus was not unsafe. Employer argues that Rodriguez's use of a single plank did not amount to an unsafe practice, "due to his experience, his stellar safety record and his personal preference." (Employer's Petition, p. 7.) Employer asserts that because Luckert was not intended to use the single plank that Rodriguez had been standing on, the single plank on top of the shoring tower was not an unsafe condition or work practice that needed to be identified and addressed.

Employer's IIPP required daily written planning (a Pre-Task Plan) for all work activities, with a more detailed Job Hazard Analysis (JHA) for high-risk activities, which included both "Concrete: pre-cast, vertical, and form work" and "Fall hazards: exposures 6+ feet, overhead work." (Exhibit 8.) The JHA was a "planning tool" intended to break high-risk activities into individual steps, identify potential hazards at each step, and implement measures to address each hazard. (*Id.*) Benham testified that Employer did not comply with this requirement in erecting the shoring towers. (4/27/18 Hearing Testimony, pp. 118-121.) Benham also noted in his Root Cause Analysis that "There was not a specific Pre-Task Plan for this shoring operation." (Exhibit 7.) While Employer did have additional procedures in place to inspect, identify, and evaluate hazards, those procedures were not implemented with regard to the single plank condition. Although Employer conducted an

inspection and held two safety meetings on the morning of the accident, the use of a single plank to stand on while constructing the shoring towers was not identified or addressed as unsafe.

The manufacturer's recommendations for the Harsco shoring frames used by Employer specify that scaffold planks used during frame installation "must conform to OSHA specifications." (Exhibit 18, p. 21, emphasis in original.) California's relevant OSHA regulations require a working surface at least 20 inches wide. (§§1637, subd. (a); 1640, subd. (b)(5)(A).) Illustrations depicting proper frame assembly show two parallel planks laid together across the top rungs of the tower. (Exhibit 18, p. 23.) The Harsco manual does not explicitly state that two planks are to be used during erection of the shoring towers, although it does instruct users to use two planks during disassembly. (Exhibit 18, p. 25.) Employer argues that the ALJ incorrectly interpreted this to mean that two planks must always be used while erecting shoring towers. However, the manual states that the width of work surfaces must conform to OSHA specifications, which in this case means a work surface at least 20 inches wide.

At the hearing, Garcia testified that although he was unaware of the manufacturer's recommendations, he was aware that Employer's own safety rules³ required the use of not one but two ten inch wide planks to stand on when assembling shoring towers above the level of the first unit. (1/23/19 Hearing Transcript, pp. 38-40.) Garcia further testified, "I knew that we had to use two, but with German [Rodriguez] we didn't follow that rule," and that rather than enforce the use of two planks for all employees, Garcia preferred to let the worker decide for himself or herself what "feels comfortable" in this regard. (*Ibid.*) Rodriguez testified that the two-plank rule was not enforced. (4/27/18 Hearing Transcript, pp. 189-190.) Wynne, the site supervisor, used one plank, following Garcia's training, as did Garcia himself. (1/23/19 Hearing Transcript, pp. 80-81.) .

The record establishes that Garcia knew Rodriguez was using only one plank on the day of the accident, in violation of Employer's safety rules. Even though Garcia may not have been able to foresee that Luckert, who lacked Rodriguez's experience in lifting and positioning heavy and cumbersome materials while balanced on a ten-inch wide surface, would disobey instructions and climb onto the plank, Garcia knew that the safety rules required two planks. This was a hazard that should have been identified.

The Board has long recognized that an employer may not substitute its judgment for the mandate of safety orders. (*Giumarra Vineyards Corporation*, Cal/OSHA App. 1256643, Denial of Petition for Reconsideration (May 26, 2020); *City of Sacramento Fire Department*, Cal/OSHA App. 80-1014, Decision After Reconsideration (Feb. 19, 1985).) Nor may an employer delegate the choice of whether to follow those rules to employees. (*Western Pacific Roofing Corp.*, Cal/OSHA App. 92-1787, Decision After Reconsideration (May 23, 1996); *The Office Professionals*, Cal/OSHA App. 92-604, Decision After

³ Employer's IIPP as submitted into evidence does not contain a reference to the minimum width of planks to be used as a work surface when erecting shoring towers, but Employer's witnesses uniformly testified that they knew this rule to exist, and, as noted, Benham identified the use of a work surface less than 20" in width as a root cause of the accident. Employer's Petition does not dispute the existence of the two-plank rule.

Reconsideration (June 19, 1995).) By allowing Garcia to decide what conditions required identification as hazards, Employer failed to identify the unsafe condition that led to Luckert's fall.

The Division established that Employer failed to implement its IIPP when it failed to conduct an inspection and hazard analysis that addressed the risks and hazards associated with using one plank instead of two as a platform for erecting the towers. Citation 1, Item 1, Instance 2 is affirmed.

