BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: **RJP FRAMING, INC.** **5137 Golden Foothill Parkway, Suite 100** **El Dorado Hills, CA 95762** *Employer*	**DOCKET 13-R2D1-3729** **DECISION**

Statement of the Case

RJP FRAMING, INC. (Employer) is a construction framing company. Beginning July 11, 2013 until November 22, 2013, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Anthony Galvez (Galvez), conducted an accident investigation at a place of employment maintained by Employer at Tecerro Student Housing Phase 3, Building No. 5, Davis, California (the site). On December 2, 2013, the Division cited Employer for failure to guard a roof opening.[1]

Employer filed a timely appeal of the citation, contesting the existence of the violation, the classification and the reasonableness of the proposed penalty in Citation 1. The Employer filed a motion to amend the appeal to add an affirmative defense challenging the applicability of the safety order and raising the logical time defense.

This matter was heard by Mary Dryovage, Administrative Law Judge for the California Occupational Safety and Health Appeals Board, Sacramento, California on January 15, 2015. Raymond C. Peterson, Project Manager, represented Employer. Jon Weiss, District Manager, represented the Division. The parties presented oral and documentary evidence. Employer and the Division each submitted post-hearing briefs. The matter was submitted for decision on February 9, 2015. The submission date was extended to May 22, 2015 by the Administrative Law Judge.

Issues

A. Was there was a "roof opening" at the jobsite on June 12, 2013?

B. Was the roof opening guarded by either temporary railings and toeboards, or by covers?

C. Were employees exposed to the unguarded opening?

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

D. Did the logical time for complying with section 1632, subdivision (b)(1) not yet arrive at the time of the accident?

E. Was the violation properly classified as serious?[2]

F. Was the proposed penalty reasonable?

Findings of Fact

1. A roof opening existed at the site on June 12, 2013.

2. The roof opening was not guarded by either temporary railings and toeboards or by covers.

3. Four or more employees were exposed to the unguarded opening prior to the accident, on June 12, 2013.

4. The logical time for complying with section 1632, subdivision (b)(1) was when employees were assigned to sheath the roof, prior to the accident, on June 12, 2013.

5. The alleged violation was correctly classified as "serious".

6. The proposed penalty of $5,850 is reasonable.

Analysis

The Division cited employer for a violation of section 1632, subdivision (b)(1) of the General Industry Safety Orders as follows:

> Floor, Roof, and skylight openings shall be guarded by either temporary railings and toeboards or by covers.

Citation 1, Item 1 alleges:

> On June 12, 2013, an employee of RJP Framing, Inc. was injured at Tecerra Student Housing Phase 3, Building #5 in Davis, CA when the employee fell through a roof opening. The roof opening, where employees were working was not guarded by temporary railings and toeboards or by a cover.

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

[2] The parties stipulated that Antonio Velazquez, a carpenter employed by RJP, sustained injures as the result of a fall on June 12, 2013.

each element of the violation occurred. (*Lockheed California Company*, Cal/OSHA App. 80-889, Decision After Reconsideration (July 30, 1982).)

The elements of the violation are these: 1) existence of a roof opening, 2) the opening was not guarded by either temporary railings and toeboards or by covers and 3) employees were exposed to the hazard of an unguarded roof opening.

A. Was there was a "roof opening" at the jobsite on June 12, 2013?

Section 1632, subdivision (a) "address[es] the hazard of employees or materials (which can fall onto employees) from falling through openings in floors, roofs, walls or from stairways or runways arising from temporary or emergency conditions." (*Bostrom-Bergen Metal Products,* Cal/OSHA App. 00-1012, Decision After Reconsideration (Jan. 10, 2003).)

An "opening" is defined in section 1504, subdivision (a) (Exhibit 11):

> An opening in any floor or platform, 12 inches or more in the least horizontal dimension. It includes: stairway floor openings, ladderway floor openings, hatchways and chute floor openings.

