BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1192534**
SHIMMICK CONSTRUCTION COMPANY INC. **8201 EDGEWATER DRIVE, SUITE 202** **OAKLAND, CA 94621** **Employer**	**DECISION**

Statement of the Case

Shimmick Construction Company, Inc. (Employer) is a company that provides heavy construction services. Beginning November 21, 2016, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Lorenzo Zwaal (Zwaal), conducted an inspection arising from a fatal injury on a construction site at 4765 Spring Road in Moorpark, California (the site).

On April 26, 2017, the Division issued four citations to Employer alleging six violations of California Code of Regulations, title 8.[1] The Division alleges that Employer failed to: complete its Form 300 for calendar years 2015 and 2016; ensure that forks on a forklift were carried as low as possible, consistent with safe operations; ensure an employee wore a seat belt; ensure an employee operated a forklift according to the manufacturer's recommendations; ensure a forklift operating on a grade in excess of 10 percent was driven with the load upgrade; and ensure that a forklift with an obstructed forward view was driven with the load trailing.

Employer filed timely appeals of the citations, contesting the existence of the violations, their classifications, the reasonableness of abatement requirements and time allowed, and the reasonableness of the proposed penalties. Additionally, Employer asserted various affirmative defenses.[2]

This matter was heard by Rheeah Yoo Avelar, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (Appeals Board) on March 18, 2021, and August 3 and 4, 2021. ALJ Avelar conducted the hearing with the parties and witnesses appearing remotely via the Zoom video platform. Lisa Prince, of The Prince Firm, represented

[1] Unless otherwise specified, all references are to sections of California Code of Regulations, title 8.
[2] 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).)

Employer. William Cregar, Staff Counsel, represented the Division. The matter was submitted on October 20, 2021.

Issues

1. Did Employer fail to complete column F of its Form 300 for years 2015 and 2016?

2. Did Employer fail to ensure that an employee carried the forks on a forklift as low as possible, consistent with safe operations?

3. Did Employer fail to ensure an employee wore his seat belt while operating a forklift?

4. Did an employee operate a forklift under speed, stress, load, or environmental conditions contrary to the manufacturer's recommendations?

5. Did Employer fail to ensure an employee carried a load upgrade while descending a grade in excess of 10 percent?

6. Was the forward view from the forklift cab obstructed?

7. Are the violations in Citations 2, 3, and 4 properly classified as Serious?

8. Are the proposed penalties reasonable?

Findings of Fact

1. Employer's November 2016 entry on its Form 300 was made within six months prior to the issuance of the citation.

2. Employer's column F of the November 2016 entry on its Form 300 identifies an injury without providing additional information.

3. Employer's Superintendent, Eric Lightle (Lightle), instructed Jorge Fonseca (Fonseca) to perform compaction of the soil at the site.

4. Fonseca transported a compactor to the compaction area using a forklift. A metal chain suspended the compactor from a fork of the forklift.

5. Fonseca did not carry the forks of the forklift as low as possible.

6. Fonseca wore his seat belt while operating the forklift.

7. The suspended compactor created a load condition during the operation of the forklift.

8. A 10 percent grade is a slope that is approximately 18 degrees from horizontal. Fonseca drove a forklift with its forks pointing forward and downgrade while descending a ramp which was angled at least 20 degrees from horizontal.

9. The suspended compactor did not obstruct Fonseca's view from the forklift cab.

10. Fonseca's forklift swerved away from the ramp into the ditch. Fonseca exited the cab of the forklift feet first. The forklift shifted, pinning him to the wall of the ditch, and causing a fatal injury.

11. The proposed penalties for Citation 1, Item 1, Citation 1, Item 2, Citation 2, Item, 1, and Citation 3, Item 1, were not calculated in accordance with the Division's policies and procedures.

Analysis

1. Did Employer fail to complete column F of its Form 300 for years 2015 and 2016?

The Division cited Employer for a violation of section 14300.29, subdivision (b)(1), which provides:

> b) Implementation.
>
> > (1) What do I need to do to complete the Cal/OSHA 300?
> >
> > You must enter information about your establishment at the top of the Cal/OSHA Form 300 by entering a one or two line description for each recordable injury or illness, and summarizing this information on the Cal/OSHA Form 300A at the end of the year.

In citing Employer, the Division alleges:

> Prior to and during the course of the inspection, including, but not limited to, on November 21, 2016, the employer submitted the OSHA Form 300 for Calendar years 2015 and 2016 and did not completely fill out column F.

The Division has the burden of proving a violation by a preponderance of the evidence. (*ACCO Engineered Systems*, Cal/OSHA App. 1195414, Decision After Reconsideration (Oct. 11, 2019).) "Preponderance of the evidence" is usually defined in terms of probability of truth, or of evidence that when weighed with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence. (*Timberworks Construction, Inc.*, Cal/OSHA App. 1097751, Decision After Reconsideration (Mar. 12, 2019).)

