

Respondent, a construction contractor, appeals from a recommended decision and order finding a Class 1 violation of New York City Building Code (BC) Section 3301.2 for failure to safeguard all persons and property affected by construction operations. In the notice of violation (NOV), the issuing officer stated that on December 10, 2008, as reported, on the 50th floor of the building, a glass panel of the curtain wall broke and fell to the street because a steel cable of the vertical safety netting came out from the 51st floor and hit the glass. In the NOV, the issuing officer noted that the same kind of incident involving glass panels falling to the street occurred previously and that Respondent had similar non-compliance on May 12, 2008 and September 17, 2008. Respondent was therefore charged in the NOV with an Aggravated II condition pursuant to Section 102-01(f) of Title 1 of the Rules of the City of New York (RCNY).

At the hearing, Respondent contended that the facts stated in the NOV did not establish that it failed to properly safeguard persons and property. Respondent claimed that it took all necessary steps to safeguard persons and property and that a mechanical defect caused the cable to snap. Respondent also argued that it should not be charged with an Aggravated II violation because it either entered into stipulations or corrected the conditions described in prior violations with which it was charged. Petitioner, the Department of Buildings (DOB), asserted that Respondent failed to properly safeguard persons and property in that the cable snapping and causing the glass panel to fall meant that Respondent failed to properly maintain safety measures in some manner. Petitioner offered into evidence a DOB computer record setting forth thirty-nine violations with which Respondent was charged under the NYC Construction Codes (or the predecessor statutes in effect prior to July 1, 2008) for the three-year period ending December 23, 2008. Of these NOVs, hearings were held and Respondent was found in violation on seventeen, and Respondent entered into stipulations on two. In her recommended decision and order, the administrative law judge (ALJ) found that the use and installation of a steel cable by Respondent as part of its safety netting constituted construction operations and that Respondent was in violation because the cable snapped causing the glass panel to shatter and fall. The ALJ also found that the evidence established that Respondent had a violation history during the previous three years warranting the imposition of an Aggravated II civil penalty.

In its appeal, Respondent reiterates its claim that it maintained the job site in a proper condition and that the snapping of the cable, resulting in the shattering of the glass panel which fell, was caused by a defective cable, not any failure by Respondent to provide and maintain proper safety measures. Respondent also again argues that because it established at the hearing that it corrected the violating conditions set forth in the majority of the NOVs issued to it on prior occasions, this NOV should not have been designated as Aggravated II. Respondent maintains that the mere presence of multiple prior violations is insufficient to designate this NOV as Aggravated II, that such designation requires Petitioner to establish a pattern of failing to obey Stop Work Orders, filing of false documents, or multiple defaults, which Petitioner has failed to do.

Petitioner did not answer the appeal.

BC Section 3301.2 provides:

Contractors, construction managers, and subcontractors engaged in building work shall institute and maintain safety measures and provide all equipment or temporary construction necessary to safeguard all persons and property affected by such contractor's operations.

In addition, BC Section 3301.5 requires that any equipment other than hand tools that would affect public safety when operated must be inspected before it is used and that periodic inspections be performed during construction operations.

Petitioner's case rested on the reasonable inference that because a cable of the vertical safety netting snapped, causing it to hit and break a glass panel which then fell to the ground, Respondent failed to properly maintain safety measures at the job site. At the hearing, Respondent claimed that the cable snapped because it was defective. However, Respondent offered no evidence that the safety netting and its constituent parts, including the cable, had been inspected as required by BC Section 3301.5 to ascertain if there was a defect in the cable. On this record, the Board finds that Respondent has failed to refute the reasonable inference that the cable snapped, resulting in the glass panel breaking and falling to the ground, as a result of Respondent's failure to maintain the safety netting.

Code Section 28-204.2 provides that, unless otherwise provided by rule, an order shall require that violations classified as major or lesser be corrected within 30 days from the date of the order, and immediately hazardous (Class 1) violations corrected "forthwith."

1 RCNY 102-01(f)(2) provides, in pertinent part, that Aggravated II penalties shall be imposed:

(iii) Where respondent . . . has a history of non-compliance with laws or rules enforced by the Department at one or more locations, including but not limited to a pattern of unreasonable delays in correcting violations, a pattern of failing to obey Stop Work Orders, filing false documents, or multiple defaults.

(iv) For purposes of this section, "in violation" shall mean to be adjudged in violation of any law or rule enforced by the Department following a hearing, to admit the charge, or to sign a stipulation agreement either at or before a hearing before any administrative or judicial tribunal. Failure to appear at a hearing leading to entry of a default order or

judgment shall also be deemed a finding “in violation.”

The Aggravated II penalty may be imposed for a number of reasons. The rule does not require, as Respondent suggests, that Petitioner establish a pattern of failing to obey Stop Work Orders, filing false documents, or multiple defaults. Petitioner’s evidence at the hearing showed that at the cited location Respondent had been issued and found in violation on seventeen NOVs after hearings had been conducted. New York City Administrative Code Section 28-204.2 provides that a violation for which a certificate of correction is filed “may serve as a predicate for the purposes of assessing aggravating factors attributable to multiple offenses.” The Board therefore finds that correction of the violating conditions described in these NOVs and the subsequent filing of certificates of correction did not negate the pattern of non-compliance with laws enforced by DOB established by Petitioner’s evidence. As to the two NOVs in which Respondent entered into stipulations, 1 RCNY 102-01(f)(2)(iv) explicitly includes the signing of a stipulation agreement either before or after a hearing in that section’s definition of “in violation.” The Board finds that Petitioner has established a history of Respondent’s non-compliance with laws enforced by DOB to merit the imposition of Aggravated II penalties for this violation.

Accordingly, the ALJ’s recommended decision and order is affirmed.