**Cal/OSHA Approves Post-Tensioning Rules, Reinforcing Steel Reforms**

The Cal/OSH Standards Board unanimously approved new regulations to protect construction workers engaged in the post-tensioning of concrete, and those who work with and around reinforcing steel – rebar.

There is always another side. Proponents hailed the move as an important step to reducing preventable deaths and injuries in these dangerous jobs. But an association representing general contractors, while supporting the overall goal, said the rulemaking package unnecessarily burdens those employers.

Post-tensioning has been in use in California for many years, but current regulations don’t cover this construction technique, in which crews place steel cables in ducts or sleeves before pouring the concrete, then tensioning the cables at each end after the pour. It pre-stresses the concrete, making it stronger.

The proposal was the result of a petition by the Iron Workers International Union (IW) and supported by the Western Steel Council (WSC), representing steel erectors. Now IW has its sights on other states, including Oregon, Washington, Nevada, Arizona, Hawaii, Michigan, Tennessee and Kentucky, and plans to use California as the model.

Steve Rank, executive director of safety and health for IW says Fed-OSHA has failed to act on updating the corresponding 1971 OSHA standard, which does not address many serious hazards to workers performing reinforcing steel and post-tensioning.

“Pursuing these standards is one of the safety initiatives of the ‘Zero Incident Campaign’ commissioned by Eric Dean, IW’s general president,” Rank tells Cal-OSHA Reporter.

The reforms address specific hazards that have resulted in many fatalities and disabling injuries, Rank says. “State OSHA plans must lead the way.” He notes that labor and management worked together to develop the newly adopted standards. The American National Standards Institute (ANSI) first adopted them in 2013 in its A10.9 Concrete and Masonry standard.

“We are pleased that Cal/OSHA has taken the lead,” he adds, crediting Standards Board staff, particularly Executive Officer Marley Hart. “It’s a big thing for us.”

**Willful Allegations in Hollister Blast**

Cal/OSHA alleges that Pacific Scientific Energetic Materials’ failure to implement safety procedures for an intricate operation involving explosives was the main factor in a December 2016 incident that left an employee seriously injured.

Pacific Scientific similarly failed to institute safety procedures in incidents in 2015 and 2007, according to Cal/OSHA, that led to injuries, the Division of Occupational Safety and Health says.

Recounting the earlier incidents, DOSH says Pacific Scientific willfully violated three Title 8 safety orders and cited the firm for seven serious and general violations. The Division seeks almost $300,000 in penalties.

The company manufactures “energetic” materials, devices and subsystems for space missions, military applications and law enforcement.

The injured employee, 63-year-old Judy Montoya, had mounted 79 metal tubes filled with explosives known as Small Column Initiation Delays (SCIDs) onto support brackets on a metal tray. The SCIDs were being prepared for neutron radiation analysis.

While attempting to secure the tubes with packing tape, the SCIDs “initiated” and exploded, sending shrapnel flying in all directions, Cal/OSHA says. Montoya suffered an amputated right thumb and tissue damage to the hand causing permanent disfigurement. What triggered the explosion is under investigation.

The willful violations come because a Pacific Scientific worker suffered a serious injury in 2015, and a 2007 explosion sent another employee to intensive care with serious burns. In each case, Cal/OSHA cited the employer for, among other things, failing to analyze the process for hazards and develop safe procedures, under the Process Safety Management standard, General Industry

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**Post-Tensioning continued on page 11812**
Safety Orders §5189. The conditions in the 2016 case “were substantially similar to those past cases,” according to a government spokesman.

In the 2015 incident a worker injured his hands when lead azide ignited and a shell exploded. The employee was handling the shell; he had been protected by a transparent shield, but it did not cover his hands. The firm paid $29,000 of a proposed $34,310 in a settlement.

In the 2007 incident, an employee suffered burns and a nasal fracture in an explosion. He was pouring explosive material into an automated weigh/load machine by hand when it triggered. Pacific The company paid $7,900 of a proposed $30,400 in a Cal/OSHA

Appeals Board decision.

Pacific Scientific is planning an appeal to the latest citations.

**Fork Safety Proposal Adopted**

The Cal/OSHA Standards Board has adopted a revision to its safety order on industrial trucks that is designed to ensure that their forks are not raised to an unsafe level.

The rule change governs when operators can leave their forklifts while the equipment is running. The adoption now goes to the Office of Administrative Law for final approval and the setting of an effective date – most likely October 1.

Currently, General Industry Safety Orders §3650(t)(17) allows an operator to be out of the driver’s seat with the lift’s forks raised no higher than 42 inches for loading or unloading above the level where the operator is standing.

But Cal/OSHA has concluded that if operators are standing on an elevated surface near a lift, raising the forks to 42 inches above that surface could be unsafe. The revision changes the requirement so that the forks can be raised no more than 42 inches from the level where the lift is located.

Here is the regulatory text the board adopted:

§3650. Industrial Trucks. General.

(t) Industrial trucks and tow tractors shall be operated in a safe manner in accordance with the following operating rules:

(17) When the operator of an industrial truck is dismounted and within 25 feet (7.6 meters) of the truck which remains in the operator’s view, the load engaging means shall be fully lowered, controls placed in neutral, and the brakes set to prevent movement.

EXCEPTION: Forks on fork-equipped industrial trucks may be in the raised position for loading and unloading by the operator if the forks are raised no more than 42 inches above the same level on which the industrial truck where the operator/loaded is located, and the power is shut off, controls placed in neutral and the brakes blocked. If on an incline, the wheels shall be securely blocked. Whenever the forks are raised, the operator will remain in the seat of the industrial truck except when the operator is actively loading or unloading materials.
Controversy Over IIPP Committee

The Cal/OSHA Standards Board has approved action on a petition aimed at heading off legislative action to require employers to provide copies of their Injury and Illness Prevention Programs upon request – and not just to employees.

The 3-2 vote by the board authorizes the board to form an advisory committee to study the petition by regulatory consultant Dan Leacox. He wants to require employers to give access to IIPPs, but would not require them to make copies upon request.

At the board’s June 15 meeting, labor advocates urged the board to deny the petition, asserting that it would disrupt efforts to address IIPP access through AB 978. That legislation has passed the Assembly and now is being considered by the state Senate.

AB 978 would require that employers provide, upon request, a copy of their IIPP to employees or their authorized representatives.

The bill would be “far more expeditious” than an administrative regulation, says lobbyist Mark Schacht of the California Rural Legal Assistance Foundation. Schacht says the push behind the bill is to ensure that employees have access to their company’s IIPP. He says employees have told labor groups that employers say they have no right to see their IIPPs.

But Gov. Jerry Brown, in vetoing past legislation related to occupational safety and health, has said the opposite – that the legislature should not interfere with the Cal/OSHA rulemaking process.

Petitioner Leacox tells the board that the issue is not a choice between the petition and AB 978. The petition “would just clarify things,” he says. The bill, though, is “speculative,” he adds, noting that similar legislation in 2016 never made it out of committee.

Elizabeth Treanor, director of the Phylmar Regulatory Roundtable OSH Forum, summed up employers’ opposition to the legislation: It could become a paperwork nightmare. “Can it really be helpful for people to have to flip through sometimes thousands of pages,” she asks. “It would be much better for employees to have information on what those systems are.” Allowing employees to see the IIPP is one thing, but having to provide a copy to anyone who asks is quite another, Treanor said.

Marti Fisher, a lobbyist for the California Chamber of Commerce, says after last year’s failed legislation, employers agreed that the IIPP standard (GISO §3203) does not explicitly require employee access, and that issue should be clarified. The board is well within its authority to develop rulemaking on this issue, she said.