Was Citation 1, Item 1, issued within six months of any violation?

Labor Code section 6317, in relevant part, states, "No citation or notice shall be issued by the division for a given violation or violations after six months have elapsed since occurrence of the violation." The issue of jurisdiction can be raised at any time. (*Airlines Reporting Corp. v. Renda* (2009) 177 Cal.App.4th 14, 20; *Sierra Wes Drywall, Inc.*, Cal/OSHA App. 94-1071, Decision After Reconsideration (Nov. 18, 1998).) The Appeals Board has held that the six month period in Labor Code section 6317 is jurisdictional. (*Shimmick Construction Company, Inc.*, Cal/OSHA App. 09-0399, Denial of Petition for Reconsideration (Jul. 19, 2012).) Section 14300.29, subdivision (b)(3), requires that any entry for a recordable injury or illness must occur within seven calendar days of receiving information that a recordable injury or illness took place.

The Division alleges Employer failed to record all of the information required in column F for calendar years 2015 and 2016. The Division issued the citation on April 26, 2017. Employer's entry of November 16, 2016 is the sole entry that is dated within the six months prior to the citation. Thus, the Division had jurisdiction to issue the citation.

Did Employer violate section 14300.29, subdivision (b)?

Section 14300.29, subdivision (b), requires employers to "enter a one or two line description of each recordable injury or illness." The Appeals Board has held that entering only descriptions of the injury without adding other details is not full compliance. (*Key Energy Service, LLC.,* Cal/OSHA App. 13-2239, Decision After Reconsideration (Dec. 24, 2014).) Employer's column F entry of November 16, 2016 states, "Abdominal injuries," without any further information. This description of the injury without adding other details is not full compliance with the regulation. Accordingly, Citation 1, Item 1, is sustained.

2. **Did Employer fail to ensure an employee carried the forks on a forklift as low as possible, consistent with safe operations?**

The Division cited Employer for a violation of section 3650, subdivision (t)(15), which provides:

> (t) Industrial trucks and tow tractors shall be operated in a safe manner in accordance with the following operating rules:
>
> […]
>
> (15) The forks shall always be carried as low as possible, consistent with safe operations.

In citing Employer, the Division alleges:

> Prior to and during the course of the inspection, including, but not limited to, on November 16, 2016, an employee was operating a Caterpillar Telehandler Forklift with a plate compactor attached to the fork by a chain and the forks were not carried as low as possible consistent with safe operation.

Section 3649 defines an industrial truck as:

> A mobile power-driven truck used for hauling, pushing, lifting, or tiering materials where normal work is normally confined within the boundaries of a place of employment.

There is no dispute that the forklift is a power-driven truck used for lifting and hauling and that the regulation applies. Lightle testified that he observed Fonseca driving the forklift with the compactor suspended by a chain from a fork. Charles Schneider, Employer's Senior Construction Engineer, testified that he never observed this practice at the site until after arriving on the scene at this particular incident. Both testified that this was an impermissible practice, and that the compactor was typically transported in the bed of a pick-up truck. In response to questioning by the Division, Lightle and Schneider both responded that transportation on a pallet held by the forks, although not the practice, would have been feasible.

Employer suspended a compactor from a fork of the forklift, which is an impermissible method of transport. Employer conceded that transport using a pallet, an acceptable method of transport, would have been feasible. Use of such a permissible alternate means of transport would allow the forks to be carried as low as possible. The Division thus established that Employer failed to ensure that the forks were carried as low as possible, consistent with safe operations, and Citation 1, Item 2, is sustained.

3. **Did Employer fail to ensure an employee wore his seat belt while operating a forklift?**

The Division cited Employer for a violation of section 3650, subdivision (t)(33), which provides:

> (t) Industrial trucks and tow tractors shall be operated in a safe manner in accordance with the following operating rules:
>
> […]
>
> (33) When provided by the industrial truck manufacturer, an operator restraint system such as a seat belt shall be used.

In citing Employer, the Division alleges:

> Prior to and during the course of the inspection, an employee was operating a Caterpillar Telehandler Forklift and was not wearing the provided seatbelt. As a result, on or about November 16, 2016, the forklift operator drove the forklift into a trench and was fatally injured after being ejected from the forklift.

Lightle testified that he was at least 150 to 200 feet away when he saw Fonseca's forklift, travelling down a ramp, "swing" to the side and back up. The unusual movement caught Lightle's attention. Lightle then turned around and observed Fonseca slide out of the forklift, feet first, facing forward. Lightle testified that he immediately ran to Fonseca. Lightle was in the cab reaching for the controls when the vehicle slid, pinning Fonseca to the dirt wall of a ditch to the side of the ramp.