2. Was a violation of section 1637, subdivision (k)(1), established by a preponderance of the evidence by the Division?

Citation 1, Item 2, alleged a General violation of section 1637, subdivision (k)(1), which provides:

(k) Erection and Dismantling.

(1) The erection and dismantling of scaffolds or falsework shall be performed under the supervision and direction of a qualified person.

Section 1647, subdivision (k)(1), adopts the definition of "qualified person" set forth in section 1504, which in turn states that a "qualified person" is:

A person designated by the employer who by reason of training, experience or instruction has demonstrated the ability to safely perform all assigned duties and, when required, is properly licensed in accordance with federal, state, or local laws and regulations.

The Division's violation description stated:

Prior to and during the Cal/OSHA inspection, including, but not limited to 1/31/2017, the employer, DPR Construction INC ET AL [sic] failed to provide supervision and direction of a qualified person while erecting shoring towers. An employee that lacked specific experience and training was erecting Harsco Frame Shoring on his first week on the job.

The ALJ found that the Division established Employer's failure to provide a qualified person to supervise the erection of the shoring tower. The ALJ concluded, first, that Garcia did not adequately supervise Luckert, because at the time of the accident, Garcia was between ten and forty feet away from him and could not see him. The Division, in its Answer to Employer's Petition, additionally argued that Garcia also did not adequately direct Luckert and Rodriguez in their task, because he did not instruct Luckert, in particular, that it was a safety hazard to stand on only one plank. The ALJ's Decision did not separately address the adequacy of direction, but the Division's argument that Garcia did not adequately direct Luckert is valid.

The ALJ further concluded that Garcia was not a “qualified person” to supervise the erection of the shoring towers, on the basis that “Employer did not establish by a preponderance of the evidence that by reason of training, experience, or instruction Employer has demonstrated Garcia’s ability to safely perform all assigned duties.” (Decision, p. 9.) The Board agrees, and we therefore need not reach the deeper question of whether Garcia’s supervision was adequate.

The record indicates that, based on his experience and training, Garcia was qualified to supervise the erection of the shoring towers. Employer provided evidence that Garcia had thirteen years of experience erecting shoring towers with DPR, including union and employer-provided safety training, and had five years of experience in concrete work prior to his employment with DPR. He led safety meetings for his crew members, including training on fall protection. However, based on Garcia’s undisputed ongoing failure to follow and enforce Employer’s safety rules regarding the width of scaffold planks used during the erection of shoring towers, it cannot be said that Garcia adequately directed Luckert, or that he “demonstrated the ability to safely perform all assigned duties.”

Citation 1, Item 2 is affirmed.

3. Was a violation of section 1637, subdivision (a), established by a preponderance of the evidence by the Division?

Citation 2, Item 1 alleged a Serious violation of section 1637, subdivision (a), which provides:

Scaffolds shall be provided for all work that cannot be done safely by employees standing on permanent or solid construction at least 20 inches wide, except where such work can be safely done from ladders.

The Division’s violation description alleged:

Prior to and during the Cal/OSHA inspection, including, but not limited to 1/31/2017, the employer; DPR Construction INC. ET AL [sic] failed to provide a safe work platform of solid construction footing while erecting a Harsco Frame Shoring. As a result, employee of DPR Construction INC. et al fell 6’3” while attempting to lift a 4’x6’ frame while standing on a 2 [inch] x 10 [inch] x 6 [foot] scaffold plank.’

Employer’s Petition does not challenge the classification of the alleged violation as Serious, only the applicability of the safety order. Employer argues that the plank from which Luckert fell was not a “platform” within the meaning of the safety order, and that section 1637, subdivision (a), does not control the activity addressed in the citation. The issue here -- whether certain employees’ permitted use of the single plank violated section 1637, subdivision (a) -- requires individually addressing these questions.

Was the plank being used as a platform?

Section 1504 defines “platform” to mean: “An elevated working area or surface used for supporting workers, materials and equipment.” Section 1504 defines “scaffold” as: “Any temporary, elevated structure used for the support of a platform.”

The evidence shows that Rodriguez and other workers stood on the plank(s), while wearing fall protection equipment, in order to receive and install frame pieces (i.e., materials). The ALJ reasoned that the planks were used to support workers, materials, and equipment, and were therefore platforms subject to the scaffolding requirements of section 1637, subdivision (a).

Employer’s argument is that only one worker at a time was on any given plank or planks; therefore the planks cannot be platforms because they were not used to support “workers,” plural. The Board, however, must interpret safety orders liberally, in a light most favorable to employee safety (*Carmona v. Division of Industrial Safety* (1975) 13 Cal.3d 303), and “in a manner that affords maximum protection to workers.” (*Beutler Heating & Air Conditioning*, Cal/OSHA App. 98-556, Decision After Reconsideration (November 6, 2001).). The ALJ’s conclusion that the plank was being used as a platform is consistent with this interpretation.

