BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of: **GENERAL DYNAMICS NASSCO** **P.O BOX 85278** **SAN DIEGO, CA 92168** **Employer**	Inspection No. **1300984** **DECISION**

Statement of the Case

General Dynamics NASSCO (Employer) is a shipbuilder. Beginning March 27, 2018, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Victor Reyes (Reyes), conducted an inspection of Employer's shipyard located at 2798 E. Harbor Drive in San Diego, California, in response to a report of injury that occurred on March 7, 2018.

On September 7, 2018, the Division issued two citations to Employer. Citation 1 alleges that Employer's Injury and Illness Prevention Program did not include adequate procedures for identifying and evaluating work place hazards or methods and procedures for correcting unsafe or unhealthy conditions. Citation 2 alleges that Employer did not keep all employees clear of loads about to be lifted and suspended loads.

Employer filed timely appeals of Citations 1 and 2, contesting the existence of the violations. Employer also appealed Citation 2 on the grounds that the classification of the violation is incorrect and the proposed penalty is unreasonable. Employer also asserted a series of affirmative defenses for each citation.[1]

This matter was heard by Mario Grimm, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (Appeals Board) in West Covina, California via the Zoom video platform on June 2, 2021 and October 13 and 14, 2021. Kevin D. Bland, of Ogletree, Deakins, Nash, Smoak & Stewart, P.C., represented Employer. Kathryn J. Woods, Staff Counsel, represented the Division. Each party submitted a closing brief on December 10, 2021. The matter was submitted for decision on March 10, 2022.

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

Issues

1. Did Employer fail to identify, evaluate, and correct a workplace hazard associated with a suspended load?

2. Did Employer fail to keep an employee clear of a suspended load?

3. Did Employer establish the Independent Employee Action Defense?

4. Did the Division establish that Citation 2 was properly classified as Serious?

5. Did Employer rebut the presumption that the violation in Citation 2 was Serious by demonstrating that it did not know, and could not, with the exercise of reasonable diligence, have known of the existence of the violation?

6. Did the Division establish that Citation 2 was properly characterized as Accident-Related?

7. Is the proposed penalty in Citation 2 reasonable?

Findings of Fact

1. Peter White (White), the injured employee, was a temporary employee working at Employer's shipyard.

2. On March 7, 2018, White was installing pipe braces onto a stanchion. The pipe braces were rigged, attached to a sling, and suspended by a crane. White was at the side of a suspended pipe brace using his hands to control and adjust it into place when his right hand was crushed in a pinch point.

3. White suffered a broken finger and partial degloving of his right hand.

4. White's injury was a serious injury as defined by California Code of Regulations, title 8, section 330(h), and Labor Code section 6302.[2]

5. Employer's Rigging Safety Procedures contains provisions requiring employees to keep clear of suspended loads and avoid pinch points.

[2] Finding of fact 4 is established pursuant to a stipulation by the parties.

6. Employer's definition of keeping clear of suspended loads is limited to keeping employees clear of overhead loads.

7. Employer's procedure for installing the suspended pipe braces permitted employees to be in proximity and direct bodily contact with suspended loads.

8. Employer knew or should have known that all suspended loads, not just overhead loads, represent a work place hazard.

9. The penalty for Citation 2 was calculated in accordance with the penalty-setting regulations.

Analysis

1. Did Employer fail to identify, evaluate, and correct a workplace hazard associated with a suspended load?

California Code of Regulations, title 8, section 3203[3] requires employers to have a written Injury and Illness Prevention Program (IIPP) that meets the minimum requirements set forth in the regulation and that the IIPP must be established, implemented, and maintained effectively. In Citation 1, the Division references section 3203, subdivisions (a)(4) and (a)(6), which provide, in relevant part, that the IIPP must:

> (4) Include procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices. Inspections shall be made to identify and evaluate hazards:
>
> (A) When the Program is first established;
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> …
>
> (B) Whenever new substances, processes, procedures, or equipment are introduced to the workplace that represent a new occupational safety and health hazard; and
> (C) Whenever the employer is made aware of a new or previously unrecognized hazard.