But employer representatives are also concerned that AB 978 could amount to a “fishing expedition” for non-employees to pore through a company’s IIPP.

The petition vote was 3-2, with labor representative Dave Harrison and occupational safety rep Laura Stock voting against the committee. “We’re concerned that the right to access to these records will be unnecessarily delayed” by going though the regular rulemaking process, Harrison says.

Executive Officer Marley Hart notes that even if the legislation passes, the board would still likely have to go through the regulatory process to implement it, so denying the petition wouldn’t “get this into enforcement any easier.” Chair David Thomas adds, “I don’t want to rest my hopes on legislation.”

The advisory committee will consider:

• The extent to which an IIPP access request procedure should be specified;
• The extent to which the access request of an employee representative should be honored;
• The required or permissible form or forms in which a copy of the IIPP is to be provided;
• A reasonable timeframe in which to provide a copy of the IIPP; and
• The extent to which large employers, with multiple distinctly separate and different operations, may limit the scope of the provided IIPP.

Three More Workplace Fatalities

California workplaces suffered three more fatalities in recent days, and Cal/OSHA has started investigations into each of them.

In Lake Elsinore, an armed robber fatally shot an employee of a Circle K convenience store. Cal/OSHA is not investigating the incident per se, according to Department of Industrial Relations public information officer Frank Polizzi, but is “looking into” the workplace violence protection components of the employer’s Injury and Illness Prevention Program. Perhaps the wise and wizened government expects IIPPs to include a section about not allowing armed criminal robbers into retail stores.

In Earlimart, an employee of Shalinis Ag had been involved in an all-terrain vehicle incident in late April, was hospitalized in a coma and died in early May. Cal/OSHA learned of the fatality on June 14.

In El Centro, a driver for Triple I Press died June 19 of injuries sustained when he drove his tractor into a ditch two days earlier.
Post-Tensioning
continued from page 11809

As for rebar work, the proponents note that rod busters face
impalement, falls from elevation, improper placement of materials,
and hazardous site conditions. “It’s a proposal that’s long overdue,”
says Len Welsh, former chief of the Division of Occupational Safety
and Health, who worked with the union and WSC on the proposal.
He compared the current regulations and the now-adopted proposal as
“the Stone Age versus modern times.”

The rulemaking package includes Construction Safety Orders
§§ 1711-13, 1717 and 1721. Specifically, it addresses:

• Potential structural collapse of verticle formwork, decks,
  and columns;
• Impalement hazards;
• Misuse of material handling equipment;
• Site conditions;
• Inadequate workspace and insufficient work platform
  areas;
• Communication between workers performing post-ten-
  sioning, supervisors and the controlling contractor;
• Hoisting and rigging; and
• Training on post-tensioning techniques.

“I can tell you that the work is hard and dangerous,” says, Hart
Keeble, business manager for Reinforcing Ironworkers Local 416,
which represents rod busters.

He tells the board that “countless” workers have been killed,
maimed, crippled or rendered unable to provide for their family as
the result of preventable accidents. Since 2013 three such workers
have been killed, he noted, naming them. “They could have lived
if appropriate steps had been taken.” The new California standard
can assure safety throughout a project, and diffusing responsibilities
continue to be exempt under Title 8. “No other trade has this ex-
ception,” Sato says.

Rank counters that general contractors are the only entities that
can assure safety throughout a project, and diffusing responsibilities
only leads to tragedy. Many times, he explains, an ironworking crew
has left a project and subsequent subcontractors have taken down
perimeter safety cables, exposing other workers to fall hazards, for
instance.

“This is a comprehensive standard that contains responsibilities
for reinforcing steel contractors and general contractors,” he tells the
Standards Board. The standard requires communication between the
ironworkers and the controlling contractor, Rank notes.

Post-Tensioning/Reinforcing Steel
Proposal At a Glance

General (controlling) contractors are required to:

• Provide and maintain access roads into and out of work sites
  for safe delivery and movement of derricks, cranes, trucks
  and other necessary equipment;
• Provide a firm, properly graded and drained area that is
  readily accessible and which has adequate space to stage
  and assemble post-tensioning materials;
• Provide an adequate exterior platform for landing materials
  on multi-tiered buildings;
• Notify reinforcing steel contractors before beginning a
  project that formwork and falsework has been inspected, and
  that vertical formwork, elevated decks and walking/working
  surfaces are safe; and that excavation benching and shoring
  has been inspected;
• Overall, employers have specific requirements for post-
  tensioning operations; vertical and horizontal
  columns, walls and other reinforcing assemblies; and
  hoisting/rigging reinforcement assemblies;
• Employers are required to provide employees protection from
  exposed, projecting reinforcing steel and other projections;
• Rebar caps placed by reinforcing steel contractors must be
  left in place after their work is completed; the controlling
  contractor must inspect and accept control of the covers and
  place responsibility for them with another contractor;
• The standard has a six-foot fall protection trigger for placing or
  tying reinforcing steel into walls, piers or columns; reinforcing
  ironworkers are allowed point-to-point travel without fall
  protection up to 24 feet if there are no impalement hazards.

CEA also believes that reinforcing ironworkers should be
required to wear fall protection when working up to 24 feet. They
continue to be exempt under Title 8. “No other trade has this ex-
ception,” Sato says.

CEA also takes issue with a provision allowing foremen to
design guying, bracing and supports. That should be left to licensed
engineers, who can “properly calculate wind and buckling load for
vertical stability,” she says.

Demolition Petition Denied

A petition by the National Demolition Association (NDA) association has merit, Cal/OSH Standards Board says, but there isn’t enough information to demonstrate the technique to prevent heavy equipment from falling through floor openings will work. The board denied the petition, but suggested the NDA consult with experts to prove out the process.

NDA sought approval of a cable restraint system to prevent equipment from falling while removing debris from demo projects.

Currently, Construction Safety Orders §1735(v) calls for curbs or stop-logs at the edge of openings to prevent plunges. The organization says these devices aren’t strong enough to stop modern skid-steers.

Instead, it sought a system with two wire rope cables between building columns or walls, strung across the opening that restrains equipment. Fed-OSHA has opined that the system could potentially prevent equipment from running over the edge of an opening, but says the design must be specific to individual structures.

The Division of Occupational Safety and Health recommended that the Standards Board deny the petition. It speculated that such a system could work, but at present faces “significant engineering challenges and uncertainties.”

One of those uncertainties is how the rope tension will affect the columns to which they are attached. “The structural members may be damaged or partially removed during dismantling operations, which would likely result in their inability to sustain the required forces,” DOSH says.

The Division also said an “elemental characteristic” of cable barriers, deflection under load, poses “significant, as yet unresolved, engineering challenges.”

Board staff agreed with DOSH, and added some concerns of its own. For instance, it wonders whether the “tons of force an imperiled load would exert against the proposed barrier, could not be presumed to be only horizontally outward, and at the mid-point of the barrier cable span.” Instead, those forces could be both outward and downward against the columns.

It “remains to be established, on not only a structure-by-structure, but column-by-column basis, whether the structural columns to be relied upon will perform safely for this purpose,” the decision states.

The board also was not persuaded by the association’s claim that keeping loaders’ buckets against the floor is superior safety to lifting a “debris laden loader bucket” over the curb or stop-log. An “adequately trained and competent loader operator could be expected to both avoid, and promptly counteract, any destabilizing forward shift in loader center of gravity before the loader bucket was over the opening,” staff says. These issues are among the “many unresolved safety concerns” associated with the proposal, it says.