At the time of the accident on June 12, 2013, RJP's employees were sheathing (installing plywood) a roof on the site. Antonio Velazquez (Velazquez), a carpenter, was sheathing the roof when he lost power to his saw. He was working approximately 45 feet away from the roof opening of a four story building. Velazquez detached his fall protection device from the anchor point in order to move to another area on the roof to regain power. He fell from the roof to the plywood on the fourth floor through an opening, which measured as 90 inches by 107 inches and was intended to be an elevator shaft. Exhibit 5 is a photograph depicting the fourth floor where the employee landed.

The opening on the roof which the employee fell through was over twelve inches wide. This opening was slated to be the elevator shaft used to access the roof of the building.[3] (Exhibits 14, 15 and 16.) The Division established that the roof had an opening greater than twelve inches wide on the day of the accident.

[3] Employer's argument that section 1632, subdivision (a) does not apply to a roof opening which was designed to become an elevator shaft is rejected. Section 1633, subdivision (a) is not inconsistent with nor more specific than section 1632, subdivision (a), as both require guarding. Compare section 1633, subdivision (a), which provides "all elevator shafts in which cages are not installed and which are not enclosed with solid partitions and doors shall be guarded on all open sides by standard railing and toeboards" with section 1632, subdivision (a). The Board has "long recognized that the fact that one safety order may be more specific or more particular to a given set of facts than another is immaterial; only when an actual conflict between them exists will the more specific safety order control over the general." (*Bostrom-Bergen Metal Products,* Cal/OSHA App. 00-1012, DAR (Jan. 10, 2003), citing *Gas and Electric Company*, Cal/OSHA App. 82-1102, Decision After Reconsideration (Dec. 24, 1986).)

B. Was the roof opening guarded by either temporary railings and toeboards, or by covers?

It is undisputed that the roof opening was not guarded by either temporary railings and toeboards or by covers on three sides. Felix Lua (Lua), a carpenter who was at the worksite at the time of the accident, testified that he was in the process of installing plywood around the elevator shaft of Building 5 when the injured employee stepped onto the plywood and fell through to the fourth floor. Lua also testified that there was nothing on the roof to prevent Velazquez from entering the area around the roof opening, such as tape, warning signs or other guarding. Exhibit 8, the accident report by Sundt Construction, the General Contractor, found:

> Felix nailed off the sheet of plywood and started to cut off the over burden (cantilever part) over the elevator opening. Felix had just about the whole section of plywood cut off when Antonio walked up from behind on Felix's right side stepping on the cantilever part of the plywood that was just about completely cut through. At that point Antonio fell to the 4th floor false floor that was covering the shaft at each floor level.

Exhibit 18, the accident investigation report by RJP Framing Inc., the framing subcontractor, describes the accident and how it occurred: "[Velazquez] stepped on piece of plywood while it was being cut and fell to floor below. . .[he] removed [his] fall protection to check on power cord." Exhibit 10 is a photograph taken from the roof. It depicts the temporary railings around the opening which were installed after the accident. The employer did not dispute this evidence. The Division established that the roof opening was not guarded at the time of the accident

C. Were employees exposed to the unguarded opening?

A violation can be established only upon a showing that employees were exposed to the cited hazard. (See, e.g., *Rudolph & Sletten, Inc.,* Cal/OSHA App. 80-602, Decision After Reconsideration (Mar. 5, 1981); *Moran Constructors, Inc.,* Cal/OSHA App. 74-381, Decision After Reconsideration (Jan. 28, 1975) and *Wickes Forest Industries,* Cal/OSHA App. 79-1269, Decision After Reconsideration (Oct. 31, 1984).) Employee exposure may be established by a showing of "actual" exposure, or by showing the area of the hazard was "accessible" to employees such that it is reasonably predictable by operational necessity or otherwise that employees have been, are, or will be in the zone of danger. (*Benicia Foundry & Iron Works, Inc.,* Cal/OSHA App. 00-2976, Decision After Reconsideration (April 24, 2003).) When exposure is not proven by evidence of actual exposure, there must be some evidence that employees came within the zone of danger while performing work-related duties, pursuing personal activities during work, or employing normal means of ingress and egress to their work stations for there to be a violation. (*Ja Con Construction Systems, Inc.,* Cal/OSHA

App. 03-R3D2-441, Decision After Reconsideration (Mar. 27, 2006); *Bencia Foundry & Iron Works, Inc.,* supra.)

