

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

In the Matter of the Appeal of:

COAST WASTE MANAGEMENT, INC.
803 Blue Water Road
Carlsbad, California 92008

Employer

**DOCKETS 11-R3D2-2385
and 2386**

DECISION

Statement of the Case

Coast Waste Management Inc.,¹ is in the trash collection business. Beginning March 21, 2011, the Division of Occupational Safety and Health (the Division) through Associate Cal/OSHA Engineer Michael Loupe², conducted an accident inspection at 803 Blue Water Road, Carlsbad, California (the site). On September 12, 2011, the Division cited Employer for (1) failure to effectively implement the Injury and Illness Prevention Program (IIPP), and (2) failure to require the use of the factory installed restraint system (safety chain).

Employer filed timely appeals of all citations contending that the safety orders were not violated, the classifications were incorrect, that the abatement requirements were unreasonable and that all of the proposed penalties were unreasonable. Employer asserts various affirmative defenses.

This matter was regularly set for hearing before Jacqueline Jones, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at San Diego, California on October 1, 2014, February 24, 2015, February 25, 2015 and February 26, 2015. James Dufour, Attorney at Law, represented Employer. Tuyet-Van Tran, Staff Counsel, represented the

¹ On October 1, 2014, the Parties jointly moved to correct the name of Employer on the citation. Employer's correct name is Coast Waste Management Inc. Employer was incorrectly cited as Waste Management of California Inc. Good cause having been found, said Motion was granted on October 1, 2014. The Order on Motion to Correct Employer's name is attached and incorporated into this Decision.

² At the time of the investigation, Michael Loupe (Loupe) was an Associate Safety Engineer at the San Diego District Office. At the time of the hearing, Loupe was the District Manager of the Cal/OSHA High Hazard Office in Southern California.

Division. The parties presented oral and documentary evidence.³ The ALJ extended the submission date on her own motion to January 12, 2016.

Issues

1. Did the Employer fail to implement the element of its Injury and Illness Prevention Program requiring that it ensure that employees comply with safe and healthy work practices?
2. Did the Employer fail to implement the element of its Injury and Illness Prevention Program requiring that it evaluate unsafe work practices?
3. Did the Employer fail to implement the element of its Injury and Illness Prevention Program requiring that it have methods and or procedures for correcting unsafe or unhealthy conditions, work practices and work procedures which are implemented in a timely manner?
4. Did the Employer fail to implement the element of its Injury and Illness Prevention Program requiring that it provide training and instruction whenever new equipment is introduced to the workplace and for supervisors to familiarize themselves with the safety and health hazards for exposed employees under their immediate direction and control?
5. Was Citation 1 properly classified as General?
6. Did Employer fail to comply with section 3702, subdivision (q) by allowing employees to not use the safety chain in lieu of a door on trash trucks during stop to stop operations?
7. Did Employer willfully fail to comply with section 3702, subdivision (q) by its corporate office identifying and creating a rule that required employees to use the safety chain while driving the trash truck from the right side and then choosing not to follow the rule?
8. Was Citation 2 properly classified as Serious
9. Did Employer establish that it did not know, and could not have known through the exercise of reasonable diligence, of its violation of not using the safety chain, so as to rebut the presumption that the violation was properly classified as serious?
10. Was Citation 2 properly characterized as Serious Accident Related?
11. Was the proposed penalty in Citation 2 reasonable? Were the abatement requirements of either using a restraint system or requiring two people in the vehicle, reasonable?

Findings of Fact

1. A fatal accident occurred on March 21, 2011, at 803 Blue Water Road, Carlsbad, California 92008.
2. The victim of the fatal accident was Pablo Virgin Hernandez an employee of Coast Waste Management, Inc.

³ Unless otherwise specified, all section references are to Sections of Title 8, California Code of Regulations.