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Safety Analyst

$49.73 - $60.44/hour; $8,619.00 - $10,476.00/month; $103,428.00 - $125,710.00/year

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POSITION DESCRIPTION
Under supervision, develops and implements occupational safety programs and procedures.

Duties and Responsibilities
• Planning and conducting work-site inspections to identify safety hazards
• Investigating accidents to identify causal factors
• Developing controls or work practices to eliminate hazards
• Performing injury trend analysis
• Drafting reports of findings and recommendations
• Evaluating and developing safety programs
• Evaluating compliance with state and federal safety regulations
• Maintaining OSHA and other records
• Acting as ICS Safety Officer for planned and unplanned emergencies
• Developing emergency response plans
• Perform other related duties as required

MINIMUM QUALIFICATIONS
• Possession of a baccalaureate degree in Safety, Occupational Safety and Health, Safety Management or a closely related field from an accredited college or university; AND
• Four (4) years of professional occupational safety experience such as implementing occupational safety programs, conducting worksite inspections and conducting safety training. (Weapons, Ordinance, and Systems Safety experience is not qualifying); AND
• Possession of a valid California Driver’s License.

Substitutions:
• A Master’s Degree in Safety, Occupational Safety and Health, Safety Management, or a closely related field may substitute for two (2) years of the required experience.
• A baccalaureate degree from an accredited college or university in any major and certification as a Certified Safety Professional (CSP) may substitute for the required education and experience described above.

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Job Title: Safety Risk Manager (Exempt position)
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ESSENTIAL DUTIES AND RESPONSIBILITIES:
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EDUCATION AND/OR EXPERIENCE:
Bachelor's degree (B. A.) from four-year College or university; or five to 10 years related experience and/or training; or equivalent combination of education and experience.

CERTIFICATES, LICENSES, REGISTRATIONS:
Must poses valid CA driver's license and be insurable

OTHER SKILLS AND ABILITIES:
• Read, Write & Speak Spanish
• Must be able to relocate to our different processing areas.

Group Safety Managers
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Recology is looking to hire TWO experienced Group Safety Managers to lead our safety teams in Vacaville or Santa Rosa. 7+ years exp in a safety supervisor or management role, strategic/forward thinker, engaging leader, as well as having DOT, OSHA, comp & liability claims experience. Solid track record of implementing successful safety programs is a plus!


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Safety Officer

$80,517 - $103,064 Annually + benefits

Plans, coordinates, implements, and enforces the District's accident prevention and safety program; provides training to employees; ensures compliance with all Federal and State industrial safety codes, regulations, and standards. Refer to detailed job announcement for specific qualifications.

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EEO
According to the Appeals Board, ALJ decisions are not citable precedent on appeal, i.e., they cannot be quoted when one is appealing a decision After Reconsideration, 12-28-93.) Decisions After Reconsideration (DARs) are precedential and may be quoted in an appeal. Decisions are not binding on the Appeals Board.” (Unreviewed administrative law judge decisions are not binding on the Appeals Board.)

ROOF SHEATHING AND FASCIA BOARD
LIGHT COMMERCIAL, WORK ON STARTER BOARD,
GAGE STEEL FRAME CONSTRUCTION, RESIDENTIAL/
ERECTION AND CONSTRUCTION – WOOD AND LIGHT

STANDARD RAILINGS – DESIGN AND CONSTRUCTION OF RAILINGS, CAPABLE OF WITHSTANDING 200 POUNDS APPLIED TO TOP RAIL
Cal. Code Regs, tit. 8, § 1620(c) (2017) – Employer violated §1620(c) by failing to ensure that a railing was capable of withstanding a force of at least 200 pounds applied to the top rail.

LADDERS – GENERAL, PORTABLE LADDERS USED IN CONSTRUCTION
Cal. Code Regs, tit. 8, § 1675(b) (2017) – The evidence did not support that Employer violated §1675(b). The employee’s brief use of a closed step ladder would not have been detected despite reasonable diligence by Employer.

HEAT ILLNESS PREVENTION – HEAT ILLNESS PREVENTION PLAN (HIPP)
Cal. Code Regs, tit. 8, § 3395(i) (2017) – Employer violated §3395(i) by failing to maintain a HIPP with minimum mandatory provisions.

ERECTION AND CONSTRUCTION – WOOD AND LIGHT GAGE STEEL FRAME CONSTRUCTION, RESIDENTIAL/ LIGHT COMMERCIAL, WORK ON STARTER BOARD,
ROOF SHEATHING AND FASCIA BOARD
Cal. Code Regs, tit. 8, § 1716.2(g)(1)(A) (2017) – Employer violated §1716.2(g)(1)(A) by failing to ensure that an employee wore fall protection when working on a roof, on which the employee was exposed to a fall of more than 15 feet.

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BEAZER HOMES HOLDINGS CORP
44 COR 40-7853 [922,712]
Summary of COSHAB-ALJ’s Decision dated May 1, 2017, Inspection No. 1077503 (Roseville, CA).

J. Kevin Elmendorf, Administrative Law Judge.
For Employer: Lisa Prince, Attorney.
For DOSH: Cynthia Perez, Staff Counsel.

Following an inspection of a residential construction project, the Division cited Employer, a general contractor developer of residential properties, for failing to: (1) ensure that a stair railing was capable of withstanding a force of at least 200 pounds; (2) ensure that an employee was not using a step ladder in a closed position; (3) establish, maintain and implement an effective HIPP containing all necessary sections; and (4) ensure that employees were protected from falling from a height of more than 15 feet above grade. The first three citations were issued in accordance with the multi-employer regulations (§336.10).

Employer was the general contractor at the jobsite, with four employees and one subcontractor. Employer was responsible for safety and health conditions on the worksite with the authority for ensuring that hazardous conditions were corrected. The Division inspected the worksite after it received an anonymous report that an employee was working on a roof without fall protection.

§1620(c): General violation and $375 penalty affirmed. The safety order provides, “All railings, including their connections and anchorage, shall be capable of withstanding without failure, a force of at least 200 pounds applied to the top rail within 2 inches of the top edge, in any outward or downward direction, at any point along the top edge.” The Division specifically alleged that Employer, as controlling and correcting employer responsible for safety and health conditions at the site, failed to ensure railings with connections and anchorages leading to the second floor were capable of withstanding, without failure, a force of at least 200 pounds applied to the top rail within two inches of the top edge in the outward direction.

The Division observed and photographed an employee atop a specific unit that was not properly secured. The mounting brackets that were installed to anchor the railings to the floor were supposed to be attached with four lag bolts; however, there were only nails in some of the anchor holes in the brackets, and several of the nails were only halfway inserted. The Division testified that the railing would not withstand pressure of at least 200 pounds, which Employer did not refute. Accordingly, the Division established that the railing was not properly secured to withstand, without failure, a pressure of at least 200 pounds.

The Division stated that there were employees accessing all areas of the unit who would need to ascend and descend the stairs with the unsecured railing, which Employer did not refute. The Division established that it was reasonably predictable that employees would have access to the hazard created by the unsecured railing during the course of their normal work duties.

§1675(b): General violation dismissed; $560 penalty vacated. The safety order provides, “All portable ladders used in construction shall comply with the provisions of Section 3276 of the General Industry Safety Orders.” Section 3276(c)(16)(C) states, “Step ladders shall not be used as single ladders or in the partially closed position.” The Division alleged that Employer failed to ensure that a step ladder was not used in the closed position.

The Division observed and photographed an employee atop a sloped roof with a closed step ladder that was leaned against the outside wall of the second level of a house. While the inspector was watching, the employee climbed the ladder and was on it for approximately five minutes. Employer did not dispute that the employee was using a closed step ladder. As a result, actual employee exposure to a hazard created by using the closed step ladder existed. The Division personally observed the employee standing on the closed ladder on a sloped roof and met its burden of proof with regard
to the violation of §1675(b).