The Division presented Zwaal's field documentation worksheets, which show that he conferred with Ventura County Fire Department Captain Jeff Stuedt (Stuedt) during the inspection. Stuedt provided rescue services at the work site. Stuedt confirmed that the seat belt functioned properly but could not confirm whether or not Fonseca used the seat belt. Zwaal's field documentation worksheet also shows that he conferred with Fire Engineer Richard Macklin (Macklin). Macklin told Zwaal that he could not determine whether Fonseca was wearing a seat belt.

Zwaal testified that he personally examined the seat belt several days after the incident during his inspection. He testified that he saw no damage to the spring, coil, locking mechanism, or latch of the seat belt. He testified that he noticed some damage to the forklift. He testified that Employer explained the forklift was vandalized after the accident and prior to inspection and that the vandals may have "messed with" the seat belt.

Zwaal concluded that Fonseca was ejected from the cab of the vehicle as a result of not wearing a seat belt because of the "standing position" in which he landed on the ground. Zwaal did not provide any more information about how such a position is indicative of a failure to wear a seat belt while operating a vehicle.

Lightle testified that Employer has a seat belt policy. Marc Santalauria (Santalauria), Employer's Project Manager, also testified that Employer has a seat belt policy. They both testified that employees are regularly trained and reminded to use seat belts, with enforcement if needed.

Lightle was the only witness who observed Fonseca exit the cab and he testified that Fonseca descended feet-first. The Division relies on Fonseca's feet-first position to conclude that he was not belted during operation of the vehicle. Zwaal did not provide the basis for this conclusion despite direct inquiry. Without additional evidence, a feet-first exit could suggest a deliberate exit, rather than an ejection.

There is insufficient evidence to demonstrate that Fonseca was not wearing a seat belt while operating the forklift. Accordingly, Employer's appeal of Citation 1, Item 3, is therefore granted.

4. Did an employee operate a forklift under speed, stress, load, or environmental conditions contrary to the manufacturer's recommendations?

The Division cited Employer for a violation of section 3328, subdivision (a)(2), which provides:

> (a) All machinery and equipment:
> […]
> (2) shall not be used or operated under conditions of speeds, stresses, loads, or environmental conditions that are contrary to the manufacturer's recommendations or, where such recommendations are not available, the engineered design.

In citing Employer, the Division alleges two instances:

> Instance 1: Prior to and during the course of the inspection, an employee was operating a Caterpillar Telehandler Forklift with the cabin door open, which is contrary to the manufacturer's recommendations. As a result, on or about November 16, 2016, the forklift operator drove into a trench and was subsequently ejected from the cab of the forklift and was fatally injured.
>
> Instance 2: Prior to and during the course of the investigation, including but not limited to November 16, 2016, an employee operated a Caterpillar Telehandler Forklift with a plate compactor attached to the fork by a chain which is contrary to the manufacturer's recommendations.

Words within an administrative regulation are to be given their plain and commonsense meaning, and when the regulation is clear, there is a presumption that the regulation means what it says and the plain language controls. (*AC Transit*, Cal/OSHA App. 08-135, Decision After

Reconsideration (Jun. 12, 2013).) Where a statutory or regulatory term is not defined, "it can be assumed that the Legislature was referring to the conventional definition of that term." (*OC Communications, Inc.*, Cal/OSHA App. 14-0120, Decision After Reconsideration (Mar. 28, 2016).) To obtain the ordinary meaning of a word the Appeals Board may refer to its dictionary definition. (*Fedex Freight, Inc.*, Cal/OSHA App. 317247211, Decision After Reconsideration (Dec. 14, 2016).)

The rules of regulatory construction require courts and the Appeals Board "to give meaning to each word and phrase and to avoid a construction that makes any part of a regulation superfluous." (*Donley v. Davi* (2009) 180 Cal.App.4th 447, 465.) Accepted canons of statutory construction oblige "giv[ing] meaning to each word if possible and avoid a construction that would render a term surplusage." (*Sully-Miller Contracting Company v. California Occupational Safety and Health Appeals Board* (3d Dist. 2006) 138 Cal.App.4th 684, 695.) The same rules of construction and interpretation that apply to statutes govern the construction and interpretation of administrative regulations. (*California Highway Patrol*, Cal/OSHA App. 09-3762, Denial of Petition for Reconsideration (Aug. 16, 2012).)

The Division need only prove one instance of a violation to establish a violation of a safety order. (*Shimmick Construction Company, Inc.*, Cal/OHSA App. 1059365, Decision After Reconsideration (Jul. 5, 2019).)

The Division alleges two instances of Employer failing to ensure that equipment is operated according to the manufacturer's recommendations. However, not every deviation from the operator's manual is a violation of the safety order. The regulation has limited application. Only those deviations that relate to the four conditions listed in the regulation (i.e., speed, stress, load, or environmental conditions) may be considered.