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

(6) Include methods and/or procedures for correcting unsafe or unhealthy conditions, work practices and work procedures in a timely manner based on the severity of the hazard:

(A) When observed or discovered; and,
(B) When an imminent hazard exists which cannot be immediately abated without endangering employee(s) and/or property, remove all exposed personnel from the area except those necessary to correct the existing condition. Employees necessary to correct the hazardous condition shall be provided the necessary safeguards.

In Citation 1, the Division alleges:

Prior to and during the course of the inspection, including, but not limited to, on March 27, 2018, the employer did not implement and maintain an effective Injury and Illness Prevention Program as required in the following two instances:

1. The employer procedures for identifying and evaluating work place hazards is not adequate because supervisors did not identify hazards associated to hoisting operations including, but not limited to, pinch points after worksite had change.

2. The employer did not implement effective methods and/or procedures for correcting unsafe or unhealthy conditions, work practices and work procedures in a timely manner, including, but not limited to, hazards associated to hoisting operations.

The Division has the burden of proving a violation by a preponderance of the evidence. (*Papich Construction Company, Inc.,* Cal/OSHA App. 1236440, Decision After Reconsideration (Mar. 26, 2021).) “Preponderance of the evidence” is usually defined in terms of probability of truth, or of evidence that, when weighed with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence. (*Nolte Sheet Metal, Inc*., Cal/OSHA App. 14-2777, Decision After Reconsideration (Oct. 7, 2016).)

Instance 1: Failure to identify and evaluate work place hazards.

“Section 3203(a)(4) requires that employers include procedures for identifying and evaluating work place hazards in their Injury and Illness Prevention Programs. These procedures must include ‘scheduled periodic inspections to identify unsafe conditions and work practices.’

(Section 3203(a)(4).)" (*Brunton Enterprises, Inc.*, Cal/OSHA App. 08-3445, Decision After Reconsideration (Oct. 11, 2013).) Here, Employer had a written IIPP containing provisions for identifying evaluating work place hazards and conducted periodic inspections. While an employer may have a comprehensive IIPP, the Division may still demonstrate an IIPP violation by showing that the employer failed to implement that plan. (*DPR Construction, Inc., et al dba DPR Construction*, Cal/OSHA App. 1206788, Decision After Reconsideration (Feb. 19, 2021).)

The Division asserts that Employer failed to effectively identify hazards associated with a hoisting operation, including a pinch point hazard where White's hand was injured. On the day of the accident, White was part of a two-man rigging crew installing pipe bracing onto a stanchion. White was responsible for communicating with the crane operator to lower and position the pipe braces onto the stanchions. The pipe braces were approximately 500 pounds, 10 feet in length, and 12 inches in diameter, with a slot on each end. To install a pipe brace, the slots were fitted onto brackets that were attached to the stanchion. While standing at the side of the suspended pipe brace, White used his hands to control and adjust the suspended pipe brace so that he could align and fit the slots onto the brackets. Once the pipe brace was properly positioned, a welder tacked the pipe brace into place and the rigging was then removed.

White installed two pipe braces without incident on the day of the accident. When it came to the installation of the third pipe brace, there was a pipe run installed on the stanchion that passed directly above the bracket where the third pipe brace needed to be fitted at the top end, creating a pinch point once the pipe brace was moved onto the bracket underneath the pipe run. White placed his hand on the pipe brace such that it came between the pipe brace and the pipe run. White's right hand was crushed between the pipe brace and the pipe run, the pinch point, when the pipe brace suddenly shifted upward, hitting the pipe run.

"To prove a violation of section 3203, subdivision (a)(4), based upon a failure of implementation, the Division must establish that the employer failed to effectively implement its duty to inspect, identify, and evaluate the hazard. [Citation.]" (*DPR Construction, Inc., et al dba DPR Construction*, *supra*, Cal/OSHA App. 1206788.) Here, Employer's own investigative report of the accident reflects that White was not aware of the pinch point and that supervision should have recognized and addressed the pinch point sooner. (Exhibit 15.) Victor Reyes (Reyes), Associate Safety Engineer, testified that Gonzalo Fernandez, White's direct supervisor, stated during his interview, that the pinch point hazard had not been identified. While there was some testimony that Employer assessed the installation process, neither of Employer's witnesses testified that the pinch point had been identified.