However, the evidence did not support a finding that Employer violated §1675(b) because the employee’s brief use of a closed step ladder would not have been detected despite reasonable diligence by Employer. Accordingly, the ALJ granted Employer’s appeal of this citation.

§3395(I): General violation and $375 penalty affirmed. The Division alleged that Employer failed to establish, implement and maintain an effective HIPP, in that the written plan at the worksite lacked minimum requirements including procedures for access to shade, high heat procedures, emergency response procedures and acclimatization methods and procedures.

Employer’s summary of its HIPP contained no procedures for high heat, emergency response, or acclimatization and only two sentences regarding shade; thus, it lacked mandatory elements. Employer neither disputed that its HIPP was inadequate nor presented testimony or documentary evidence with respect to the HIPP. The Division established a violation for failure to establish, implement, and maintain an effective HIPP.

§1716.2(g)(1)(A): Serious violation and $5,060 penalty affirmed. Section 1716.2(g), under “Work on Starter Board, Roof Sheathing and Fascia Board,” provides, in relevant part, “(1) When installing starter board, roof sheathing, and fascia board, employees shall be protected from falling by scaffolding, guardrails, personal fall protection systems, or other means … as follows:

“(A) For structures greater than one story in height where the fall height exceeds 15 feet above the surrounding grade or floor level below….”

The Division asserted that the employee was involved in two separate situations where fall protection was required but not used: (1) when he was atop the third-story roof; and (2) when he exited the third-story roof via a sloped second-story roof to enter the building through the third-floor wall studs. With respect to the first scenario, Employer argued that the Division did not prove that the employee on the roof was within the zone of danger, i.e. the area surrounding the violative condition that the standard is intended to prevent (Benicia Foundry & Iron Works, Inc., Cal/OSHA App. 00-2976, DAR (April 24, 2003 [Digest § 20.494R]). Here, the hazard was a fall from more than 15 feet above grade. The zone of danger was the area that put the employee in a position where he might fall.

Although Employer argued that there was no evidence that the employee was within six feet of the edge of the roof, the ALJ inferred from the evidence that the employee was standing within the zone of danger from which he could have fallen to the concrete more than 30 feet below. These facts are supported by the evidence presented. Employer’s disciplinary program involved verbal and written warnings and termination for repeated violations of its safety rules. Employer’s witnesses testified that the disciplinary system was effective.

With respect to the second scenario, during the employee’s use of the second-story roof for egress, he was exposed to a fall of at least 15 feet at all times until he stepped through the studs onto the third floor of the building, the ALJ concluded. At the lowest point of his exit from the roof, he was at the leading edge of the second-story roof, which was at least 20 feet from the concrete below. Because he was exposed to a fall of a height exceeding 15 feet as he exited the second-story roof and was not wearing fall protection, the Division established a violation of §1716.2(g)(1) for the second fall hazard situation.

Section 1716.2(g)(3) provides, “When the work is of short duration and limited exposure and the hazards involved in rigging and installing the safety devices required by this Article equals or exceeds the hazards involved in the actual construction, these provisions may be temporarily suspended, provided adequate risk control is recognized and maintained under immediate, competent supervision.”

Employer argued that the employee’s fall exposure as he exited the building was brief and under the direction and supervision of the Division inspector and the employee’s supervisors and, thus, the nearly identical short-duration exceptions of §§1669(c) and 1716.2(g)(3) excused the cited violation. Where an employer claims an exception from a safety order, the burden of showing that it applies and has been satisfied is on the employer (Agri-Valley Irrigation, Inc., Cal/OSHA App. 07-3784, DAR (June 18, 2014 [Digest § 22.373R]). Section 1669(c) is a general exception to the fall protection requirements of Article 24 (Los Angeles City Fire Department, Cal/OSHA App. 03-3960, DAR (July 26, 2010) [Digest § 21.698R]).

The ALJ noted that both of the short-duration exceptions state, “the hazards involved in rigging and installing the safety devices required equal or exceed the hazards involved in the actual construction….” Employer did not argue that it would have been hazardous for the employee to rig himself to fall protection for his egress from the roof. Accordingly, the short-duration exceptions did not excuse the violation of §1716.2(g)(1).

Due diligence analysis. A controlling employer is entitled to attempt to show that it acted with due diligence under the circumstances in failing to correct a hazard created by a subcontractor on a multi-employer worksite; the due diligence required of a general contractor, when it is the controlling employer, varies according to circumstances (Harris Construction Company, Inc., Cal/OSHA App. 03-3914, DAR (Feb. 26, 2015) [Digest § 22.450R]). The Appeals Board in McCarthy Building Companies, Inc., Cal/OSHA App. 11-1706, DAR (Jan. 11, 2016) [Digest § 22.555R] analyzed several factors useful in determining whether a controlling employer acted with due diligence, including looking to federal authority for guidance. The Department of Labor has a formalized due diligence defense, which provides that “[a] controlling employer must exercise reasonable care to prevent and detect violations on the site” but the extent of measures required “is less than what is required of an employer with respect to protecting its own employees.”

Here, in addition to a director of construction responsible for overseeing the entire site, Employer employed three superintendents at the site. These employees each conducted regular inspections of the jobsite. Adequacy of inspections is a valid consideration when evaluating circumstances involving controlling employers (Harris Construction, supra). The superintendents regularly inspected and monitored the subcontractors’ activities, the quality of the work and the safety of employees. They regularly monitored the work on their own products, as well as the other products, looking for safety issues. One testified that when he observed a safety violation, he immediately halted the work and looked for a solution; if the issue could not be resolved immediately, he instructed the employees that they could not continue until the hazard was corrected. He further testified that if he found a subcontractor that was not in compliance with safety regulations, he attempted to get the subcontractor into compliance or, in the alternative, sent the subcontractor away from the jobsite until the situation was remedied.

Employer’s disciplinary program involved verbal and written warnings and termination for repeated violations of its safety rules. Employer’s witnesses testified that the disciplinary system was effective and the ALJ determined it effective. Employer’s construction director testified that all safety violations were reported to the jobsuperintendent. Further, Employer conducted weekly “tool box” meetings, at which superintendents reviewed safety issues
with subcontractors, including fall protection. The meetings were designed to review various safety issues, answer questions from the employees, and refresh employees’ knowledge of safe practices. One site superintendent testified that the meetings generally were held with several subcontractors, but Employer occasionally conducted a larger meeting with all of the subcontractors on the project.

In Harris Construction, supra., the Appeals Board found that a controlling employer’s knowledge or belief that a subcontractor had sufficient experience and a good safety record was a component of the due diligence defense. In the matter before the ALJ, the Division asserted that citations for alleged injury and illness prevention plan (IIPP), drinking water and HIPP violations that were issued to a subcontractor approximately seven years prior, should have given Employer reason to believe that the subcontractor did not have a good safety record. However, there were no admissions or findings of liability for any of those citations. The Division inspector testified that his search of the subcontractor’s safety and violation history did not reveal any claims of injury, serious accidents, or hazards, including fall protection issues.

Further, in McCarthy Building Companies, supra., the Appeals Board looked to an affirmative defense utilized in the state of Washington under the Washington Industrial Safety and Health Act (WISHA). The Board acknowledged that this test was not being adopted in California, but recognized it as a “valuable persuasive resource.” It lists numerous responsibilities that a prime or general contractor may satisfy in order to show that it has met its obligations to provide a safe and healthy workplace and is not responsible for a cited violation. (See McCarthy Building Companies, supra.)