Lua testified that there were approximately four or five employees on the roof on the day of the accident. Lua was beginning to cut the overhang on the plywood he was installing around the elevator shaft when he heard someone yell and saw Valasquez fall into the opening. The exposure of Antonio Valasquez was also established by RJP's accident report, Exhibit 18 which states Valasquez "stepped on a piece of plywood while it was being cut and fell to floor below." The Division established that employees were exposed to the cited hazard.

D. Did the logical time for complying with Section 1632 subdivision (b)(1) not yet arrive at the time of the accident?

The logical time defense is a Board created affirmative defense, in which the employer must prove by preponderant evidence that the employee(s) would be exposed to greater danger if the safety order were applied at a particular stage of the work rather than a later time; thus, the safety order will not apply until compliance does not create the added or greater hazard. (*Bay Cities Paving & Grading, Inc.,* Cal/OSHA App. 12-1665, Denial of Petition for Reconsideration (May 16, 2014), *citing Nicholson-Brown. Inc.* Cal/OSHA App. 77-024, Decision After Reconsideration (Dec. 20, 1979).) The logical time to comply with the safety order is before an employee is assigned to do the work which exposes the employee to the danger covered by the safety order. (*Dick Miller, Inc.,* Cal/OSHA App. 13-0578, Denial of Petition for Reconsideration (March 5, 2014).)

Employer maintains that the logical time for guarding the opening on the roof had not yet arrived because the entire area around the opening was required to be sheathed before guardrails could be installed. It claims that it was unsafe for employees to walk on the joists until after the plywood sheathing was completed and cites section 1716.2, subdivision (d) in support of this argument, which provides:

> Stabilization of Structures.
> Employees shall not work from or walk on top plates, joists, rafters, trusses, beams or other structural members until they are securely braced and supported.

The hazard of falling into openings which are not guarded or falling off the roof existed at the time the employees went on the roof to install the sheathing. An employee assigned to work on a roof can fall off the leading edge of the roof or into a large unguarded hole, such as the opening for an elevator shaft, at any time.[4] Employer was aware of this hazard and installed fall protection prior to completing the sheathing process.

[4] Velazquez disconnected his fall protection just prior to the accident. The independent employee action defense (IEAD) is not available when Employer's failure to provide guarding is the basis for the citation, such as in this case. (*Pierce Enterprises*, Cal/OSHA App. 00-1951, Decision After Reconsideration (March 17, 1984) held "an employer's rule prohibiting employees from working on unguarded scaffold platforms is inadequate and cannot provide a substitute for guarding".)

No evidence was presented that waiting until the sheathing was completed would entail less danger than installing temporary railing and toeboards or covers first. It was undisputed that employees were walking around on the I-joists on the roof before the sheathing was completed in order to install the fall protection equipment and the plywood. The injured employee was walking on the plywood, not the joists, when he fell through the hole. Guarding of the openings is required so that the employees who were working on the roof do not fall into the opening Section 1716.2 subdivision (d) by its terms does not require sheathing the roof to be completed before the guardrails around the opening for the elevator shaft are installed. Stabilization of the joists was not completed when this work was being done on the roof. Lua testified that RJP employees installed guardrails around the opening after the accident but before the sheathing was completed. (Exhibit 10)

Based on the evidence in the record, the logical time to provide temporary railings and toeboards or covers is before the employees were instructed to install the sheathing on the roof. The evidence in the record demonstrates that the guarding by placing temporary railings and toeboards or by covers around the opening was needed to avoid falling down the elevator shaft. Employer failed to prove that the logical time to guard the opening properly, as required by section 1632, subdivision (b)(1), was after the sheathing of the roof was completed.