3. The Division's Inspector was Michael Loupe. The Division received permission to conduct the inspection.
4. Mr. Virgin Hernandez was operating a 1998 Volvo Trash Disposal vehicle from the right side at the time of the accident.
5. Mr. Virgin Hernandez's cause of death was crushing injuries as a result of being run over by the 1998 Volvo Trash Disposal vehicle.
6. At the time of the accident the work practice of Coast Waste Management Inc. was to not use the safety chain or strap for stop to stop⁴ operations.
7. Employer stipulated that the proposed penalty as to Citation 1 was calculated correctly in accordance with the Division's policies and procedures.
8. Employer had a method to ensure compliance with safe work practices.
9. Employer was incapable of properly identifying and evaluating the hazard of understanding the difference between the safety belt and the safety restraint system.
10. Employer did not have methods and or procedures for correcting unsafe or unhealthy conditions, work practices and work procedures in a timely manner.
11. Employer was not requiring the use of the restraint system on the right side of refuse trucks without a door while drivers collected trash on the right side.
12. Employer knew that that the corporate office required a restraint system to be used on the right side and knowingly ignored both the manufacturer's recommendation and Employer's Rule 18.4.
13. The Division established that there was a realistic possibility of a serious physical harm or death by allowing drivers to drive refuse trucks with no door and no safety chain or strap to prevent the operator from falling out of the vehicle.
14. Employer failed to rebut the presumption that a serious violation, a death occurred.
15. The Division established that the failure to require the use of the safety chain or strap to prevent the operator from falling out of the vehicle was a contributing cause to Hernandez falling out of the refuse truck to his death.
16. The proposed penalty for Citation 2 was calculated in accordance with the Division's policies and procedures.
17. The abatement requirements of using a safety chain or strap or requiring two people in the vehicle are reasonable.

⁴ Stop to stop is a method of trash collecting.

Analysis

1. Did Employer fail to effectively implement its Injury and Illness Prevention Program?

The Division cited employer under Section 3203.

Section 3203, subdivision (a) 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:

(2) Include a system for ensuring the employees comply with safe and healthy work practices. Substantial compliance with this provision includes recognition of employees who follow safe and healthful work practices, training and retraining programs, disciplinary actions, or any other such means that ensures employee compliance with safe and healthful work practices.

(4) Include procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices. Inspections shall be made to identify and evaluate hazards.

.....

(C) Whenever the employer is made aware of a new or previously unrecognized hazard.

(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 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.

(7) Provide training and instruction.

(A) When the program is first established; [Exception omitted]

(B) To all new employees;

(C) To all employees given new job assignments for which training has not been previously 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.

The citation alleges the following:

On March 21, 2011 an employee belonging to Waste Management was fatally injured when he was run over by the VOLVO trash collection vehicle he was operating. As a result of the accident investigation Cal/OSHA determined that the employer failed to meet the requirements of the regulation 3203(a) by not effectively implementing four required sections of the regulation.

The Division has the burden of proving a violation, including the applicability of the safety order, by a preponderance of the evidence. (*Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).) Preponderance of the evidence” is usually defined in terms of probability of truth, or of evidence that when weighted 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. (*Lone Pine Nurseries*, Cal/OSHA App. 00-2817, Decision After Reconsideration (Oct. 30, 2001), citing *Leslie G. v. Perry & Associates* (1996) 43 Cal App. 4th 472, 483, review denied.)

To establish an Injury Illness Prevention Program (IIPP) violation, the Division must prove that flaws in the Employer’s written IIPP amounted to a failure to “establish” or “implement” or “maintain” an “effective” program. The Appeals Board has consistently held that a failure to implement or maintain an IIPP cannot be based on an isolated or single violation. (*GTE California*, Cal/OSHA App. 91-107, Decision After Reconsideration (Dec. 16, 1991; *David Fischer, DBA Fischer Transport, A Sole Proprietor*, Cal/OSHA App. 90-762, Decision After Reconsideration (Oct. 16, 1991); *Keith Phillips Painting*, Cal/OSHA App. 92-777, Decision After Reconsideration (Jan. 17, 1995).) Here, the Division’s citation addresses Employer’s alleged failure to implement its IIPP, through an alleged failure to ensure that its employees follow rules that were set forth in the Corporate Safety Book (Exhibit 11).