Here, in addition to meeting the various due diligence factors applied by the Appeals Board in McCarthy Building Companies, Employer satisfied the listed responsibilities in the WISHA directive. Employer specifically required a subcontractor to provide fall protection equipment. It had an effective injury IIPP, including a safe practices manual. Additionally, Employer’s superintendents engaged in regular meetings with its subcontractors regarding safety issues, including fall protection, and conducted regular inspections to discover and control recognized hazards. Finally, Employer effectively enforced its safety policies through a system of warnings and write-ups, with the possibility of termination if violations were not corrected.

Although Employer’s factual circumstances met the test for due diligence, the final factor applied by the Appeals Board in McCarthy Building Companies to determine whether a violation may be excused, the ALJ noted, is whether the hazard was latent. With regard to the railing, the due diligence defense did not relieve Employer of liability because, even to the untrained eye, the mounting brackets on the stairway in the unit were unsecured with large gaps of space where bent and only partially inserted nails failed to fully attach the brackets to the stairs.

With respect to the employee on the roof with a ladder, this was a brief, isolated incident that was not observed by any of Employer’s superintendents and, unless an inspection happened to be conducted at the very moment of the violation, would not have been detected despite reasonable diligence by Employer, the ALJ concluded. The Division did not identify or interview the employee or provide any evidence that Employer should have, with exercise of reasonable diligence, discovered that the five-minute violation had occurred. Accordingly, the due diligence defense relieved Employer of liability for this hazard.

Finally, regarding fall protection, despite exercising due diligence and conducting frequent inspections, the circumstances of the third-story roof fall protection violation were such that Employer could not reasonably have been expected to be aware that the employee was not using fall protection at that moment. However, the due diligence defense did not relieve Employer of liability for the violation of §1716.2(g) as it related to the employee’s egress from the roof via the second-story sloped roof. When the Division inspector brought the fall protection violation to the attention of Employer’s superintendents and construction director, it triggered an immediate duty to abate. Employer argued that the Division inspector’s presence was sufficient supervision and demonstrated the Division’s approval of the action without fall protection; however, it was the responsibility of Employer to ensure that the employee was safe by giving adequate orders to the employee violating the safety order. Consequently, the ALJ affirmed the citation.

Classification. The Division established a presumption that the citation was classified properly as serious (Labor Code §6432). Labor Code §6432(c), provides that “serious physical harm,” means any injury or illness, specific or cumulative, occurring in the place of employment or in connection with any employment that results in, among other things, inpatient hospitalization, permanent disfigurement, internal injuries or broken bones. The Division inspector testified that a fall from a height of more than 15 feet onto concrete below creates a realistic possibility that the employee will suffer broken bones or death. The Division established that the violation was classified correctly.

Labor Code §6432(c) provides that an employer may rebut the presumption that a serious violation exists by demonstrating that the employer did not know and could not, with exercise of reasonable diligence, have known of the presence of the violation. Failure to exercise supervision adequate to insure employee safety is equivalent to failing to exercise reasonable diligence, and will not excuse a violation on the claim of lack of employer knowledge (Gateway Pacific Contractors, Inc., Cal/OSHA App. 10-1502, DAR (Oct. 4, 2016) [Digest §22,618R]).

Employer’s argument regarding due diligence as a controlling employer was sufficient to relieve it of liability for lack of fall protection on the third-story roof. However, it could not claim that it was not aware of the presence of the violation as the employee was exiting from the third-story roof via the sloped second-story roof without fall protection. Employer’s superintendents were standing on the ground watching him descend from the roof in an unsafe manner. Employer did not take effective action to eliminate the employee’s exposure to the hazard as soon as the fall protection violation was discovered. Accordingly, Employer failed to refute the classification.

Penalties. The Division established that the penalties were calculated in accordance with the Division’s policies and procedures. (See Stockton Tri Industries, Inc., Cal/OSHA App. 02-4946, DAR (March 27, 2006) [Digest §20,795R].)
CLEANING, REPAIRING, SERVICING AND ADJUSTING
PRIME MOVERS, MACHINERY AND EQUIPMENT –
CLEANING, SERVICING AND ADJUSTING OPERATIONS
Cal. Code Regs, tit. 8, § 3314(c) (2017) – Employer failed to
control hazardous energy to prevent inadvertent movement while
an employee was servicing a calender machine.

CLEANING, REPAIRING, SERVICING AND ADJUSTING
PRIME MOVERS, MACHINERY AND EQUIPMENT –
HAZARDOUS ENERGY CONTROL PROCEDURES
Cal. Code Regs, tit. 8, § 3314(g)(1)(A) (2017) – Employer failed to
to ensure that its written hazardous energy control procedure for
a calender machine included procedures for when employees
retrieved and removed excess material.

PERSONAL SAFETY DEVICES AND SAFEGUARDS –
HAND PROTECTION, GLOVES NOT WORN WHERE
DANGER OF HAND PROTECTION BECOMING
ENTANGLED IN MOVING MACHINERY
Cal. Code Regs, tit. 8, § 3384(b) (2017) – Employer failed to
ensure that employees did not wear gloves when the danger of
the gloves becoming entangled in moving machinery existed.

POINTS OF OPERATION, RUBBER AND COMPOSITION
WORKING MACHINES – TESTING AND MAINTENANCE
Cal. Code Regs, tit. 8, § 4592(e) (2017) – Employer failed to test
and keep records showing that it performed weekly tests of the
stopping devices on the calender machine.

MANNINGTON MILLS, INC.
44 COR 40-7856 [522,713]

Summary of COSHAB-ALJ’s Decision dated May 19, 2017,
Inspection No. 317894518 (San Jose, CA).

Howard I. Chernin and Mary Dryovage, Administrative Law Judges.
For Employer: Joseph Ciucci and Adam Keating, Attorneys.
For DOSH: Cynthia Perez, Staff Counsel.

X-MOD GRAPH FROM COMPLINE

After receiving complaints about injuries to workers whose hands
had been drawn between the rollers of a 66-inch calender machine,
the Division conducted a complaint investigation of Employer, a
manufacturer of custom rubber products. Employer was cited for four
alleged violations, for failure to: (1) control hazardous energy during
cleaning and servicing of the calender; (2) create and implement
haazardous energy control procedures specific to retrieving and
removing bleed (excess material) from between the calender’s rollers;
(3) ensure that employees not wear hand protection when there is a
danger of entanglement in moving machinery; and (4) test and keep
records of tests of the stopping devices on the calender.

An employee whose duties included feeding materials into the
calender suffered a crushing injury to his hand while reaching into the
calender in between the rollers to remove excess material (bleed) while
the machine was running. The calender had been intentionally left
running while he was attempting to remove the bleed. The employee
was wearing loose-fitting work gloves, which Employer required
employees to wear in order to protect them from thermal burns from
the material being fed into the calender.

§3314(c): General violation and $1,200 penalty affirmed. The
safety order states, “Machinery or equipment capable of movement
shall be stopped and the power source de-energized or disengaged,
and, if necessary, the moveable parts shall be mechanically blocked
or locked out to prevent inadvertent movement, or release of stored
energy during cleaning, servicing and adjusting operations. Accident
prevention signs or tags or both shall be placed on the controls of
the power source of the machinery or equipment.”

