

**BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD**

In the Matter of the Appeal of:

**MCM CONSTRUCTION, INC.
P.O. Box 620
North Highland, CA 95660**

Employer

**DOCKETS 13-R1D2-3851
through 3854**

DECISION

Statement of the Case

MCM CONSTRUCTION, INC. (Employer) is a construction company that builds bridges overpasses and other structures. On June 17, 2013, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer Susan Eckhardt conducted an accident inspection at Highway 101 on Crazy Horse Canyon Road, Prunedale, California (the site). On December 13, 2013, the Division cited employer for one regulatory violation, one serious violation and two accident-related serious violations of California Code of Regulations, Title 8.¹

Citation 1, Item 1 alleges a regulatory violation of Section 1509, subdivision (b) for failure to identify and to maintain records of inspections in which unsafe conditions and work practices are identified; Citation 2, Item 1 alleges an accident-related serious violation of section 1509, subdivision (a)(6) for failure to implement a procedure for protection against the inadvertent movement of trailers on sloped ramps attempting to hitch trailers to trucks; Citation 3, Item 1 alleges a serious violation of Section 1509, subdivision (a)(7) for failure to provide training and instruction to employees on how to hitch a trailer to a truck on an incline; Citation 4, Item 1 alleges an accident-related serious violation of Section 1593, subdivision (h) for failure to ensure that a trailer parked on an incline had its wheels chocked and a parking brake set or was prevented from moving. As a result, a carpenter employee was seriously injured while he and his foreman were attempting to hitch a trailer to a truck.²

Employer filed timely appeals contesting whether the safety orders were violated and alleging multiple affirmative defenses. At the hearing, the employer waived all affirmative defenses. The parties stipulated that the penalties

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

² The Division filed a motion to amend Citation 4, Item 1, to add an "accident-related" characterization, which was granted over the objection of the employer.

associated with each of the citations were calculated in accordance with the Division's policies and procedures.

This matter came on regularly for hearing before Mary Dryovage, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at Oakland, California on June 27, 2014. Robert Peterson, Esq. represented Employer. Denise M. Cardoso, Staff Attorney represented the Division. The parties presented oral and documentary evidence. The parties requested and were granted leave to file briefs. The ALJ extended the submission date on her own motion to May 5, 2015.

Issues

- A. Did employer maintain records of scheduled and periodic inspections which identify unsafe conditions and work practices for at least one year?
- B. Did employer implement a procedure for protection against the inadvertent movement of trailers on sloped ramps while employees attempt to hitch trailers to trucks?
- C. Was the violation of section 1509, subdivision (a), and by reference section 3203, subdivision (a)(6) in Citation 2, Item 1 properly classified as a serious violation?
- D. Was there a causal nexus between employer's failure to implement a procedure for protection against the inadvertent movement of trailers on sloped ramps while employees are attempting to hitch trailers to trucks and the occurrence of Raul Esparza's injury?
- E. Did the employer provide training and instruction to employees on how to hitch a trailer to a truck when both are on an incline?
- F. Was the violation of section 1509, subdivision (a), and by reference section 3203, subdivision (a)(7) in Citation 3, Item 1 properly classified as "serious"?
- G. Were the hazards in Citation 3 duplicative of the hazards in Citation 2 and subject to the same abatement?
- H. Did the employer ensure that a trailer parked on an incline had its wheels chocked and a parking brake set or was otherwise prevented from moving by effective mechanical means?
- I. Was the violation of section 1593, subdivision (h) in Citation 4, Item 1 properly classified as a serious violation?
- J. Did the Division establish that the failure to prevent the trailer from moving by effective mechanical means was the cause of the accident?

Findings of Fact

1. Employer failed to keep records of scheduled and periodic inspections which identify unsafe conditions and work practices.
2. Raul Esparza, a carpenter employed by MCM Construction on the Crazy Horse project, incurred a serious injury as a result of an accident on June 14, 2013.³
3. Employer had no Injury and Illness Prevention Program (IIPP) or written procedure to protect against the inadvertent movement of a trailer parked on a sloped ramp, while employees were attempting to hitch trailers to trucks.
4. The trailer involved in the accident was parked on an incline on June 14, 2013.
5. Failure to chock the wheels of a trailer caused the trailer to move down the incline and drag Esparza, causing serious injury to his leg.
6. The failure to implement a procedure for protection against the inadvertent movement of trailers on sloped ramps while employees are attempting to hitch trailers to trucks caused Esparza's injury.
7. The employer failed to provide training and instruction to employees on how to hitch a trailer to a truck when both are on an incline.
8. The employer failed to ensure that a trailer parked on an incline had its wheels chocked and a parking brake set or was otherwise prevented from moving by effective mechanical means.
9. The Division did not establish that the employer's failure to prevent the trailer from moving by effective mechanical means caused the serious accident.