The Division established a violation of section 1632, subdivision (b)(1).

E. Was the alleged violation correctly classified as serious?

Labor Code section 6432, subdivision (a) provides:

> There shall be a rebuttable presumption that a 'serious violation' exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm [5] could result from the actual hazard created by the violation.

The legal standard "realistic possibility" is not defined in the safety orders. The Appeals Board utilized a "reasonable possibility" standard in *Oliver Wire & Plating Co., Inc.*, Cal/OSHA App. 77-693, Decision After Reconsideration (April 30,

[5] Labor Code section 6432, subdivision (e) provides as follows:

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

1980) when analyzing whether an employer, whose workers are possibly exposed to the danger of splashing caustic chemicals, must ensure the use of eye protection. The Appeals Board determined that it is unnecessary for DOSH to "present actual proof of hazardous splashing if a realistic possibility of splashing exists." They explained, "[c]onjecture as to what would happen if an accident occurred is sufficient to sustain (a violation) of the existence of unsafe working conditions if such a prediction is clearly within the bounds of human reason, not pure speculation." This definition was again utilized in *Bellingham Marine Industries, Inc.*, Cal/OSHA App. 12-3144, Decision After Reconsideration (Oct. 16, 2014), citing *Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (September 27, 2001).

Associate Safety Engineer Galvez testified that the type of injury that usually results from an accident caused by lack of fall protection or a fall involves serious physical harm in 59% of the cases and may result in death, which was the case in two investigations of accidents caused by falls. The factors he considered when investigating an accident resulting from a fall is the distance the person fell, what body-part the employee landed on, the hazards on the ground where the employee landed, and objects that the employee is likely to hit. Galvez's opinion that serious injury or death from falling through a hole to the temporary floor below is a realistic possibility is found credible and is accepted.[6]

The medical records established that Valasquez was diagnosed as having a right distal radius fracture and right Colles fracture, left distal radius fracture and left Colles fracture, cervical strain and contusion to the chest. (Exhibit 17.) Exhibit 21 is a photograph of Valasquez with two broken arms in casts. He was transferred from the medical clinic to Sutter Hospital and discharged the same night, as the employee decided to complete surgery in southern California. (Exhibit B) A Form 1-B-Y was sent to the employer to allow it to contest the serious classification. (Exhibit 20.)

The Division having established the rebuttable presumption, employer had an opportunity to present evidence to the contrary. Employer did not rebut or challenge the documentation of the serious physical harm or the testimony that serious physical harm was a realistic possibility. Galvez's testimony established that serious physical injury was more than speculation, and therefore, a realistic possibility in the event of an accident caused by the violation. The citation was correctly categorized as "serious", based on the preponderance of evidence.

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[6] Galvez testified that he was current in his Division-mandated training, as shown in Exhibit 3, and has experience conducting accident inspections involving falls. Galvez' s opinion was also based upon his five years of experience working for the Division and twelve years in prior jobs within the industry in which he had safety responsibilities and investigated similar accidents. Galvez has a Bachelor of Science in mechanical engineering that is relevant to job hazards. His opinion was based upon a reasonable evidentiary foundation consisting of his education, experience and training. Thus, Galvez is competent to give his opinion per Labor Code section 6432, subdivision (g). (See *Wright & Associates, Inc.*, Cal/OSHA App. 95-3649, Decision After Reconsideration (Nov. 29, 1999).)

F. Whether the proposed penalty of $5,850 is reasonable.

A review of the proposed $5,850 penalty finds that the Division followed the penalty setting regulations.[7] Galvez offered testimony to establish the amount of the penalty as reflected on the penalty calculation worksheet (Exhibit 2). Employer did not contest that testimony, nor did it offer any evidence contrary to that testimony.