The Division specifically alleged that Employer failed to ensure
that the rollers of the calender were stopped and the power source
de-energized or disengaged during cleaning, servicing and adjusting
operations, including employees reaching into the machine to retrieve
bleed that had fallen down into the machine. The Appeals Board, in
Rialto Concrete Products, Inc., Cal/OSHA App. 98-413, DAR (Nov.
27, 2001) [Digest § 20.175R], interpreted the operative language in
§3314 as imposing two primary safety requirements prior to cleaning,
adjusting and servicing machinery: (1) machine parts capable of
movement must be stopped; and (2) the power source must either
de-energized or disengaged. If the two primary requirements are
not effective to prevent inadvertent movement, another requirement
applies: the parts capable of movement must be mechanically blocked
or locked in place.

The Board long has recognized the inherent danger involved in
working around energized machinery (Stockton Steel Corporation,
Cal/OSHA App. 00-2157, DAR (August 28, 2002) [Digest §
20.367R]). The Board has rejected the interpretation of “servicing”
within the meaning of §3314 as limited to routine or minor service
work, stating that the term may have many purposes other than
preventing damage to machinery or equipment (Machinery Trade
Center, Cal/OSHA App. 00-3244, DAR (June 3, 2002) [Digest §
20.305R]). Servicing activities may be taken to prevent an interruption
of production by replacing a part before it fails or to enhance or
maintain satisfactory functioning of a machine or piece of equipment,
either in terms of quantity or quality of product or to avoid some
undesirable effect (Machinery Trade Center, supra, citing United
States Pipe and Foundry Company, Inc. (Cal/OSHA App. 98-1130,
DAR(June 29, 2001) [Digest § 20.067R]).

Employer disputed whether retrieving and removing bleed from
within the calender was cleaning or servicing, within the scope of
§3314. The ALJ, however, inferred from Employer’s provision of
tools to remove bleed that it was concerned that bleed, if not removed,
could affect the quality of the product. Thus, the Division established
that the safety order applied here. It was undisputed that employees
reached into the calender to retrieve bleed while the machine was
running. The Division established a violation.

Section 3314(c)(1) states, “If the machinery or equipment must
be capable of movement during this period in order to perform the
specific task, the employer shall minimize the hazard by providing and
requiring the use of extension tools (e.g., extended swabs, brushes,
scrapers) or other methods and means to protect employees from
injury due to such movement. Employees shall be made familiar with
the safe use and maintenance of such tools, methods or means, by
thorough training.” This provision recognizes that there are occasions
or types of machines which must be in operation for cleaning,
adjusting, etc. (Stanislaus Food Products Company, Cal/OSHA
App. 13-572, DAR (April 23, 2015) [Digest §22.464R]).

Evidence
of compliance requires proof of three elements: (1) the equipment must be moving; (2) alternative means or methods to minimize the hazards are furnished; and (3) employees are trained in such alternatives (Stanislaus Food Products, supra).

In the matter before the ALJ, the only evidence that the calender needed to be kept running while employees retrieved and removed bleed from the rollers was testimony from a manager that there was no way to lock out or tag out the calender while retrieving and removing bleed, and that the machine had to be kept running continuously in order to continue making product. However, this testimony did not relate to whether the machine had to be kept capable of movement during cleaning or servicing. Therefore, Employer failed to establish the first element of §3314(c)(1).

Independent employee action defense (IEAD). In order to establish the IEAD, an employer must establish that: (1) the employee was experienced in the job being performed; (2) the employer has a well-devised safety program that includes training employees 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 against employees who violate the safety program; and (5) the employee caused a safety infraction that he or she knew was the result of a failure to follow the employer’s safety requirements (FedEx Freight, Inc., Cal/OSHA App. 12-0144, DAR (December 14, 2016) [Digest ¶ 22,641R]; Mercury Service, Inc., Cal/OSHA App. 77-1133, DAR (Oct. 16, 1980) [Digest ¶ 14,137R]). A single missing element defeats the IEAD (Home Depot USA, Inc. #6617 Home Depot, Cal/OSHA App. 10-3284, DAR (Dec, 24, 2012) [Digest ¶ 22,129R]).

Proof of experience requires evidence that the worker had done the specific task enough times in the past to become reasonably proficient (citation omitted). There was no evidence as to how many times the employee had performed the task of retrieving and removing bleed from the calender prior to when he suffered his injury, and consequently, Employer failed to establish that he had performed the task “enough times” to become proficient. Thus, Employer failed to establish the first element of the IEAD.

Moreover, Employer failed to establish that it had a well-devised safety program. Although the employee testified that he received some training, the only document evidencing his training did not describe the type or scope of the training he received. There was no evidence that the employee had been trained on the risk that his hand could become entangled or drawn into the calender machine as a result of reaching in to retrieve and remove bleed. Employer failed to establish the second element of the IEAD.

§3314(g)(1)(A): General violation and $600 penalty affirmed. The Division alleged that Employer failed to ensure that its written hazardous energy control procedures for the calender included the need for employees to utilize the hazardous energy control procedures before reaching into the machine to retrieve bleed of the material being worked that had fallen down into the machine. Applicability of the safety order was established by the fact that employees engaged in the servicing of the calender when they reached in to retrieve and remove bleed.

Employer’s hazardous energy control procedures for the calender contained lockout/tagout procedures, but did not mention bleed or provide procedures for controlling hazardous energy specifically while retrieving and removing bleed. It was undisputed that Employer did not consider the act of retrieving and removing bleed from the calender as falling within the scope of §3314 and, therefore, Employer did not develop procedures for employees to follow to arrest the machine’s movement while performing that specific task. The Division established a violation.

§3384(b): Serious violation and $9,000 penalty affirmed. The safety order states, “Hand protection, such as gloves, shall not be worn where there is a danger of the hand protection becoming entangled in moving machinery or materials.” It was undisputed that the employee was wearing loose-fitting “one size fits all” gloves, while feeding material into the calender machine when his hand was pulled into the pinch point between the two rollers. There was ample evidence that he and other employees were accustomed to reaching into the moving calender to retrieve bleed while wearing loose-fitting gloves. As result of reaching into the moving calender, the employee suffered a crushing injury when his gloved hand was drawn into a pinch point between the two rollers of the calender and became entangled. Thus, the Division established a violation.

Independent employee action defense. To establish the second element of the IEAD, an employer’s well-devised safety program must contain specific procedures (Blue Diamond Growers, Cal/OSHA App. 10-1280, DAR (Oct. 17, 2012) [Digest ¶ 22,084R]). Further, the employer must show that the employee received training applicable to the work, tools, equipment, or vehicle involved in a particular instance and must make some showing regarding the content and quality of the training received (Robert A. Bothman, Inc., Cal/OSHA App. Inspect. 317201556, DAR (March 1, 2017) [Digest ¶ 22,666R]).

The injured employee testified that he was instructed on how to wear the loose-fitting gloves that he was wearing at the time of the incident, but there was no evidence that he was instructed specifically on procedures designed to prevent his hand from being caught in the nip point between the rollers of the calender. He credibly testified that he decided how to wear the gloves, which indicated that specific instructions were not given to employees.

The evidence supported that that Employer’s safety program was not well-devised and that it lacked specific procedures for safely removing bleed from the rollers of the calender. Moreover, Employer produced inadequate evidence that the injured employee and his coworkers received sufficient training applicable to their work, specific to the safe removal and retrieval of bleed from the rolls of the calender. Thus, Employer failed to establish the second element of the IEAD.

§4592(e): Serious violation reclassified as general; and $4,000 penalty reduced to $700. The safety order provides, “Each stopping device shall be tested for braking distance once a week by a competent person, and a record of such tests shall be made and kept on file for at least one year. Such records shall be available to the Division or its employees.”

The Division inspector testified that Employer’s maintenance foreman told her during the inspection that the calender was not tested weekly and there was no documentation for any testing during a three-month period. Employer’s failure to provide stronger evidence of compliance suggested that it did not comply with the safety order. The Division established a violation.