Duke Vuong (Vuong), Employer's Safety Manager at the time of the accident, testified that Employer considered whether it was possible to install the pipe run after the pipe braces, which would have eliminated the pinch point, but it was determined that the order of installation

executed was the safest. However, there was no testimony from Vuong as to whether the pinch point created by the pipe run was identified and evaluated at that time. White testified that he and the other rigger discussed the best way to install the pipe braces prior to starting the work, but there was nothing from White indicating that the pinch point had been identified. Even if White had identified the pinch point, this would not be sufficient to establish that Employer effectively implemented its procedures. The task of identifying and evaluating work place hazards cannot be delegated to non-supervisory employees for purposes of implementing an IIPP. (*Hansford Industries, Inc. dba Viking Steel*, Cal/OSHA App. 1133550, Decision After Reconsideration (Aug. 13, 2021).) As such, Employer could not have left it to White and the other rigger, who were non-supervisory employees, to identify and evaluate work place hazards.

Employer argues that the occurrence of an accident, alone, is insufficient to establish an IIPP violation as it had identified pinch point hazards, in general, relating to rigging and had a well-established rule in its Rigging Safety Procedure Manual requiring riggers to keep clear of suspended loads and pinch points. Section 6.8.25 of Employer's Rigging Safety Procedure Manual provides: "All people are in the clear before moving a load." (Exhibit B.) Section 6.8.28 provides "Always stand clear of the load so if it swings, slips, or spills, injuries do not occur. Do not stand near material that could be struck by a moving load." (*Id.*) Section 6.8.29 provides: "Hands and feet are kept clear of pinch points. Be alert for 'settling' or rolling of material as it is raised or lowered, or when landing on skids or blocks." (*Id.*)

A single, isolated failure to implement a detail within an otherwise effective program does not necessarily establish a violation for failing to maintain an effective program where that failure is the sole imperfection. (See *GTE California*, Cal/OSHA App. 91-107, Decision After Reconsideration (Dec. 16, 1991); *David Fischer, dba Fischer Transport, A Sole Proprietorship*, Cal/OSHA App. 90-762, Decision After Reconsideration (Oct. 16, 1991).) Additionally, the Appeals Board has found no violation of section 3203, subdivision (a)(4), where there is evidence that an employer took reasonable measures to identify and mitigate a hazard, although the Division may disagree that sufficient measures were taken. (*Coast Waste Management, Inc.*, Cal/OSHA App. 11-2385, Decision After Reconsideration (Oct. 7, 2016).)

In this case, it cannot be said that there was an isolated failure to recognize a pinch point or that Employer took reasonable measures to identify and mitigate the hazard of suspended loads. It is not only the pinch point that presented a hazard. The suspended load is a hazard. Despite Employer's written safety rules requiring employees to stay clear of suspended loads, Employer's actual procedure permitted employees to be in proximity to, and even in direct bodily contact with, suspended loads in violation of section 5042, subdivision (a)(9). As discussed in detail below, the plain language of section 5042, subdivision (a)(9), requires employees be kept clear of, not only overhead loads, but of all suspended loads, but Employer understood keeping clear of loads to be limited to the area underneath a suspended load and

argues that it was necessary for White to touch the suspended pipe braces. Employer could not have effectively identified and evaluated hazards associated with suspended loads, when Employer did not ensure compliance with the safety order in the first place and its own procedures created the hazard.

Based on the foregoing, the Division established that Employer failed to implement its IIPP because it failed to effectively identify and evaluate hazards associated with suspended loads.

Instance 2: Failure to correct work place hazard.