Analysis

A. Did employer maintain records of scheduled and periodic inspections which identify unsafe conditions and work practices?

The Division has the burden of proving by a preponderance of the evidence that the employer failed to insure that records of scheduled and periodic inspections to identify unsafe conditions and work practices were maintained for

³ The parties stipulated that Raul Esparza incurred a serious injury under California Occupational Safety and Health program.

at least one year. (*Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).)

The Division cited employer for a violation of section 1509, subdivision (a),⁴ which refers to section 3203, subdivision (b)(1), which provides as follows:

Records of the steps taken to implement and maintain the Program shall include:

(1) Records of schedules and periodic inspections required by subsection (a)(4)⁵ to identify unsafe conditions and work practices, including person(s) conducting the inspection, the unsafe conditions and work practices that have been identified and action taken to correct the identified unsafe conditions and work practices. These records shall be maintained for at least one (1) year.

Citation 1, Item 1 alleges:

On and before June 14, 2013, the employer failed to ensure that records of scheduled and periodic inspections to identify unsafe conditions and work practices, including person(s) conducting the inspection, the unsafe conditions and work practices that have been identified and action taken to correct the identified unsafe conditions and work practices were maintained for at least one (1) year.

The requirements of the safety standard are that records of scheduled and periodic inspections be maintained for at least one year. Division's Associate Safety Engineer, Susan Eckhardt (Eckhardt), testified that she requested records documenting that Employer conducted periodic and scheduled inspections for the job site. Employer's Safety and Risk Manager, Edward Orsi (Orsi) told Eckhardt at

⁴ Section 1509, subdivision (a) provides:

Every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program in accordance with section 3203 of the General Industry Safety Orders.

⁵ Section 3203, subdivision (a)(4) provides:

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;
- (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.

the opening conference that employer did not maintain any records of its scheduled and periodic inspections. Employer did not present any contrary evidence that it conducted scheduled and periodic inspections at the time of the inspection. A violation is established when an employer fails to maintain records of scheduled and periodic inspections. Therefore, the Division established a violation of section 1509, subdivision (a) and 3203, subdivision (b)(1).⁶

Employer's appeal of Citation 1, Item 1 is denied and the penalty of \$375 is assessed.

B. Did employer implement a procedure for protection against the inadvertent movement of trailers on sloped ramps while employees are attempting to hitch trailers to trucks?

The Division cited employer for a violation of section 1509, subdivision (a), *supra*, which refers to section 3203 subdivision (a)(6), which provides as follows:

Effective July 1, 1991, every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program (Program). The Program shall be in writing, and shall, at a minimum:

(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.

Citation 2, Item 1 alleges:

On or around June 14, 2013, the employer failed to correct an unsafe condition by implementing a procedure for protection against the inadvertent movement of trailers on sloped ramps while employees are attempting to hitch trailers to trucks. The employer had not implemented a procedure requiring the use of effective wheel chocks in this circumstance. As a result, a

⁶ The employer did not appeal the reasonableness of the penalty for Citation 1, Item 1 of \$375 and the parties stipulated that the penalties associated with each of the citations were calculated in accordance with the Division's policies and procedures.

carpenter employee was seriously injured while he and his foreman were attempting to hitch a trailer to a truck.

The Division must establish that employer 1) failed to establish, implement and maintain an effective Injury and Illness Prevention Program (IIPP) which is in writing, 2) failed to observe an unsafe condition, and 3) failure to correct an unsafe condition. To establish an IIPP violation, the Division must prove that flaws in a program amount to a failure to establish, implement, or maintain an effective program. Employers are required to have written procedures for correcting unsafe or unhealthy conditions, as well as respond appropriately to correct the hazards. (*Contra Costa Electric, Inc.* Cal/OSHA App. 09-3271, Decision After Reconsideration (May 13, 2014).)⁷ When an employer has placed significant responsibilities on an employee, so that the employee may be viewed as the employer's safety representative at the worksite, the employer must bear the responsibility for that employee's actions, because those actions determine the credibility of the employer's compliance with OSHA, and unless the employer bears direct responsibility for them, its safety program is meaningless. (*Davey Tree Surgery Co. v. Occupational Safety and Health Appeals Board*, (1985) 167 Cal.App.3d 1232, 1241.)