Classification. Labor Code §6432(a) provides for a rebuttable presumption of a serious violation if the Division demonstrates a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation. The Appeals Board has defined “realistic possibility” to mean a prediction that is within the bounds of human reason, not pure speculation (Bellingham Marine Industries, Inc., Cal/OSHA App. 12-3144, DAR (Oct. 16, 2014) [Digest ¶ 22,414R]).

The Division inspector classified the violation of §3384(b) as serious because an employee wearing the gloves worn by the employee at the time of the injury accident could experience the glove and hand being drawn into the rollers, resulting in crushing or burning injuries, which actually occurred. The Division stated that a crushing injury is more likely than a burning injury and that an employee’s entire arm could potentially be drawn into the machine.

Employer’s director of operations admitted that Employer required the use of the loose-fitting gloves when operating the calender and feeding material, and that the injured employee and other employees were not given adequate training on the use of a hook tool for removing bleed, prior to the injury accident. Thus, Employer failed to show that it did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation. (See Labor
Regarding the violation of §4592(e), Employer contended that the Division’s failure to issue a 1BY in compliance with Labor Code §6432(b)(2) prohibited it from classifying the citation as serious. The Division conceded that it did not issue a 1BY form, and admitted that it had intended to issue the citation as general.

Classification. Although the Division conducted an investigation into several of the topics covered within Labor Code §6432(b)(1), Employer was never given the opportunity to provide evidence that the violation was not serious or to rebut the presumption of a serious violation. The ALJ, consequently, modified the classification from serious to general. Substantial evidence supported that failing to have a qualified individual inspect the machine’s “e-stops” on a weekly basis bore a relationship to employee safety and health; the purpose of the e-stop was to bring the calender to a halt, particularly in the event that an employee’s hand is drawn into the nip point between the rollers.

Abatement. An employer is free to choose the least burdensome means of abatement (Starcrest Products of California, Inc., Cal/OSHA App. 02-1385, DAR (Nov. 17, 2004) [Digest ¶ 20.642R]; The Daily Californian/Calgraphics, Cal/OSHA App. 90-929, DAR (August 28, 1991) [Digest ¶ 17.763R]). If an employer believes that it cannot successfully abate the violations, it may seek a variance from the Standards Board. (See Labor Code §143.)

Employer failed to demonstrate that it would have been infeasible for it to comply with any of the cited safety orders. Although Employer argued that it could not comply with §3384(b), which requires the use of hand protection when there is a risk of injuries due to thermal burns and other hazards, the Division credibly testified that Employer could comply with both subdivisions by offering employees extension tools to use, as well as by employing guards or seeking a variance. Employer asserted that employing a combination of guards and extension tools was not feasible, but did not offer any evidence in support. Finally, Employer did not provide evidence that it sought and received a variance permitting the use of the loose-fitting gloves in connection with feeding and operating the calender.

Regarding the violation of §4592(e), the Division credibly testified that Employer reasonably could abate the violation by a competent person inspecting and testing the e-brake weekly, and recording and keeping the results for at least one year. Employer offered no evidence that this would be infeasible; it merely pointed to evidence that the e-brake was functioning properly, which was not relevant to whether Employer could feasibly inspect the e-brake, as required.

Penalties. The ALJ deemed the proposed penalties for the first three citations reasonable. With respect to the reclassified citation, the evidence supported that severity should have been rated high. The Division rated extent as moderate because Employer was taking some measures to inspect and maintain the e-stop, although not as frequently as the safety order required. Applying the penalty adjustments and the abatement credit resulted in a penalty of $700, which the ALJ found reasonable.

Following an inspection, the Division cited Employer, an installer of solar equipment including roof-mounted solar panels, for failure to ensure that an employee working on the roof of a house under construction wore appropriate fall protection.

§1670(a): Serious violation and $16,875 penalty affirmed.

The safety order provides, in pertinent part, “Approved personal fall arrest, personal fall restraint or positioning systems shall be worn by those employees whose work exposes them to falling in excess of 7 1/2 feet in any plane, leading edges, through shaftways and openings, sloped roof surfaces steeper than 7:12, or other sloped surfaces steeper than 40 degrees not otherwise adequately protected under the provisions of these Orders.”

The Division inspector observed an employee working alone on the roof for at least 15 minutes. He was not wearing fall protection. The roof was approximately 19 feet above ground level, and there was nothing along its edge, such as a guardrail or parapet wall, to prevent him from falling.

Employer disputed that the cited safety order applied to the work activity. The Division inspector saw Employer’s employee working by himself on a roof that was more than 7 1/2 feet above the ground, near the edge of the roof and apparently without any form of fall protection. Employer conceded that the employee was on the roof taking measurements in anticipation of installing solar panels. The house on which the employee was working already had a roof, and there was no evidence that installing solar panels would make the roof different in terms of its overall composition and design. Rather, Employer intended to alter the roof by attaching solar equipment to it. Thus, §1670(a) applied to the work activity at issue.

Employer failed to ensure that the employee wore approved personal fall arrest, fall restraint or positioning systems. The employee
told the Division inspector that he was a site surveyor and that he was not a manager. Employer’s project manager testified that while its installers wore approved fall protection, its surveyors did not. This was irrelevant, however, because the safety order makes no distinction between surveyors and installers.

The employee was working on the roof of a structure near the unprotected perimeter and was exposed to a fall of greater than 7½ feet. Given the undisputed evidence that he was working on a roof installing solar equipment and that he was not wearing approved fall protection, the Division established that Employer violated the safety order.

More specific safety order analysis. Employer argued that another, more specific safety order applied to the work being performed by the employee. Employer contended that §§1730(e), 1723(c) and 1669(c) applied to the work of a site surveyor performing the work that the Division observed. To establish this affirmative defense, an employer must demonstrate that it was in compliance with the more specific safety order. (See Bragg Crane & Rigging Co., Cal/OSHA App. 01-2428, DAR (June 28, 2004) [Digest ¶ 20,613R]; Bellingham Marine Industries, Inc., Cal/OSHA App. 12-3144, DAR (Oct. 16, 2014) [Digest ¶ 22,414R].) Only when an actual conflict exists will the more specific safety order control over the general (citation omitted).

Section 1723(c) states, “When work is of short duration and limited exposure, such as minor patching, roof inspection, etc., and the hazards involved in rigging and installing the safety devices required by this Article exceeds the hazards involved in the actual construction, these provisions may be temporarily suspended provided that adequate risk control is recognized and maintained.” Whether the roofing safety orders apply depends not on whether the job was assigned to or conducted by roofing company workers, or is part of a roofing job “ticket,” but on whether a job places an employee in danger of exposure to falling more than 7½ feet from the perimeter of a structure or unprotected sides or edges, unless the job is unequivocally the application or removal of a roof covering (Caldwell-Roland Roofing, Inc., Cal/OSHA App. 03-2905, DAR (June 9, 2010) [Digest ¶ 21,678R] citing Beutler Heating & Air Conditioning, Cal/OSHA App. 98-556 and 00-014, DAR (Nov. 6, 2001) [Digest ¶ 20,169R]). The Appeals Board in Beutler Heating and Air Conditioning affirmed that the Standards Board confined the applicability of the roofing safety orders to the work of removing and applying materials forming the outer covering of the roof that is designed to protect the house.