"Section 3203(a)(6) requires employers to have written procedures for correcting unsafe or unhealthy conditions, as well [as] to respond appropriately to correct the hazards. [Citations.]" (*BHC Fremont Hospital, Inc.*, Cal/OSHA App. 13-0204, Denial of Petition for Reconsideration (May 30, 2014).) Here, again, the Division is not arguing that Employer did not have the necessary written procedures. The Division asserts that Employer failed to implement its procedures because it did not respond timely to a hazard associated with the hoisting operation where White was injured.

"Proof of implementation requires evidence of actual responses to known or reported hazards. [Citation.] Further, the corrective action taken by the employer must be sufficient in magnitude and scope to address the particular hazard. [Citation.]" (*Papich Construction Company, Inc.*, Cal/OSHA App. 1236440, Decision After Reconsideration (Mar. 26, 2021).) Section 3203, subdivision (a)(6), is a performance standard, which "creates a goal or requirement while leaving it to employers to design appropriate means of compliance under various working conditions. [Citation.]" (*MCM Construction, Inc.*, Cal/OSHA App. 13-3851, Decision After Reconsideration (Feb. 22, 2016).) "Employers are given wide latitude in how they choose to correct hazards, and presumably, creation of a new written procedure may not always be necessary." (*Id.*)

Here, Employer argues that it was not aware of White's hand in the pinch point prior to the accident because the accident was not observed by a supervisor, and that after the accident, Employer provided training to employees. However, it is not simply White's hand placement that created the hazard and required Employer's awareness. The hazard was the suspended load and employee being near and touching suspended loads. Employer knew of this hazard because it was Employer's own procedure that allowed that hazard. Accordingly, Employer had knowledge of the hazard prior to White's accident.

As to the training after White's accident, Employer issued a Rigging Safety Gram that alerted affected personnel of the pinch point hazard where White's hand was injured. (Exhibit 16.) The Rigging Safety Gram cautioned employees to be aware of body positioning and

changed work environments. Essentially, Employer's response was to remind employees to avoid pinch points. Avoiding pinch points is insufficient to correct the hazards presented by suspended loads. Again, Employer permitted employees to be near and in direct bodily contact with suspended loads in direct contravention of a safety order. As such, the Division established a violation of section 3203, subdivision (a)(6).

Based on the foregoing, the Division has established violations of the safety order in both instances. Therefore, Citation 1 is affirmed.

2. Did Employer fail to keep an employee clear of a suspended load?

In Citation 2, the Division cited Employer for a violation of Section 5042, subdivision (a)(9), which provides:

> (a) Whenever any sling is used, the following practices shall be enforced:
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> […]
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> (9) All employees shall be kept clear of loads about to be lifted and of suspended loads. (See Section 5002).

The Division alleges:

> Prior to and during the course of the investigation, the employer did not keep all employees clear of loads about to be lifted and of suspended loads. As a result, on or about 3/7/2018, an employee working under a suspended load was seriously injured when the load being lifted injured the employees [*sic*] hand.

To prove a violation of section 5042, subdivision (a)(9), the Division must establish by a preponderance of the evidence that a sling was in use and the employees were not kept clear of a suspended load or a load that is about to be lifted.

Here, it is undisputed that a sling was used and the pipe brace was a suspended load. Employer argues that the safety order was not violated because White or any part of his body was not underneath the suspended load, but rather, he was at the side of the suspended load using his hand to adjust and fit the pipe brace onto the bracket. Vuong testified that keeping clear of a suspended load means employees are not to be underneath a suspended or overhead load. White testified that his understanding of keeping clear of loads means not being under a load or at the side of a load, but that when it becomes necessary to touch a suspended load, keeping clear of suspended load means avoiding pinch points. However, section 5042, subdivision (a)(9), is not limited to overhead loads, and requires employees be kept clear of all suspended loads.

While section 5042, subdivision (a)(9), requires employees to be kept clear of suspended loads, it also refers to section 5002, which uses the term "overhead loads." The Appeals Board has found that "[b]oth suspended loads and overhead loads present hazards to workers" and "it would be an absurd reading of section 5042(a)(9) to say that it does not apply unless loads are high enough to be over an employee's head when a load suspended inches high can present significant hazards to workers. [Citations.]" (*Clark Pacific Precast, LLC, Donald G. Clark Corp. & Robert E. Clark Corp. dba Clark Pacific*, Cal/OSHA App. 09-0283, Denial of Petition For Reconsideration (Oct. 25, 2012).)