Eckhardt testified that she requested written documentation and was provided no evidence of a written IIPP. During the inspection, Orsi, the superintendent told Eckhardt that there was no procedure for hitching trucks to trailers on slopes or for chocking wheels. Based on the admission to Eckhardt that there was no IIPP, it is found that the Division established that there was no written IIPP.

The second requirement is to observe or discover an unsafe condition which needed to be corrected. Carpenter Raul Esparza (Esparza) testified that he and Foreman Robert Zablosky (Zablosky) loaded up the company truck or other equipment with tools and supplies at the start and finish of each workday (Shatnawi, Galarza, and Esparza).

Employer was constructing a northbound off ramp on U.S. 101 to Crazy Horse Canyon Road. On the day of the accident, June 14, 2013, Zablosky was attempting to connect the truck to his own personal trailer, according to Esparza. Zablosky told Esparza "to pick up all the tools because we were going to leave early", as it was his last day on the project. He gave Esparza his check and they put the equipment onto Zablosky's trailer. The trailer was loaded with Zablosky's personal effects, as well as tools, supplies and equipment needed on the job, including a generator, a torch, an oxyacetylene hose, a compressor hose and a

⁷ 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 90-762, Decision After Reconsideration (Oct. 16, 1991).) On the other hand, the Board has also held that an IIPP can be proved not effectively maintained on the ground of one deficiency, if that deficiency is shown to be essential to the overall program. (*Keith Phillips Painting*, Cal/OSHA App. 92-777, Decision After Reconsideration (Jan. 17, 1995).)

saw. Zablosky was moving from the supervisor's housing in Prunedale to another job site for the employer.

The trailer was parked on a sloped ramp between the worksite and the employee parking lot. (Exhibit 4.) Two pieces of wood, described as two inches by two inches, were placed behind the wheels of the trailer which held the vehicle in place while the employees were working that day. Esparza estimated that the load was over one thousand pounds. The incline of the road at the location of the accident was measured as 8.9 degrees, as shown by the Smart Tool level depicted in Exhibit 13.⁸

Esparza was walking to his vehicle after his workday ended. Esparza saw Zablosky struggling to hook his trailer to a company-owned truck. Esparza attempted to assist him in hitching the trailer to the truck and was seriously injured during the process.

Zablosky had difficulty orienting the truck and the trailer hitch. Several attempts were made to position the truck correctly. Esparza told Zablosky to pull the truck forward, to realign it with the tongue of the trailer. Esparza stood in between the truck and trailer jack,⁹ trying to move the trailer to line it up properly.

Zablosky put the truck in gear, moved forward and then backed up the truck to line up the trailer coupler to the trailer hitch.¹⁰ The truck bumped the trailer. Zablosky lost sight of Esparza but got out of the truck when he saw his trailer rolling down the slope toward the intersection. The trailer hit Esparza's leg, which was trapped between the tongue and the trailer jack. He was dragged fifteen or more feet down the ramp. Exhibit 9 depicts a two foot wide by seven foot long streak of blood on pavement where the accident took place. Esparza sustained a major leg injury and was taken to the hospital in an ambulance.

A procedure which was not established, implemented, or maintained was the requirement for safely hitching a trailer to a truck on a sloped ramp. The trailer began to roll down the pavement when the truck hit the trailer. Both vehicles rolled toward the intersection. The truck hit the concrete barrier rail on the eastside of the ramp, bounced off and continued down the ramp, while the trailer dragged Esparza and stopped when it hit the barrier rail. Exhibit 7 shows the bumper marking where the trailer made contact with the barrier rail. Exhibit

⁸ A Smart Tool level is a tool which measures the angle of the pavement.

⁹ The trailer jack keeps the trailer level when it is not connected to the tow vehicle. (Exhibit 8.)

¹⁰ Chocks in this case are pieces of wood placed on the downhill side of the wheels of the trailer which prevented it from rolling. They were described as two inch by two inch and are shown in Exhibits 7 and 9. There is contradictory evidence regarding whether the chocks were removed by either Zablosky or Esparza. Eckhardt testified that employees she interviewed told her that the trailer started to move after the chocks were removed. The trailer also could have "jumped" off the chocks when it was bumped by the truck.