Employer provided no evidence that the solar panels were placed in lieu of traditional outer coverings such as those described in §1723(a). Employer asserted that solar panels have evolved over time into devices that serve dual purposes: collecting and storing energy, as well as providing a covering that protects the structure and the inhabitants within from the outside weather. However, Employer failed to show that the products that it installed were anything akin to roofing. Rather, the evidence indicated that a roof already was present, so whatever Employer intended to install was more likely than not in addition to, and not in place of, traditional roofing material. In the absence of any evidence that Employer was engaged in roofing operations, Employer failed to demonstrate that a different, more specific safety order applied to the work activity.

Further, Employer failed to demonstrate compliance with §1669(c). That safety order states, “When the work is of short duration (i.e., non-repetitive) and limited exposure and the hazards involved in rigging and installing the safety devices required by this Article equals or exceeds the hazards involved in the actual construction, these provisions may be temporarily suspended, provided adequate risk control is recognized and maintained under immediate, competent supervision.”

It was undisputed that the employee was unsupervised while he was working at the site; thus, §1669(c) did not apply. Employer argued that the employee had received competent person training; however, the safety order does not indicate that self-supervision satisfies the requirement, and the ALJ declined to read such language into the regulation (citation omitted). In any case, Employer failed to show how the hazards involved in installing up to four anchor points, which Employer claimed would take approximately 15 minutes apiece to install, would equal or exceed the hazard of exposure to serious injury or death from an approximately 20 foot fall. Therefore, Employer did not demonstrate that it complied with §1669(c).

Abatement. The Division does not mandate specific means of abatement; rather, employers may choose the least burdensome means of abatement (Starcrest Products of California, Inc., Cal/OSHA App. 02-1385, DAR (Nov. 17, 2004) [Digest ¶ 20,642R]; The Daily Californian/Calgraphies, Cal/OSHA App. 90-929, DAR (August 28, 1991) [Digest ¶ 17,763R]). If an employer believes that it cannot successfully abate the violations, it may seek a variance from the Standards Board. (See Labor Code §143.)

Employer did not demonstrate that it would have been infeasible, impractical or unreasonably expensive to provide fall protection to employees exposed to falls from greater than 7½ feet that could result in serious injury or death. Employer argued that the work performed by its site surveyors was of such short duration that it would have taken longer to implement approved fall protection in the field than it would have taken to perform the work. However, the testimony of Employer’s project manager confirmed that it was feasible for its surveyors to use approved fall protection while performing their surveying work, and Employer did not offer any further evidence that requiring it to abate the violation by installing anchor points on the roof at the site would have been infeasible, impractical or unreasonably expensive. Consequently, requiring Employer to abate the hazard created by an employee working on the unprotected edge of a roof without approved fall protection, was reasonable, the ALJ concluded.

Classification. A rebuttable presumption of a serious violation exists when the Division establishes a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation (Labor Code §6432(a)). Here, the Division established a realistic possibility of serious physical harm: the inspector credibly testified that someone falling from a height of more than 19 feet could suffer broken bones, head trauma, and punctured lungs that could result in hospitalization for treatment for more than 24 hours. Thus, a presumption existed that the violation was classified properly as serious: an actual hazard existed because of Employer’s failure to provide employees working at elevated locations with approved fall protection, which created a realistic possibility of serious physical harm or death.

Employer conceded that it did not require employees to wear approved fall protection while performing the type of work that the Division observed. Employer knew from the plans of the house that its employee would be exposed to a fall from a height greater than 7½ feet but took no measures to protect him from falling. Instead, it reasonably relied on an incorrect interpretation of the applicable regulation and its opinion that the employee’s work was of such short duration that it was not necessary to utilize fall protection. As a result, Employer failed to rebut the serious classification of the violation. (See Labor Code §6432(a).)

Affirmative defenses. Employers have the burden of establishing affirmative defenses (Blue Diamond Growers, Cal/OSHA App. 10-1280, DAR (Oct. 17, 2012) [Digest ¶ 22,084R]). Employer pleaded but did not adequately support any of its numerous affirmative defenses.

Penalty. Penalties calculated in accordance with the penalty-setting regulations are presumptively reasonable will not be reduced absent evidence that the amount was miscalculated, the regulations were improperly applied, or that the circumstances warrant a reduction (Stockton Tri Industries, Inc., Cal/OSHA App. 02-4946, DAR (March 27, 2006) [Digest ¶ 20,795R]). Employer offered no evidence that the penalty amount was miscalculated, that the regulations were improperly applied or that it was entitled to a reduction. The ALJ found the proposed penalty reasonable.
MACHINERY AND EQUIPMENT – MACHINERY AND EQUIPMENT IN SERVICE MAINTAINED IN SAFE OPERATING CONDITION

Cal. Code Regs, tit. 8, § 3328(g) (2017) – The Division did not establish that Employer’s lettuce harvester machines were not maintained in a safe operating condition. Specifically, a short emergency stop cable on a lettuce harvester machine did not cause the harvester to be in an unsafe operating condition.

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FOOTHILL PACKING, INC.
44 COR 40-7860 [¶22,715]

Summary of COSHAB-ALJ’s Decision dated May 30, 2017, Inspection No. 1089051 (Salinas, CA).

Dale A. Raymond, Administrative Law Judge.

For Employer: Manuel Melgoza, Attorney.
For DOSH: Greg Clark, Senior Safety Engineer.

The Division cited Employer, a farm labor contractor, for failure to provide training regarding heat illness prevention, and failure to maintain machinery in service in a safe operating condition. The Division withdrew the heat illness citation.

§3328(g): General violation dismissed; $850 penalty vacated. The safety order provides, “Machinery and equipment in service shall be maintained in a safe operating condition.” The machinery at issue, the harvester, traveled forward at one mile per hour. Employees picked lettuce in front of the path of travel.

Sections 3328(a) through (h) protect against the hazard of improper design, use, maintenance, and repair of machinery that is in service, i.e., operated or used by employees in service of their employers (Carris Reels of California, Cal/OSHA App. 95-1456, DAR (Dec. 6, 2000) [Digest ¶ 19,941R]). All lettuce harvester machines that Employer used had emergency stop activators that were in working condition at all relevant times.

There was conflicting evidence regarding the emergency stop buttons and the emergency stop cables. The ALJ did not find the Division inspector’s testimony entirely credible. The inspector was unable to identify the safety cable depicted in a photograph he took until the safety cable was pointed out to him, and he wavered between which machine did not have a cable. Moreover, he did not take a photograph of the harvester without a cable, even though the citation was based on the alleged lack of such a cable. Further, the inspector had not performed a prior inspection that involved lettuce harvester machines, and had performed few safety inspections, the ALJ noted. The ALJ found Employer’s harvest manager, who was very familiar with the harvesters and tested the stop mechanisms daily, more credible on this point. The evidence supported that each harvester had six emergency stop buttons and all of them had an emergency stop cable.

To harvest lettuce, employees stood in front of the harvesters, picked heads of lettuce, put each head in a plastic bag, put them on a platform, and then put the heads in a box on the harvester. The hazard associated with a harvester that cannot be stopped is that it could strike an employee. Evidence showed two employees working in front of the harvester wing on one side, directly below the area where there was no cable. The Division argued that requiring an employee to take a step to reach the cable or requiring the employee to extend an arm at an angle to pull the cable was unsafe. The Division had the burden to show that a short cable created a hazard that could result in injury. (See Stockton Steel Corporation, Cal/OSHA App. 00-2157, DAR (August 28, 2002) [Digest ¶20,367R].)

The Division presented no evidence that not having the ability to access the cable by reaching directly up was unsafe, nor did it demonstrate a realistic possibility that Employer’s emergency stop was inadequate, not immediately accessible, or otherwise unsafe. The Division did not present expert testimony or cite a standard regarding emergency stop requirements. Consequently, the Division failed to establish that the harvester machines were not being used in a safe operating condition.