The purpose of section 5042, subdivision (a)(9), is to protect employees from all the hazards of a suspended load, not just the danger of being immediately underneath a suspended load. (*MCM Construction, Inc.*, Cal/OSHA App. 94-246, Decision After Reconsideration (Mar. 30, 2000).) In *MCM Construction*, the Appeals Board found that a worker who was in direct bodily contact with a suspended load guiding it into place was not kept clear of a load "as expressly required by the words of section 5042(a)(9)." (*Id.*) Similarly, in this case, White was not kept clear of a suspended load as he was in direct bodily contact with the suspended pipe brace.

Employer argues that it is impossible not to touch a suspended load where two pieces are being connected, in this case the pipe brace and the bracket, and that use of the rigger's hands to control and make adjustments to the position of the suspended load is the safest way to perform the work. White testified that the use of a tether to guide the pipe brace was considered, but that it was easier and more exacting to push the pipe brace side-to-side with his hands to get the pipe brace into place. Vuong testified that due to the "tight tolerance" needed to get the slots onto the brackets, the use of hands is the only way to position the pipe brace. Vuong explained that a tether or guiding rope would not have been effective, because positive control is needed to align the slot to the bracket. However, these reasons are insufficient to support a finding that Employer did not violate the safety order.

"The Appeals Board has long recognized that an employer may not substitute its judgment for the mandate of safety orders." (*DPR Construction, Inc., et al. dba DPR Construction*, *supra*, Cal/OSHA App. 1206788, citing *Giumarra Vineyards Corporation*, Cal/OSHA App. 1256643, Denial of Petition for Reconsideration (May 26, 2020); *City of Sacramento Fire Department*, Cal/OSHA App. 80-1014, Decision After Reconsideration (Feb. 19, 1985).) Furthermore, the Appeals Board cannot rewrite the safety order. (*Armour Steel Co., Inc.*, Cal/OSHA App. 08-2649, Decision After Reconsideration (Feb. 7, 2014).) It is well established that "[i]f an Employer feels a safety order is unreasonable it should apply to the [Occupational Safety & Heath] Standards Board for a variance or to have the safety order repealed or amended. [Citations.]" (*City of Sacramento Fire Dept.*, Cal/OSHA App. 88-004,

Decision After Reconsideration (Mar. 22, 1989); *McElroy Metal Mill Inc.*, Cal/OSHA App. 1405439, Denial of Petition for Reconsideration (May 28, 2021).)

The plain language of section 5049, subdivision (a)(9), requires employers to keep employees clear of suspended loads. Here, White was in direct bodily contact with suspended loads. Accordingly, the Division established a violation of the safety order.

3. Did Employer establish the Independent Employee Action Defense?

Employer asserts that it is not liable for the violation alleged in Citation 2 based on the Independent Employee Action Defense (IEAD). In order to successfully assert the affirmative defense of IEAD, an employer must establish the following elements:

(1) The employee was experienced in the job being performed;

(2) The employer has a well-devised safety program which 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 which he or she knew was contra to the employer's safety requirements.

(*Mercury Service, Inc.*, Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980).)

"As the IEAD is an affirmative defense, Employer bears the burden of proof to establish that all five elements of the IEAD are present by a preponderance of the evidence." (*Sacramento County Water Agency Department of Water Resources*, Cal/OSHA App. 1237932, Decision After Reconsideration (May 21, 2020).) A single missing element defeats the IEAD. (*RNR Construction, Inc., supra,* Cal/OSHA App. 1092600.)

Here, Employer presented evidence that White was an experienced rigger. Although White's injury occurred on his third day preforming rigging duties, White had several years of experience rigging while he was in the Navy and attended Employer's rigging training school prior to performing any rigging duties for Employer. Employer also presented evidence that it enforced its safety program and sanctioned employees who violated its safety program. Consequently, Employer has established elements one, three, and four of the IEAD. Employer cannot, however, establish elements two and five of the IEAD.