17 is the CHP Report showing the path of the truck, as it traveled down the ramp.¹¹

Employer argues that there was no unsafe condition which must be corrected for several reasons: The accident occurred after Esparza had been paid and had ceased working; Esparza volunteered to assist Zablosky when the accident happened; the task of hitching Zablosky's trailer to the truck was not part of his regular job duties; the use of chocks to block movement of the truck were effective until they were removed. These arguments are rejected.

After the conclusion of the workday on June 14, 2013, Esparza put the tools and equipment on Zablosky's trailer, which was loaded with Zablosky's personal belongings, as well as company property. It is undisputed that a work practice existed whereby Zablosky and Esparza and other co-workers put tools and equipment onto and off of a company owned vehicle every day. It was part of Esparza's job to assist Zablosky in loading and unloading of tools and equipment. Esparza knew that Zablosky had been assigned to another jobsite by the company and was moving from the supervisory housing to another location. Zablosky was the foreman who was responsible for safety on the job and supervised Esparza in the performance of his duties. Although Esparza had been paid for his work and told to take the rest of the day off, when Zablosky implicitly requested Esparza to help him connect the trailer to the truck, he complied. It is not reasonable to expect Esparza to reject Zablosky's need for assistance under these circumstances. (*See, Davey Tree Surgery Co. v. Occupational Safety and Health Appeals Board, supra.*)

There were no procedures in place to identify hazards as they arise and to take action to correct the unsafe condition, namely to safely hitch a trailer to a truck on a sloped ramp. The Division established that an observable unsafe condition existed and no procedures were in place to correct the unsafe condition. Therefore, it is found that the employer violated Section 3203(a)(6).

C. Was the violation of section 3203, subdivision (a)(6) properly classified as "serious"?

To sustain a serious violation of Labor Code section 6432, subdivision (a)(2), the Division was required to establish the serious classification by showing that "there is a realistic possibility that death or serious physical harm¹² could

¹¹ Zablosky told the CHP Investigator that he put the truck in park before he got out of the vehicle, but this statement is not credited because it contradicts the undisputed evidence that the truck careened off the barrier rail and continued down the slope in the same direction as the trailer, as shown in the CHP report, Exhibit 17.

¹² The parties stipulated that Raul Esparza incurred a serious injury under California Occupational Safety and Health program. "Serious physical harm" includes 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. (Labor Code Section 6302(h). (See, *e.g. Abatti Farms/Produce*, Cal/OSHA App. 81-0256, Decision After Reconsideration (Oct. 4, 1985); *Chooljian Brothers Packing Co. Inc.*, CAL/OSHA 95-2549, Decision After Reconsideration (Jun. 15, 2000).)

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: . . . 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.”

Realistic possibility" is not defined in the safety orders. However, the Appeals Board has interpreted the phrase "realistic possibility" to mean a prediction "clearly within the bounds of human reason, not pure speculation." (*B & B Roof Preparation, Inc.*, Cal/OSHA App. 12-2946, Decision After Reconsideration (Oct. 6, 2014) citing *Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (Sep. 27, 2001), which quotes *Oliver Wire & Plating Co., Inc.*, Cal/OSHA App. 77-693, Decision After Reconsideration (Apr. 30, 1980).) The occurrence of a serious injury is proof that a serious injury is a realistic possibility.

Exhibit 9 depicts the accident scene in which Esparza was loaded into the ambulance, taken to the hospital, and received treatment for at least three days. He suffered partial amputation of his leg. Eckhardt’s opinion¹³ was that an employee would likely suffer a serious accident if a truck tapped a trailer parked on an incline while an employee was between the truck and the trailer. Thus, the evidence supports a finding that there is a realistic possibility of serious physical harm.

The realistic possibility of a serious injury combined with existence of the actual hazard caused by failure to have a procedure in place for safely hitching a trailer to a truck on a slope, comes within the definition of “serious” set forth in Labor Code section 6432. The Division has proven the elements necessary to create a rebuttable presumption that a serious violation has occurred. However, employer presented no evidence to rebut the presumption. Therefore, the violation was properly classified as serious.

D. Did the Division establish that failure to implement a procedure for protection for safely hitching a trailer to a truck on a slope was properly categorized as an accident-related violation?

To be accident-related, there must be a causal nexus between the violation and the employee’s injuries. (See *Obayashi Corporation*, Cal/OSHA App. 98-3674, Decision After Reconsideration (June 5, 2001).) The Division establishes that a violation is accident-related by showing that the violation more likely than not was the cause of the injury. (*Mascon, Inc.*, Cal/OSHA App. 08-4270, Denial of Petition for Reconsideration (Mar. 4, 2011).)