Instance 1: Cab Door

The Division provided evidence showing that the forklift operating manual requires the cab door to remain closed during operation. The operating manual states, "Cab door (1) must be closed during operation."

Lightle testified that he observed Fonseca driving the forklift with the cab door open immediately prior to his injury, and that employees often drove with the cab door open on hot days. However, the Division failed to specify how an open cab door is a speed, stress, load, or environmental condition that is contrary to the manufacturer's recommendations.

The Division did not establish that the safety regulation applies in this instance because the Division failed to categorize the open door under any of the four conditions.

Instance 2: Suspended Compactor

The Division provided the portion of operator's manual entitled, "Load Falling Hazard," which provides:

> Never suspend load from forks or other parts of carriage weldment. Use only approved lift points.

An illustration accompanies the admonition, showing cords suspending a load below the forks.

The Division did not identify or propose a definition of the term, "load condition." The General Industry Safety Orders do not provide a definition for "load." The Appeals Board has applied the ordinary or dictionary meaning, which is "a weight or quantity resting upon something else regarded as its support." (See *Western States Steel, Inc.* Cal/OSHA App. 84-1089, Decision After Reconsideration (Aug. 13, 1987).) The Appeals Board has also established that "load" may have several meanings depending on the context (*Michels Corp DBA Michels Pipeline Construction* Cal/OSHA APP 07-4274 Decision After Reconsideration (Jul. 20, 2012).) The Appeals Board has consistently held that the Occupational Safety and Health Act of 1973 requires liberal interpretation of safety orders to promote employee safety. (*Carmona v. Division of Industrial Safety* (1975) 13 Cal.3d 303, 31.) The Appeals Board also held that, "Safety orders must be interpreted in a manner that affords maximum protection to workers." (*Beutler Heating & Air Conditioning*, Cal/OSHA App. 98-556, Decision After Reconsideration (Nov. 6, 2001).) Under these principles, an inclusive definition of "load" must be applied.

As discussed above, Lightle testified that Fonseca drove a forklift with a compactor suspended with a chain from a fork. The compactor's weight rested upon a fork of the forklift. Thus, the suspended compactor is found to be a "load" within the meaning of the safety order.

The operations manual addresses load placement or securement, e.g. forks must support, not suspend, loads. Employer did not dispute that a chain suspended the compactor from a fork. The Division established that the compactor placement or securement is a load condition. The suspension of a compactor by a chain slung around a fork is not recommended by the manufacturer. Employer failed to follow this recommendation. Therefore, Citation 2, Item 1, is sustained.

5. Did Employer fail to ensure an employee carried a load upgrade when descending a grade in excess of 10 percent?

The Division cited Employer for a violation of section 3650, subdivision (t)(14)(A), which provides:

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

[…]
(15) Grades shall be ascended or descended slowly.
(A) When ascending or descending grades in excess of 10 percent, loaded trucks shall be driven with the load upgrade.

In citing Employer, the Division alleges:

Prior to and during the course of the inspection, including, but not limited to, on November 16, 2016, an employee was operating a Caterpillar Telehandler Forklift transporting a plate compactor and was descending a grade in excess of 10 percent with the load downgrade.

As discussed above, there is no dispute that the forklift is an industrial truck. Thus, the regulation applies.

Zwaal testified that a 10 percent grade is approximately an 18 degree angle. Zwaal also testified that he reviewed the Coroner's report which determined the road Fonseca was navigating was at a 25 degree angle. Zwaal recalled that Ike Riser (Riser), Employer's President of Safety, measured the angle at about 20 to 25 degrees. All of these measurements indicate that the angle of the road was at least 20 degrees from horizontal, indicating that the grade of the road was at least 18 percent, which is in excess of 10 percent.

Lightle testified that he observed Fonseca descending the ramp in a forklift, moving forward with the forks pointing downgrade. The safety order requires a vehicle to descend grades in excess of 10 percent with the load upgrade, thus requiring the forklift at issue to move forward with the forks pointing upgrade.

The Division established that Employer failed to ensure that the forklift descending a grade in excess of 10 percent was driven with the load upgrade. Accordingly, Citation 3, Item 1, is sustained.

6. Was the forward view from the forklift cab obstructed?

The Division cited Employer for a violation of section 3650, subdivision (t)(11), which provides:

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

[…]

(11) The driver shall slow down and sound the horn at cross aisles and other locations where vision is obstructed. If the load being carried

> obstructs forward view, the driver shall be required to travel with the load trailing.

In citing Employer, the Division alleges:

> Prior to and during the course of the inspection, an employee was operating a Caterpillar Telehandler Forklift with a plate compactor attached to the fork by a chain that obstructed the operator's forward view. As a result, on or about November 16, 2016, the forklift operator drove the forklift into a trench and was fatally injured after being ejected from the forklift.