Does section 1637(a) apply to shoring towers?

Employer’s safety expert, Steven Bowers (Bowers), testified that section 1637, subdivision (a), does not apply to the erection of shoring towers. However, as the ALJ pointed out, it is a well-established principle that an expert witness may not testify regarding interpretation of a regulation. (*Coast Waste Management, Inc., supra*, Cal/OSHA App. 11-2385; *California Shoppers, Inc. v. Royal Globe Ins. Co.* (1985) 175 Cal.App.3d 1, 67; *Communication Satellite Corp. v. Franchise Tax Bd.* (1984) 156 Cal. App. 3d 726, 747; *Elder v. Pacific Tel. & Tel. Co.* (1977) 66 Cal. App. 3d 650, 664.) The Board has also indicated that such testimony is of little relevance on legal issues reserved for the Board to decide. (*Coast Waste Management, Inc., supra*.)

Employer also argues that the regulation does not encompass “falsework” or “shoring,” because these words are not included in the title of section 1637, which is titled “General Requirements” and is contained within Article 21, “Scaffolds,” while a separate section, section 1717, is titled “Falsework and Vertical Shoring,” and is located in Article 29, “Erection and Construction.” Employer asserts that to interpret otherwise would create an underground regulation.

The Board has rejected the approach of relying on a regulations title rather than content in determining its applicability to facts of the matter. (*Central Coast Pipeline Construction Company, Inc.*, Cal/OSHA App. 76-1342, 1343, Decision After Reconsideration (Jul. 16, 1980).) The ALJ examined the regulation and found a number of references to falsework in section 1637 -- including in subdivision (k)(1), the subject of Citation 1, Item 2 -- and concluded that section 1637, subdivision (a), applies to the facts of this matter in that it establishes the circumstances necessitating scaffolds.

In addition, the Board has previously addressed the question of whether shoring towers are subject to section 1637, and determined that they are. In *Webcor Construction LP dba Webcor Builders*, Cal/OSHA App. 317176766, Denial of Petition for Reconsideration (Jan. 20, 2017), the Board stated:

Employer argues that the temporary support structure which was the subject of all three citations at issue here was a "shoring tower," not "falsework" or a "scaffold," and therefore not subject to section 1637, subdivision (c). The Decision properly rejected this argument.

Section 1637 is a construction safety order, to which the definitions in section 1504 apply. (Section 1504, subd. (a).) Section 1504 defines "Falsework and Shoring for Concrete Construction" as follows: "Temporary formwork and vertical shoring, etc., to support concrete and placing operations for supported slabs of concrete structures." The definition encompasses the tower in question. The tower was temporary, vertical, and being put in place to shore concrete portions of the building being constructed as they were put in place. Employer's semantic argument is not persuasive. [Citations omitted.]

Here, as well, the shoring tower in question was temporary, vertical, and being put in place to shore concrete during construction. The ALJ's decision that section 1637, subdivision (a) applies to shoring towers is consistent with the Board's reasoning.

Did Employer's practice of allowing certain employees to use a single plank violate the safety order?

It is established that Luckert fell from a plank that was ten inches wide, and that Rodriguez's use of a single plank was a known and ongoing violation of Employer's internal safety rules. Having further established that the plank in question was being used as a platform, and that section 1637, subdivision (a) does apply to shoring towers, the ALJ concluded that Rodriguez's use of the ten-inch plank triggered the scaffolding requirement. We agree.

The Division established by a preponderance of the evidence that section 1637, subdivision (a), applies in this case, and the single ten-inch plank was insufficient to satisfy Employer's duty to provide a scaffold for the subject work. Section 1637, subdivision (a), is not a performance standard that allows employers latitude to decide how to comply with the safety order. (*Contra Costa Electric, Inc.*, Cal/OSHA App. 09-3271, Decision After Reconsideration (May 13, 2014), citing *Davey Tree Service*, Cal/OSHA App. 08-2708, Decision After Reconsideration (Nov. 15, 2012).) The language is clear. Working platforms must comply with the width required in the safety order, or the employer must provide scaffolding to protect workers from falls. The violation is established. To hold

otherwise would risk creating confusion for employers as to when the scaffolding requirement is triggered.

Citation 2, Item 1 is affirmed.

DECISION

For the foregoing reasons, Citation 1, Item 1, is affirmed. Citation 1, Item 2, is affirmed. Citation 2, Item 1, is affirmed.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD



Ed Lowry, Chairman



Judith S. Freyman, Board Member

Marvin Kropke, Board Member



FILED ON: **02/19/2021**