¹³ Eckhardt’s opinion was based upon a reasonable evidentiary foundation consisting of her education, experience and training. See *Wright & Associates, Inc.*, Cal/OSHA App. 95-3649, Decision After Reconsideration (Nov. 29, 1999.) She has a Master’s in Public Health from U.C. Berkeley (1985) and received her certification as an Industrial Hygienist in 1990. She has worked for the Division for over 24 years and was current in her required Division training. During her employment as an Associate Safety Engineer, she conducted more than 550 inspections.

Here, Esparza's leg injury would not have occurred if the trailer did not roll, hitting Esparza's leg, which was trapped between the tongue and the jack. Following a procedure for safely hitching a trailer to a truck on a slope would have prevented this accident from occurring. The Division established that the serious violation was the cause of Esparza's injuries, and, therefore, the violation is accident-related.

Accordingly, Citation 2 was properly classified as serious accident-related. Employer stipulated that the \$18,000 penalty for Citation 2 was calculated in accordance with the Division's policies and procedures. The assessment of the penalty is discussed below, as the same abatement is found to remedy this violation as for Citation 3, Item 1.

Employer's appeal of Citation 2, Item 1, is denied. The penalty of \$18,000 is assessed.

E. Did employer provide training and instruction to employees on how to hitch a trailer to a truck when both are on an incline?

The Division cited employer for a violation of section 1509, subdivision (a), which refers to section 3203, subdivision (a)(7), which provides as follows:

- (a) Effective July 1, 1991, every employer shall establish, implement, and maintain an effective Injury and Illness Prevention Program (Program). The Program shall be in writing and, shall, at a minimum:
 - (7) Provide training and instruction:
 - (A) When the program is first established;
 - (B) To all new employees;
 - (C) To all employees given new job assignments for which training has not previously been received;
 - (D) Whenever new substances, processes, procedures or equipment are introduced to the workplace and represent a new hazard;
 - (E) Whenever the employer is made aware of a new or previously unrecognized hazard; and,
 - (F) For supervisors to familiarize themselves with the safety and health hazards to which employees under their immediate direction and control may be exposed.

Citation 3, Item 1 alleges:

On or before 6/14/13, the employer failed to provide training and instruction to employees on how to hitch a trailer to a truck when both are on an incline.

To establish a violation of section 1509, subdivision (a), and by reference section 3203, subdivision (a)(7), the Division must establish that the employer failed to provide training and instruction in one of six types of circumstances. The purpose of § 3203(a)(7) is to provide employees with the knowledge and ability to recognize, understand and avoid the hazards they may be exposed to through training and instruction. Failure to train an employee to identify and correct hazards is sufficient to find a violation of section 1509, subdivision (a). (*A. Teichert & Son, Inc. dba Teichert Construction*, Cal/OSHA App. 05-2650, Decision After Reconsideration (Aug. 16, 2012), citing *Clark Pacific Precast, LLC, et al.*, Cal/OSHA App. 08-0027, Denial of Petition for Reconsideration (Jul. 26, 2010); *Tutor-Saliba-Perini*, Cal/OSHA App. 97-3209, Decision After Reconsideration (Apr. 24, 2003); *Los Angeles County, Department of Public Works*, Cal/OSHA App. 96-2470, Decision After Reconsideration (April 5, 2002).)

Employer was alleged to have failed to provide training and instruction to employees regarding hitching a trailer to a truck on an incline. Esparza testified that he did not receive training on how to hook up a trailer to a truck. Eckhardt was told that there was no specific training regarding hitching equipment on an incline based on an email from Orsi sent to Eckhardt which stated: “I don’t have any training records for Robby [Zablosky] or Raul [Esparza] in relation to trailers”, in response to Eckhardt’s request for training documents. (Exhibit 15.) There was no documentation or other evidence that either Zablosky or Esparza was given training.

They normally parked their vehicles on level ground, not on an incline, according to Esparza. Hitching the trailer to the company truck was a new assignment, given by Zablosky, in his capacity as foreman. Zablosky was in a hurry and was moving his belongings from company housing near the job site in Prunedale to another job for the company.

The employer maintains that it was not given notice of which subsection of the safety standard it was alleged to have violated. Employer argues that there is no evidence that the actions which caused the accident constituted new procedures which represent a new hazard (§ 3203, subd. (a)(7)(D) or that the employer was made aware of a new or previously unrecognized hazard (§ 3203, subd. (a)(7)(E). The hazards of hitching a trailer to a truck on an incline was a “new job assignment”, involved “new” equipment, “a new or previously unrecognized hazard”, as well as “safety and health hazards to which employees under their immediate direction and control may be exposed” and therefore fit one or more subsections, including (C), (D), (E) and (F).