As established above, Fonseca drove a forklift forward with the forks elevated, suspending a compactor by a chain. Lightle testified that it did not appear that the chain and compactor configuration obstructed Fonseca's view. However, he testified that although he climbed the forklift towards the cab's controls after Fonseca exited the cab, he did not look through the windshield.

Santalauria testified he entered the cab and looked through the windshield soon after the incident. He testified that the compactor did not cause any additional obstruction of the view, explaining that the components of the forklift itself, the carriage, outriggers, tires, etc., cause significant obstruction of the driver's view. Santalauria testified that an operator is able to see only from approximately 20 feet ahead of the vehicle because of its bulky configuration. He further testified that Fonseca dug the ditch next to the ramp on the previous day, suggesting Fonseca was aware of the terrain. He testified that the outrigger already took up the visual space that the compactor occupied. He opined that higher suspension of the compactor would likely have created a visual obstruction.

Although the photographic evidence shows that the suspension chain is visible through the front windshield of the forklift cab, the photographs do not establish that the compactor obstructed the forward view from the cab.

The Division failed to establish that the compactor obstructed the operator's view, and therefore, Employer's appeal of Citation 4, Item 1, is granted.

7. Are the violations properly classified as Serious?

Labor Code section 6432, subdivision (a), 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:

[…]

(2) The existence in the place of employment of one or more unsafe or unhealthful practices, means, methods, operations, or processes 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 Appeals Board has defined the term "realistic possibility" to mean a prediction that is within the bounds of human reason, not pure speculation. (*A. Teichert & Son, Inc. dba Teichert Aggregates*, Cal/OSHA App. 11-1895, Decision After Reconsideration (Aug. 21, 2015).) The Division cannot meet its burden unless it introduces some satisfactory evidence demonstrating the types of injuries that could result and the possibility of those injuries occurring. (*Environmental Construction Group*, Cal/OSHA App. 1129260, Decision After Reconsideration (May 16, 2019), citing *MDB Management, Inc*., Cal/OSHA App. 14-2373, Decision After Reconsideration (Apr. 25, 2016).) The Appeals Board also determined that a stipulation of serious physical harm without the requisite link between the serious physical harm and the actual hazard created by the violation is insufficient to meet the Division's initial burden. (*Environmental Construction Group*, *supra*, Cal/OSHA App. 1129260).)

Labor Code section 6432, subdivision (g), provides:

A division safety engineer or industrial hygienist who can demonstrate, at the time of the hearing, that his or her division-mandated training is current shall be deemed competent to offer testimony to establish each element of a serious violation, and may offer evidence on the custom and practice of injury and illness prevention in the workplace that is relevant to the issue of whether the violation is a serious violation.

In *MDB Management, Inc*., *supra,* Cal/OSHA App. 14-2373, the Division demonstrated that a safety order was violated but did not provide evidence of the types of injuries that could result from the actual hazard of a 12-foot fall without fall protection, or the possibility of those

injuries occurring. The Appeals Board noted that the inspector's Division-mandated training was up to date and thus the Division could have offered his testimony as evidence to show the possible serious consequences of the violation and satisfy its initial burden of proof. Instead, the Division requested the Appeals Board take official notice that such a fall carries with it a realistic possibility of serious injury. The Appeals Board determined that a violation by itself is insufficient to establish a serious classification and that the Appeals Board "will not assume facts not in evidence nor will it take official notice on its own initiative to satisfy the Division's burden of proof on a Serious violation." (*Ibid.*)

At the time of hearing, Zwaal was not a safety engineer or industrial hygienist for the Division. No testimony was offered to establish that Zwaal was current with his Division-mandated training at the time of the hearing. The Division did not otherwise demonstrate that Zwaal's opinion testimony regarding classification should be credited. Therefore, Zwaal is not deemed competent to offer testimony as to the custom and practice of injury and illness prevention in the workplace that is relevant to the issue of whether the violations are serious. His testimony regarding the realistic possibility of serious physical harm as to both citations is not credited.

The Division, however, may still establish that a realistic possibility that death or serious physical harm could result from the hazards created by the violations by offering evidence other than Zwaal's opinion. The Division "cannot meet its burden unless it introduces at least some satisfactory evidence demonstrating the types of injuries that could result and the possibility of those injuries occurring." (*MDB Management, Inc*., *supra,* Cal/OSHA App. 14-2373.)

Citation 2, Item 1

The violation at issue in Citation 2 is Employer's failure to ensure forklift loads were rigged according to the manufacturer's recommendations. Zwaal testified that the chain suspending the compactor, and the forks supporting the chain were both made of metal. He testified that, in the event of a sudden braking, failure to use an approved lift point could result in the chain slipping off the fork because they are both made of metal. He asserted that a falling load could have harmed nearby employees. He testified:

> Brake with the chain, and the load slides off. […] Whatever you're hauling, in this case the compactor, could have fallen off. Say you hit the brakes abruptly near other employees, it could have injured employees. The pick point is to prevent it from slipping off the forks.