The second element of the IEAD requires employers to have a well-devised safety program, which includes training employees in matters of safety respective to their particular job

assignments. “This element should be analyzed by taking a realistic view of the written program and policies, as well as the actual practices at the workplace. [Citation.]” (*Sacramento County Water Agency Department of Water Resources, supra*, Cal/OSHA App. 1237932.) As discussed above, Employer's practice permits employees to be in proximity to and in direct bodily contact with suspended loads in violation of section 5049, subsection (a)(9). As this was employer’s practice, it follows then, White was not properly trained to keep clear of all suspended loads. Indeed, White’s testimony was that it was permissible to use his hands to guide the suspended pipe braces as he did on the day of the accident. When an employer’s safety rule is in direct violation of a safety order, the safety program is not well-devised. (*Id*.) Accordingly, Employer’s safety program is not well-devised.

“The [fifth] element requires the employer to demonstrate that the employee causing the infraction knew he was acting contra to the employer’s safety requirements. [Citation.]” (*Synergy Tree Trimming, Inc*., Cal/OSHA App. 317253953, Decision After Reconsideration (May 15, 2017).) “Whether an action was inadvertent or constituted a conscious disregard of a safety rule is a question that must be determined, in light of all facts and circumstances.” (*Ibid*.) In this case, Employer’s investigation of the accident determined that White should not have had his hand in the pinch point. However, this in insufficient to establish that White knowingly violated a safety rule. While White was trained and aware that he should avoid pinch points, White testified that he did not believe he was doing anything wrong when the accident occurred. There is no testimony from White that he was aware of the pinch point at issue, and despite this awareness, he nonetheless put his hand in the pinch point. Therefore, the preponderance of the evidence demonstrates that White did not intentionally violate Employer’s safety requirement.

As Employer cannot prove the second and fifth elements of IEAD, Employer cannot establish this defense to Citation 2.

4. Did the Division establish that Citation 2 was properly classified as Serious?

Labor Code section 6432, subdivision (a), in relevant part states:

> There shall be a rebuttable presumption that a “serious violation” exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation. The demonstration of a violation by the division is not sufficient by itself to establish that the violation is serious. The actual hazard may consist of, among other things:
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> […]

(2) The existence in the place of employment of one or more unsafe or unhealthful practices that have been adopted or are in use.

"Serious physical harm" is defined as an injury or illness occurring in the place of employment that results in:

(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.

(Lab. Code §6432, subd. (e).)

The parties stipulated that White's injuries constitute a "serious injury" under section 330, subdivision (h). At the time of the accident, a serious injury was defined as any injury or illness occurring in a place of employment that results in:

(1) inpatient hospitalization for a period in excess of 24 hours for other than medical observation;
(2) the loss of any member of the body; or
(3) any serious degree of permanent disfigurement.

The injuries identified in the definition of "serious injury" are included as injuries in the definition of "serious physical harm." Therefore, White's serious injury establishes that the hazard created by the violation can and did result in serious physical harm. As such, the Division established the rebuttable presumption that the citation was properly classified as Serious.

5. Did Employer rebut the presumption that the violation in Citation 2 was Serious by demonstrating that it did not know, and could not, with the exercise of reasonable diligence, have known of the existence of the violation?

Labor Code section 6432, subdivision (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 the exercise of reasonable diligence, have known of the presence of the violation. In order to satisfactorily rebut the presumption, the employer must demonstrate both:

(1) The employer took all the steps a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation, taking into consideration the severity of the harm that could be expected to occur and the likelihood of that harm occurring in connection with the work activity during which the violation occurred. Factors relevant to this determination include, but are not limited to, those listed in subdivision (b) [; and]

(2) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered.