The absence from employer's records of documentation of training for Zablosky or Esparza is *prima facie* evidence¹⁴ of the fact that the training did not occur. The Division established a violation of section 1509, and by reference section 3203, subdivision (a)(7)(D) and (E).

¹⁴ “*Prima facie* evidence” is evidence sufficient to raise a presumption of fact or to establish the fact in question unless rebutted. (The *Lectric Law Library Dictionary*.)

F. Was the violation of section 1509 subdivision (a), and by reference section 3203, subdivision (a)(7) properly classified as “serious”?

As stated in Section C, above, the Division was required to establish the serious classification by showing that “there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation. . . .” (§ 6432, subd. (a)(2).) The occurrence of the serious injury here is proof that a serious injury is a realistic possibility. The realistic possibility of a serious injury combined with existence of the actual hazard caused by failure to train employees on the procedure for safely hitching a trailer to a truck on a slope, comes within the definition of “serious” set forth in section 6432. Therefore, the violation was properly classified as serious.

G. Were the hazards addressed in Citation 3 duplicative of the hazards in Citation 2, and subject to the same abatement?

The Appeals Board may set aside a penalty if 1) the hazards are substantially identical or duplicative of another violation, and 2) abatement of one will serve to abate the other. (*A & C Landscaping, Inc. aka A & C Construction, Inc.*, Cal/OSHA App. 04-4795, Decision After Reconsideration (Jun. 24, 2010) and cases cited therein; *JSA Engineering, Inc.*, Cal-OSHA App. 00-1367, Decision After Reconsideration (December 3, 2002).) Penalties which tend to be duplicative or cumulative, and are not needed to effectuate abatement, are inconsistent with the spirit and intent of the Act. (*A & C Landscaping, Inc.*, *supra*, citing *Strong Ties Structures*, Cal/OSHA App. 75-856, Decision After Reconsideration (Sept. 16, 1978); *Western Pacific Roofing Corp.*, Cal/OSHA App. 96-529, Decision After Reconsideration (Oct. 18, 2000).)

Here, different but interrelated sections of the General Industry Safety Orders were cited. The employer’s duty to train employees is a component of the duty to effectively implement and maintain an IIPP, as discussed above with respect to the violation of section 3203, subdivision (a)(6). The hazards addressed in Section 3203 subdivision (a)(6), which involves failure to implement and maintain an effective IIPP and section 3203, subdivision (a)(7), which involves failure to train employees, both involve the implementation of procedures to detect unsafe conditions. The first prong of *A & C Landscaping, supra*, has been established because the hazards involved in subdivisions (a)(6) and (a)(7) are substantially identical or duplicative of the other violation. A single abatement, implementing and maintaining an effective IIPP, which requires appropriate training, would have eliminated the hazards in both citations.

Employer’s appeal of Citation 3, Item 1, is denied. It is determined that the violation in Citation 3 is similar to Citation 2 pursuant to section 336, subdivision (k). Therefore, pursuant to section 336, subsection (k), the penalty will be reduced to \$506.

H. Employer failed to ensure that a trailer parked on an incline had its wheels chocked and a parking brake set or was otherwise prevented from moving by effective mechanical means.

Citation 4, Item 1 alleges a violation of section 1593, subdivision (h) and states:

Haulage Vehicle Operation.

(h) Parking Brakes. Whenever the equipment is parked, the parking brake shall be set. Equipment parked on inclines shall have the wheels chocked and the parking brake set or be otherwise prevented from moving by effective mechanical means.

Citation 4, Item 1 alleges:

Location: HWY 101 northbound off-ramp at Crazy Horse Canyon Ro., Prunedale, CA

On or around 6/14/13, the employer failed to ensure that a trailer (CA license 4KW7634) parked on an incline (northbound off-ramp to Bridge #44-0285) had its wheels chocked and a parking brake set or was otherwise prevented from moving by effective mechanical means.

In order to establish a violation of section 1593, subdivision (h), the Division must establish that 1) the equipment was parked on an incline, 2) the equipment was not prevented from moving by effective mechanical means, such as a chock, setting the parking brake, or another means.

Both Esparza and Eckhardt testified that the trailer was parked on an incline. Exhibit 4 is a photograph of the trailer involved in the accident parked on an incline. Exhibit 13 shows that the incline at the site of the accident was measured by the Smart Tool level as 8.9%.