He did not discuss the types of injuries that could result from the hazard of falling loads, or the possibility of those injuries occurring.

Although Zwaal's testimony alone cannot be credited to establish the Serious classification, the Division may offer additional testimony from an inspector current in his or her training. However, the Division did not provide such testimony or other evidence to identify the types of injuries that could result, or the possibility of their occurrence in the event of falling loads. The record does not otherwise contain evidence to specify the types of injuries or the possibility of their occurrence.

Zwaal broadly asserts that falling loads may cause injury, without specifying the type or degree of injury, or the possibility of any injury occurring. The record contains no evidence specifying what occurs if a load falls, or the types of injury that falling hazards may cause as a result of a violation of this regulation. The Division failed to meet its initial burden and the record does not contain other evidence that supports the classification, thus, there can be no finding that a realistic possibility of serious physical harm exists if this safety order is violated. Therefore, the classification is reduced from Serious to General.

Citation 3, Item 1

The violation at issue in Citation 3 is Employer's failure to ensure a forklift travelling down a slope in excess of 10 percent grade carried its load upgrade. Zwaal testified that moving a load forward on a downward slope could result in the load shifting to obstruct the view. He testified that driving without being able to see could lead to death.

With the identification of death as a possible outcome of a violation of the safety order, the Division makes the requisite link between the hazard of obstructed vision and the physical harm of a fatal injury. Although the Division did not offer other evidence to support Zwaal's uncredited testimony, the record does contain Lightle's testimony that the forklift swayed and strayed from the ramp into the ditch, pinning Fonseca. Swerving into a ditch and suffering fatal crushing injuries from an escape attempt are both within the bounds of reason and consistent with driving forklift downhill in violation of the regulation. Thus, the realistic possibility of serious injury or death from the actual hazard created by a violation of the safety order is established.

Although Zwaal's opinion testimony alone may not be credited to establish the Serious classification, sufficient facts in evidence support his assertion that a violation may have serious consequences. The evidence in the record demonstrates both the hazardous conditions that occur as a result of a violation of the safety order, and the fatal nature of the possible injury therefrom. Accordingly, Citation 3, Item 1, is properly classified as Serious.

8. Are the proposed penalties 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. (*RNR Construction, Inc*., Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017).)

Generally, the Division, by introducing its proposed penalty worksheet and testifying to the calculations being completed in accordance with the appropriate penalties and procedures, will be found to have met its burden of showing the penalties were calculated correctly. (*M1 Construction, Inc*., Cal/OSHA App. 12-0222, Decision After Reconsideration (Jul. 31, 2014).) The Appeals Board has held that maximum credits and the minimum penalty allowed under the regulations are to be assessed when the Division fails to indicate the basis of its adjustments and credits. (*Armour Steel Co*., Cal/OSHA App. 08-2649, Decision After Reconsideration (Feb. 7, 2014).)

During the hearing, the Division presented its proposed penalty worksheet and Zwaal testified how he calculated the penalties.

Citation 1, Item 1

Citation 1, Item 1, is a Regulatory violation with a minimum penalty of $500.

Employer Size

Section 335, subdivision (b), and section 336, subdivision (d)(1), provide that an adjustment credit may not applied for Size when an employer has more than 100 employees. Zwaal testified that no reduction applied because Riser informed him that Employer had over 600 employees. Thus, the Division made no adjustment for employer size. This satisfies the requirements of section 336, subdivision (d)(1).

Good Faith

Section 335, subdivision (c), provides that an adjustment credit for Good Faith may be applied based on the quality and extent of an employer's safety program, and includes indications of an employer's desire to comply with safety regulations. Section 336, subdivision (d)(2), provides that the ratings are Good for an effective safety program and a reduction of the Gravity-based penalty by 30 percent, Fair for an average safety program and a penalty reduction by 15 percent, and Poor for no effective safety program and no reduction to the penalty.

Zwaal rated Employer's Good Faith as fair because Employer was cooperative during the inspection and applied the 15% adjustment credit to the penalty.

History

Section 335, subdivision (d), and section 336, subdivision (d)(3), provide that if an employer has not had a negative history of violations in the past three years, based upon no Serious, Repeat, or Willful violations and less than 20 General or Regulatory violations per 100 employees, a maximum five percent reduction of the penalty may be applied.

Zwaal testified that he reviewed Employer's History on "OSHA.gov" and saw Employer had prior visits from the Division for injuries or complaints. Zwaal testified that he rated History as fair but did not specify whether the Division issued any citations. The Division did not provide other evidence to demonstrate Employer's History and so the maximum 10 percent reduction of the penalty may be applied.

The application of the 15 percent Good Faith and 10 percent History credits, results in a 25 percent reduction of the minimum regulatory penalty of $500, or $125, resulting in the penalty of $375 for Citation 1, Item 1.