Galvez testified that the gravity based penalty was $18,000 because it was rated as "serious". He evaluated the following factors under the applicable regulations: "severity" was rated as high, based on the degree of discomfort, temporary disability and time lost from normal activity which an employee is likely to suffer as a result of the violation; "extent" was rated medium, based on the number of employees exposed to the condition; "likelihood" was also rated medium.[8] The gravity based penalty of $18,000 was not raised or lowered, due to the rating of medium for "extent" and "likelihood". (Section 336.)

The penalty adjustment factors resulted in a reduction of the penalty by 35%, the sum of the following reductions: good faith (15%), size (10%), and history (10%). The good faith was rated fair, based on the quality and extent of the employer's safety program, resulting in a 15% adjustment.[9] At the time of the accident, Employer had less than 100 employees and was given a 10% adjustment. There was no history of serious, repeat or willful violations and less

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[7] Penalties calculated in accordance with the penalty setting regulations (§§ 333-336) are presumptively reasonable. (*Stockton Tri Industries, Inc.,* Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).) A penalty proposed by the Division in accordance with those regulations is presumptively reasonable and will not be reduced absent evidence by Employer that the amount of the proposed civil penalty was miscalculated, the regulations were improperly applied, or that the totality of the circumstances warrant a reduction. (*Id.*) The calculation used to determine the adjusted penalty is: 35% of $18,000 is $6,300, $18,000 minus $6,300 equals $11,700.

[8] Under section 335, subdivision, (a)(3), "likelihood" is defined as follows:

> Likelihood is the probability that injury, illness or disease will occur as a result of the violation. Thus, likelihood is based on (i) the number of employees exposed to the hazard created by the violation, and (ii) the extent to which the violation has in the past resulted in injury, illness or disease to the employees of the firm and/or industry in general, as shown by experience, available statistics or records.

[9] Under section 336, subdivision, (c), "good faith" is defined as follows:

> The Good Faith of the Employer—is based upon the quality and extent of the safety program the employer has in effect and operating. It includes the employer's awareness of CAL/OSHA, and any indications of the employer's desire to comply with the Act, by specific displays of accomplishments. Depending on such safety programs and the efforts of the employer to comply with the Act, Good Faith is rated as:
>
> GOOD—Effective safety program.
> FAIR—Average safety program.
> POOR—No effective safety program

than one general or regulatory violation within the last three years, resulting in 10% adjustment.[10] The adjusted penalty was $11,700. A 50% abatement credit was given to the Employer based on the fact that it made a good faith effort to abate the alleged violation. As a result the penalty was further reduced to $5,850, or one half of $11,700. (§ 336, subd. (d)(4)(B).) A reasonable penalty is therefore established in the amount of $5,850.

Conclusion

The evidence supports a finding that Employer failed to guard the roof opening. The employer failed to rebut the presumption that a serious violation of section 1632, subdivision (b)(1) exists. A penalty of $5,850 is assessed.

Order

It is hereby ordered that Employer's appeal be denied. Citation 1 is affirmed and the penalty as set forth in the attached Summary Table shall be assessed

DATED: June 30, 2015
MD:sp

MARY DRYOVAGE
Administrative Law Judge

[10] Under section 336, subdivision (d), "history" is defined as follows:

> The History of Previous Violations--is the employer's history of compliance, determined by examining and evaluating the employer's records in the Division's files. Depending on such records, the History of Previous Violations is rated as:
> GOOD-- Within the last three years, no Serious, Repeat, or Willful violations and less than one General or Regulatory violation per 100 employees at the establishment.
> FAIR-- Within the last three years, no Serious, Repeat, or Willful violations and less than 20 General or Regulatory violations per 100 employees at the establishment.
> POOR-- Within the last three years, a Serious, Repeat, or Willful violation or more than 20 General or Regulatory violations per 100 employees at the establishment.
> For the purpose of this subsection, establishment and the three-year computation, shall have the same meaning as in Section 334(d) of this Article.