The equipment was prevented from moving by mechanical means by two - two inch by two inch chocks, while it was parked. Whether the trailer was prevented from moving by effective mechanical means after it was bumped by the truck is subject to conflicting evidence.

First, the chocks were either removed or the wheels jumped the chocks during this episode.¹⁵ Esparza testified that at first, he and Zablosky tried to move the chocks out from under the wheels of the trailer in order to realign the truck and attach it to the trailer. While it is clear that the trailer was prevented

¹⁵ See footnote 9, above.

from movement by the chocks while it was parked, this changed when they began attempting to attach the trailer to the truck.

Secondly, the chocks used here were not sufficient to hold the trailer in place when the truck bumped into it. The weight of the trailer was estimated to be over one thousand pounds. The truck was very large. (Exhibit 14) Exhibit 7 shows two - two inch by two inch chocks on the side of the pavement where the accident occurred. These chocks were not “effective” to stop the trailer from rolling down the pavement, after the truck bumped the trailer.

Third, Esparza testified that Zablosky put the truck in reverse and got out of the truck while it was rolling backward. When the truck bumped the trailer, the trailer started to roll. Esparza was caught between the truck and the trailer as he was trying to move the trailer. Esparza testified that he was trying to stop the trailer from rolling into the concrete wall or into traffic at the intersection. Because of his position, Esparza was dragged by the trailer when it started to roll down the slope.

The Division established that the trailer was not prevented from moving by effective mechanical means in violation of section 1593, subdivision (h).

I. Was the violation of section 1593 subdivision (h) properly classified as “serious”?

To sustain a serious violation of Labor Code Section 6432, subsection (a)(2), the Division was required to establish the serious classification by showing 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: . . . 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.”

The occurrence of a serious injury is proof that a serious injury is a realistic possibility. Exhibit 9 depicts the accident scene in which Esparza was loaded into the ambulance and taken to the hospital. The realistic possibility of a serious injury combined with existence of the actual hazard caused by failure to have a procedure in place for safely hitching a trailer to a truck on a slope, comes within the definition of “serious” set forth in section 6432. Therefore, the violation was properly classified as serious.

J. Did the Division establish that the failure to prevent the trailer from moving by effective mechanical means was the cause of the accident?

The amended citation classified the violation as accident-related. The Board requires a showing of a causal nexus between the violation and the serious injury by a preponderance of the evidence. (*HHS Construction Cal/OSHA App. 12-0492, Decision After Reconsideration (Feb. 26, 2015), citing Obayashi Corporation, Cal/OSHA App. 98-3674, Decision After Reconsideration (June 5, 2001).*) A

violation is not accident-related unless a preponderance of the evidence establishes that the violation more likely than not was a cause of the injury. (*Mascon, Inc.*, Cal/OSHA App. 08-4270, Denial of Petition for Reconsideration (Mar. 4, 2011); *Siskiyou Forest Products*, Cal/OSHA App. 01-1418, Decision After Reconsideration (Nov. 1, 2002); *Davey Tree Surgery Company*, Cal/OSHA App. 99-2906, Decision After Reconsideration (Oct. 4, 2002).)

Under the facts of this case, the Division failed to establish that the failure to have effective chocks was the cause of the accident. Rather, the fact that the truck was put into reverse and bumped the trailer, which caused the trailer to roll. The driver, Foreman Zablosky, got out of the truck without placing the truck in park. He lost sight of Esparza, who was caught between the two pieces of equipment and dragged down the pavement. The intervening cause was the actions of the foreman to put the truck in reverse, bump the trailer which caused it to roll and then get out of the truck to try to stop the trailer from rolling into traffic. Lack of a proper sized chock or other equipment to prevent the trailer from moving while it was parked was not the “but for” cause of the accident, given that the trailer moved as a result of the truck backing up into it.

The accident cannot be said to be caused by the failure to comply with this safety order. That being the case, the accident-related characterization is not established, and the \$18,000 fixed penalty for a serious accident-related violation does not apply; credits must be given.

The proposed penalty for Citation 4, Item 1, as originally issued as a serious violation, was \$5,060. Exhibit 2, the proposed penalty worksheet, calculated the penalty as follows: The \$18,000 initial base penalty is reduced by \$4,500 due to the low “extent”; the gravity base penalty is \$13,500. (§ 336, subd. (c).) The 25% penalty adjustment factor (\$3,375) is based on 15% for good faith and 10% for history, and results in a reduction to \$10,125. (§ 336, subd. (d)(2) and (3).) A 50% abatement credit is applied, further reducing the penalty to \$5,060. (§ 336, subd. (e).) The original proposed penalty of \$5,060 is reasonable.