General Citations

Citation 1, Item 2, and Citation 2, Item 1, are General violations. Three considerations, Severity, Extent, and Likelihood, affect the gravity of the violation and its penalty. The initial base penalty for all General violations is based on the Severity. (§336, subd. (b).) The base penalty is then subject to adjustments for Extent and Likelihood. The resulting penalty is known as the Gravity-based penalty. Next, the adjustment credits of Good Faith and History, already calculated as 25 percent, will be applied to each penalty total. Finally, abatement credit of 50 percent may be applied. The calculations for each General citation will be examined in turn.

Citation 1, Item 2

Severity

Section 335, subdivision (a)(1)(A)(ii), provides that Severity for a violation not related to illness or disease shall be determined as follows:

> When the safety order violated does not pertain to employee illness or disease, Severity shall be based upon the type and amount of medical treatment likely to be required or which would be appropriate for the type of injury that would most likely result from the violation. Depending on such treatment, Severity shall be rated as follows:
>
> LOW-- Requiring first-aid only.

MEDIUM-- Requiring medical attention but not more than 24-hour hospitalization.

HIGH-- Requiring more than 24-hour hospitalization.

Section 336, Subdivision (b) provides that the base penalties for Low, Medium, and High, shall be $1,000, $1,500, and $2,000 respectively.

Zwaal rated the Severity of this violation as Medium because of the type of accident that occurred and because he considered violation of the safety regulation a contributing factor. The penalty for a Medium Severity violation starts at $1,500.

Extent

The base penalty is then adjusted for Extent. Section 335, subdivision (a)(2)(ii), provides that Extent for a violation that is not related to illness or disease shall be determined as follows:

> […] Extent shall be based upon the degree to which a safety order is violated. It is related to the ratio of the number of violations of a certain order to the number of possibilities for a violation on the premises or site. It is an indication of how widespread the violation is. Depending on the foregoing, Extent is rated as:
>
> LOW-- When an isolated violation of the standard occurs, or less than 15% of the units are in violation.
>
> MEDIUM-- When occasional violation of the standard occurs or 15-50% of the units are in violation.
>
> HIGH-- When numerous violations of the standard occur, or more than 50% of the units are in violation.

Section 336, subdivision (b) provides that for a rating of Low, 25 percent of the base penalty shall be subtracted; for a rating of Medium, no adjustment to the base penalty shall be made; and for a rating of High, 25 percent of the base penalty shall be added.

Zwaal did not provide testimony as to why he rated Extent as Medium. The Division did not provide any other evidence regarding the ratio of the number of violations of a certain order to the number of possibilities for a violation on the site. The lowest rating will thus be applied, and 25 percent of the base penalty ($375) shall be subtracted.

Likelihood

Likelihood is evaluated according to section 335, subdivision (a)(3), which provides:

> 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. Depending on the above two criteria, Likelihood is rated as: LOW, MODERATE OR HIGH

The penalty thus far determined is further subjected to an adjustment for Likelihood. Section 336, subdivision (b) provides that for a rating of Low, 25 percent of the base penalty shall be subtracted; for a rating of Medium, no adjustment to the base penalty shall be made; and for a rating of High, 25 percent of the base penalty shall be added.

Zwaal testified that he rated Likelihood as Medium based on the Severity of accident, and because he determined the violation of the regulation was a factor in accident. He did not specifically discuss the number of employees exposed or the extent to which the violation has resulted in injury in the past. The lowest rating will thus be applied, and 25 percent of the base penalty ($375) shall be subtracted.

Based on these factors, the base penalty of $1,500 for Citation 1, Item 2, is reduced by 50 percent ($750), for a Gravity-based penalty of $750. The Gravity-based penalty is reduced by 25 percent for Good Faith and History ($187.50) to an adjusted penalty of $562.50.

Abatement

Section 336, subdivision (e)(1) provides for a 50% abatement credit for General violations "on the presumption that the employer will correct the violations by the abatement date. The resultant penalty is termed Proposed Penalty."

Zwaal did not address the Division's proposed application of the 50 percent credit. With the application of the abatement credit, the total penalty is $281.25. Civil penalties are rounded down to the next whole dollar during the calculation stages, and final figures are adjusted downward to the next lower five dollar value. (§ 336, subd. (j).) Accordingly, the penalty of $ 280.00 for Citation 1, Item 2, is found reasonable.

Citation 2, Item 1

Severity

This citation was originally classified as Serious. Zwaal did not provide testimony as to Severity because Serious citations are automatically high in Severity. However, because the citation is reclassified from Serious to General, the base penalty, from which all other adjustments are made, must be reduced in accordance with section 336.