Here, Employer argues that it did not have knowledge of the violation because White's hand positioned in the pinch point was not observed by a supervisor and was not readily apparent as it happened in a matter of seconds. However, as established above, Employer had actual knowledge of the violation because Employer's own procedure permitted the violation by allowing employees to be near and in direct bodily contact with a suspended load. Employer did not rebut the presumption that Citation 2 is properly classified as Serious, and as such, the Serious classification is established.

6. Did the Division establish that Citation 2 was properly characterized as Accident-Related?

In order for a citation to be classified as Accident-Related, there must be a showing by the Division of a "causal nexus between the violation and the serious injury." (*Webcor Construction*, Cal/OSHA App. 317176766, Denial of Petition for Reconsideration (Jan. 20, 2017).) The violation need not be the only cause of the accident, but the Division must make a "showing [that] the violation more likely than not was a cause of the injury." (*Id.*, citing *MCM Construction, Inc.*, *supra*, Cal/OSHA App. 13-3851.)

At the time of the accident in 2018, Labor Code section 6302, subdivision (h), provided that a "serious injury" included, among other things, any injury or illness occurring in a place of employment or in connection with any employment which required inpatient hospitalization for a period in excess of 24 hours for other than medical observation or when an employee loses any member of the body or suffers any serious degree of permanent disfigurement.

Here, the parties stipulated that White suffered a serious injury as defined in Labor Code section 6302, subdivision (h). White's injury occurred because his hand was placed on a suspended pipe brace when it suddenly shifted up and hit the pipe run. Had White been kept clear of the suspended load, he would not have been able to place his hands on the suspended pipe brace in the first place. As such, White's serious injury resulted directly from Employer's

failure to keep employees clear of suspended loads. Therefore, Citation 2 is properly characterized as Accident-Related.

7. Is the proposed penalty in Citation 2 reasonable?

Penalties calculated in accordance with the penalty-setting regulations set forth in sections 333 through 336 are presumptively reasonable and will not be reduced absent evidence 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. (*Sacramento County Water Agency Department of Water Resources, supra,* Cal/OSHA App. 1237932.)

Section 336, subdivision (c), provides that the base penalty for a Serious violation shall be assessed at $18,000. Section 336, subdivision (d)(7), provides that the penalty for a Serious violation causing death or serious injury, illness, or exposure, may only be reduced for Size. Section 335, subdivision (b), and section 336, subdivision (d)(1), provide that no adjustment may be made for Size when an employer has over 100 employees.

As discussed above, the citation is properly classified as Serious and the violation resulted in a serious injury. Reyes's testimony that Employer had over 100 employees is undisputed. Therefore, no adjustment is warranted for Size and the proposed penalty in the amount of $18,000 is found to be reasonable.

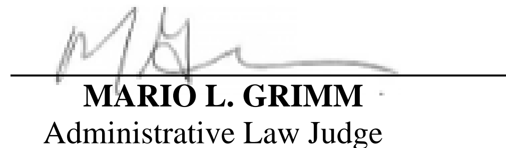
Conclusion

In Citation 1, the Division established that Employer violated section 3203, subdivision (a), by failing to establish, implement, and maintain an effective IIPP, because it did not effectively implement its procedures for identifying, evaluating, and correcting hazards associated with suspended loads. Employer did not appeal the reasonableness of the proposed penalty. The proposed penalty is found reasonable.

In Citation 2, the Division established that Employer violated section 5042, subdivision (a)(9), by failing to keep an employee clear of a suspended load. Employer failed to establish the Independent Employee Action Defense. The violation was properly classified as Serious and properly characterized as Accident-Related. The proposed penalty is found reasonable.

Order

It is hereby ordered that Citations 1 and 2 and the associated penalties are affirmed as set forth in the attached Summary Table.



Dated: 04/08/2022

MARIO L. GRIMM
Administrative Law Judge

The attached decision was issued on the date indicated therein. If you are dissatisfied with the decision, you have thirty days from the date of service of the decision in which to petition for reconsideration. Your petition for reconsideration must fully comply with the requirements of Labor Code sections 6616, 6617, 6618 and 6619, and with California Code of Regulations, title 8, section 390.1. **For further information, call: (916) 274-5751.**