Employer’s appeal of Citation 4, Item 1, is denied. However, the Division did not establish the accident-related characterization; Citation 4, Item 1, as originally issued was correctly classified as serious. The penalty of \$5,060 is assessed.

Conclusion

Citations 1, 2, 3 and 4 are affirmed. Citations 2, 3 and 4 were correctly classified as serious; the penalty assessed for Citation 3 will be reduced pursuant to section 336, subsection (k); the Division did not establish the accident-related characterization for Citation 4.

Order

It is hereby ordered that the citations are established, modified or withdrawn as indicated above and as set forth in the attached Summary Table.

It is further ordered that the penalties as set forth in the attached Summary Table be assessed, for the reasons stated above.

DATED: June _____, 2015

MARY DRYOVAGE
Administrative Law Judge

**ATTACHMENT A
SUMMARY OF EVIDENTIARY RECORD
MCM CONSTRUCTION INC.
Dockets 13-R1D2-3851 through 3854
Date of Hearing: June 26, 2014**

Division's Exhibits

Exhibit Number	Exhibit Description	Admitted
1	Jurisdictional Documents	Yes
2	Proposed penalty worksheet	Yes
3	Drawing of worksite, parking lot and trailer drawn by Raul Esparza	Yes
4	Photo of Robby's trailer	Yes
5	Photo of hitch involved in accident	Yes
6	Picture drawn by Raul Esparza of bridge incline	Yes
7	Photo of grey wall showing scrap on concrete wall and two pieces of 2 inch by 2 inch wood chocks	Yes
8	Photo of trailer involved in accident	Yes
9	Photo of blood on pavement where accident took place	Yes
10	Photo showing slope of road where accident occurred	Yes
11		No
12		No
13	Photo of Smart Tool showing 8.9% slope	Yes
14	Photo of MCM truck involved in accident	Yes
15	Email from Ed Orsey to Susan Eckhardt re: request for training documents dated 9/24/13	Yes
16	DMV Vehicle Registration for MCM 2006 Ford Truck	Yes
17	CHP Report by J. Gallemore, dated June 14, 2013.	Yes

Witnesses Testifying at Hearing

1. Raul Esparza
2. Yusuf Shatnawi
3. David Galarza
4. Susan Eckhardt

CERTIFICATION OF RECORDING

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

Signature

06/04/2015
Date

SUMMARY TABLE DECISION

In the Matter of the Appeal of:
MCM CONSTRUCTION INC.
DOCKETS 13-R1D2-3851 through 3854

Abbreviation Key:

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

DOCKET	C	I	SECTION	T	ALLEGED VIOLATION DESCRIPTION MODIFICATION OR WITHDRAWAL AND REASON	A	V	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT PRE- HEARING	FINAL PENALTY ASSESSED BY BOARD
13-R1D2-3851	1	1	1509(b)(1)	Reg	[Failure to maintain records of scheduled and periodic inspections to identify unsafe conditions and work practices.] ALJ affirmed citation.	X		\$375	\$375	\$375
13-R1D2-3852	2	1	1509(a)(6)	S	[Failure to implement a procedure for protection against movement of trailers on sloped ramps.] ALJ affirmed citation.	X		\$18,000	\$18,000	\$18,000
13-R1D2-3853	3	1	1509(a)(7)	S	[Failure to provide training and instruction on how to hitch a trailer to a truck when both are on an incline.] ALJ determined violation similar to Citation 2-1 per C.C.R. §336(k).	X		\$5,060	\$5,060	\$506
13-R1D2-3854	4	1	1593(h)	S	[Failure to ensure a trailer parked on an incline had its wheels chocked and parking brake set or was prevented from moving by effective mechanical means.] ALJ determined that accident-related characterization was not established and affirmed citation as “serious”.	X		\$5,060	\$18,000	\$5,060

Sub-Total		\$28,495	\$41,435	\$23,941
Total Amount Due*				\$23,941

(INCLUDES APPEALED CITATIONS ONLY)

NOTE: Payment of final penalty amount should be made to:

Accounting Office (OSH)
 Department of Industrial Relations
 PO Box 420603
 San Francisco, CA 94142
 (415) 703-4291, (415) 703-4308 (payment plans)

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

ALJ: MD/sp
POS: 06/04/15