The instance of violation at issue is the Employer's failure to comply with the manufacturer's recommended load conditions. There is no testimony or other evidence about "the type and amount of medical treatment likely to be required or which would be appropriate for the type of injury that would *most likely result* from the violation." (§ 335, subd. (a)(1)(A), emphasis added.) Without sufficient evidence from the Division, the Severity is determined to be Low, resulting in a Base Penalty of $1,000. (§ 336, subd. (b).)

Extent

Zwaal did not provide any testimony regarding why he rated Extent as Medium as to either instance of this violation. The Division did not provide any other evidence regarding the ratio of the number of violations of this regulation to the number of possibilities for a violation on the site. The lowest rating will thus be applied, and 25 percent of the base penalty ($250) shall be subtracted.

Likelihood

Zwaal provided limited testimony as to why he rated Likelihood as Medium. He briefly discussed the first instance, testifying that a supervisor witnessed Fonseca driving with the door open and that the likelihood of sliding out of a cab without a seat belt on was at least Medium, if not High. Zwaal did not discuss the second, affirmed, instance. His testimony regarding the open door does not apply to load conditions on the forks. The Division did not present evidence showing the number of employees exposed or the extent to which the violation has resulted in injury in the past. The lowest rating will thus be applied, and 25 percent of the base penalty ($250) shall be subtracted.

Based on these factors, the base penalty of $1,000 for Citation 2, Item 1, is reduced by 50 percent of the base penalty ($500), for a Gravity-based penalty of $500. The Gravity-based penalty is reduced by 25 percent for Good Faith and History ($125) to an adjusted penalty of $375.

Abatement

Zwaal did not address the Division's proposed application of the 50 percent credit with regard to this citation. With the application of abatement credit, the total penalty is $187.50. This amount rounds down to $185.00, which is found to be reasonable.

Citation 3, Item 1

The violation at issue is the Employer's failure ensure a forklift descending in excess of 10 percent grade carried its load upgrade and was found to be properly classified as Serious.

Severity

Serious citations are automatically high in Severity with a base penalty of $18,000, which must then be adjusted in accordance with section 336. (§ 336, subd. (c).)

Extent

Zwaal did not provide any testimony regarding why he rated Extent as Medium. The Division did not provide any other evidence regarding the ratio of the number of violations of this regulation to the number of possibilities for a violation on the site. The lowest rating will thus be applied, and 25 percent of the base penalty ($4,500) shall be subtracted.

Likelihood

Zwaal testified that he rated this a Medium likelihood because he considered the violation of the regulation a contributing factor to the accident, "driving down grade, you know metal on metal" in possible reference to his prior testimony. He did not specifically discuss the number of employees exposed or the extent to which the violation has resulted in injury in the past. The lowest rating will thus be applied, and 25 percent of the base penalty ($4,500) shall be subtracted.

Based on these factors, the base penalty of $18,000 for Citation 3, Item 1, is reduced by 50 percent of the base penalty ($9000), for a Gravity-based penalty of $9000. The Gravity-based penalty is reduced by 25 percent for Good Faith and History ($2,250) to an adjusted penalty of $6750.

Abatement

Zwaal did not address the Division's proposed application of the 50 percent credit with regard to this citation. With the application of abatement credit, the total penalty is $337.50, which rounds down to $335.00 and is found to be reasonable.

Conclusion

The evidence supports a finding that Employer violated section 14300.29, subdivision (b)(1), for failure to provide all the information to complete one entry on its 2016 Form 300. The proposed penalty, as modified herein, is reasonable.

The evidence supports a finding that Employer violated section 3650, subdivision (t)(15), for failure to ensure forks on a forklift were carried as low as safely possible. The proposed penalty, as modified herein, is reasonable.

The evidence does not support a finding that Employer violated section 3650, subdivision (t)(33), for failure to ensure a forklift operator wore a seat belt.

The evidence supports a finding that Employer violated section 3328, subdivision (a)(2), for failure to ensure load conditions conformed to manufacturer's recommendations. The proposed penalty for the reclassified citation, as modified herein, is reasonable.

The evidence supports a finding that Employer violated section 3650, subdivision (t)(14)(A), for failure to ensure descent on a ramp in excess of 10 percent grade was performed with the load positioned upgrade. The proposed penalty for the citation, as modified herein, is reasonable.

The evidence does not support a finding that Employer violated section 3650, subdivision (t)(11), for failure to ensure the forward view from a forklift cab was obstructed.

Order

It is hereby ordered that Citation 1, Item 1, is affirmed and the penalty is modified to $375.00.

It is hereby ordered that Citation 1, Item 2, is affirmed and the penalty is modified to $280.00.

It is hereby ordered that Citation 1, Item 3, is vacated.

It is hereby ordered that Citation 2 is affirmed and the penalty is modified to $185.00.

It is hereby ordered that Citation 3 is affirmed and the penalty is modified to $3375.00

It is hereby ordered that Citation 4 is vacated.

Dated: 11/19/2021

RHEEAH YOO AVELAR
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.**