SUMMARY TABLE
DECISION

Abbreviation Key:	Reg=Regulatory
G=General	W=Willful
S=Serious	R=Repeat
Er=Employer	DOSH=Division

In the Matter of the Appeal of:
RJP FRAMING, INC.
DOCKET 13-R2D1-3729

DOCKET	CITATION	ITEM	SECTION	TYPE	ALLEGED VIOLATION DESCRIPTION MODIFICATION OR WITHDRAWAL AND REASON	AFFIRMED	VACATED	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT PRE-HEARING	**FINAL PENALTY ASSESSED BY BOARD**
13-R2D1-3729	1	1	1632(b)(1)	S	ALJ affirmed violation.	X		$5,850	$5,850	**$5,850**
					Sub-Total			$5,850	$5,850	**$5,850**
					Total Amount Due*					**$5,850**

(INCLUDES APPEALED CITATIONS ONLY)

NOTE: *Please do not send payments to the Appeals Board.*
ALL penalty payments must be made to:
Accounting Office (OSH)
Department of Industrial Relations
PO Box 420603
San Francisco, CA 94142
(415) 703-4291, (415) 703-4308 (payment plans)

*You will owe more than this amount if you did not appeal one or more citations or items containing penalties. Please call (415) 703-4291 if you have any questions.

ALJ:MD
POS: 06/30/15

APPENDIX A

SUMMARY OF EVIDENTIARY RECORD
RJP FRAMING, INC.
Docket 13-R2D1-3729

Date of Hearing: January 15, 2015

Division Exhibits — Admitted

Number	Description
1	Jurisdictional Documents
2	Penalty Calculation Worksheet
3	Letter re: Anthony Galvez's OSHA mandated training is current, dated 1/13/2015
4	Photo of Building 5 finished roof, taken Aug. 1, 2013
5	Photo of 4th floor showing location of roof opening which employee fell through, taken Aug. 1, 2013
6	Request for documents dated August 26, 2013
7	E-mail response to request for documents from Kaori Gesinger, Project Coordinator, RJP Framing, Inc. to Anthony Galvez, dated August 29, 2013
8	Sundt Accident Z-25 Form (6 pages) Cal/OSHA Form 1BY
9	Roof Framing Plan with 4th floor shearwalls – Building 5
10	Photo – Building 5 – guardrails installed after accident
11	Definition of "opening" – Section 1504(a)
12	Section of Roof Framing Plan – Building 5 (enlarged from Ex. 9)
13	Section of Roof Framing Plan – Building 5 (enlarged from Ex. 9)
14	Photo of opening taken from roof to floor below
15	Photo of 4th floor - landing spot of injured employee
16	Photo of floor where employee landed – indented by head of injured employee

17	Medical Records of Antonio Valasquez from Sutter Davis Hospital Emergency Department (under seal)
18	RJP Framing Accident Investigation Report, dated June 13, 2013 (2 pages)
19	RJP Framing Fall Protection, Tercero Student Housing Phase III, UC Davis, October 17, 2012
20	Cal/OSHA 1BY Form (3 pages)
21	Photo of Antonio Valasquez after accident

Employer Exhibits — Admitted

Letter	Description
A	I-Joist Installation Information - portion of larger chart (2 pages)
B	Investigative notes re: RJP Framing, Inc. IMIS No. 317244523, dated July 11, 2013

Witnesses Testifying at Hearing

1. Anthony Galvez, DOSH Associate Safety Engineer
2. Felix Lua, Carpenter for RJP Framing, Inc.

CERTIFICATION OF RECORDING

I, Mary Dryovage, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hear the above matter, hereby certify the proceedings therein were electronically recorded. The recording was monitored by the undersigned and constitutes the official record of said proceedings. To the best of my knowledge, the electronic recording equipment was functioning normally.

_____ _____

MARY DRYOVAGE June 30, 2015