Instance 1

Section 3203, subdivision (a)(2) requires every employer to have a system in place for “ensuring that employees comply with safe and healthy work

practices.” (*Marine Terminals Corp. dba Evergreen Terminals*, Cal/OSHA App. 09-1920, Decision After Reconsideration (Mar. 5, 2013).). In *Marine Terminals Corp.*, the Board explained that section 3203, subdivision (a)(2) describes:

[F]our methods that can be used by an employer to ensure that its employees comply with safe work practices: recognition of employees, training and retraining programs, disciplinary actions, or any other such means that ensures compliance. The listed methods are written with the disjunctive “or,” and the final method allows for, ‘any other such means that ensures compliance,’ indicating that any one (or more) of the previous three methods are sufficient to ensure compliance.

In *ABM Facility Services, Inc. dba ABM Building Value* 2012 Cal/OSHA App. 12-3496, Decision After Reconsideration (Dec. 24, 2015), the Board held that an employer can demonstrate compliance through testimony and evidence showing that it has met any one of these four listed methods. As in *Marine Terminals Corp.*, *supra*, Employer here introduced unrebutted testimony on “training and retraining,” establishing that employees were required to take training courses that went over relevant topics, including driver safety. Training records were produced for the decedent and other employees. (See also, *Shimmick-Obayashi*, Cal/OSHA App. 08-5023, Decision After Reconsideration (Dec. 30, 2013).)

The Division has not established that Employer failed to comply with any of the methods described in section 3203 subdivision (a)(2), and Employer has shown compliance with at least one of the listed methods.

Instance 2

The Division also alleges Employer has failed to evaluate unsafe work practices as required under section 3203, subdivision (a)(4)(C). In order to prove a violation of section 3203, subdivision, (a)(4)(C), the Division must establish the following: 1) Employer did not have procedures in place for identifying and evaluating workplace hazards and 2) Employer’s procedures did not include scheduled periodic inspections *Brunton Enterprises, Inc.*, Cal/OSHA App. 08-3445, Decision After Reconsideration (October 11, 2013).

In *Brunton Enterprises, Inc.*, the Appeals Board granted an employer’s appeal of a citation for violation of 3203, subdivision (a)(4), where there was evidence of the employer’s failure to take steps to eliminate a specific hazard in a specific operation. The Board wrote: “Division’s testimony regarding the lack of specific procedures for the operation at hand is not relevant and the evidence in the record does not otherwise disclose that Employer’s IIPP lacked procedures to identify and evaluate hazards.” Here, the circumstances are

different. Loupe testified that a hazard existed in that Safe Work Rule 18.4 required that the safety restraint be used at all times while driving dual side trash trucks from the right side. Testimony from Edgar Ivan Alberro (Alberro)⁵ confirmed that the safety restraint was not being used while driving dual side trash trucks from the right side. The parties stipulated that at the time of the accident, the work practice of Coast Waste Management Inc. was to not use the safety chain or strap for stop to stop operations. (See Finding of Fact No.6.)

Here, Loupe alleged a violation of section 3203, subdivision (a)(4)(C) because the managers did not understand the difference between the safety belt and the safety restraint system. Loupe testified that managers were not capable of identifying or evaluating that hazard as required by the safety order. Michael Crawford (Crawford), Corporate Safety Manager told Loupe that the Safety Restraint System was the seat belt. Stella Lopez (Lopez), Safety Manager and Route Manager told Loupe that the Safety Chain and the seat belt were the same thing. Kurt Stauffer (Stauffer), Route Manager and Supervisor of decedent told Loupe that the restraint system was the seat belt.

The Division alleged that the managers had no understanding of the safety restraint system and that the Employer was therefore incapable of properly identifying and evaluating the hazard as required by section 3203, subdivision (a)(4)(C). Here, there were procedures in place for identifying hazards but the managers were not capable of evaluating the hazards. It was an unrecognized hazard. Employer's IIPP says that hazards will be addressed by competent managers. The safety order requires that there be procedures to evaluate hazards. Here, the procedures were deficient. The Division established a violation of section 3203, subdivision (a)(4)(C).

Instance 3

In order to prove a violation of section 3203, subdivision (a)(6), the Division must establish the following: 1) Employer did not have methods and or procedures for correcting unsafe or unhealthy conditions, work practices and work procedures, and 2) the methods and procedures were not implemented in a timely manner. Here, Division concedes that Employer had identified the workplace hazard of driving a vehicle that had chains or straps in lieu of doors by creating Rule 18.4. Said rule required that employees use the safety chain or straps when driving from the right side. Employer did have methods or procedures for correcting an unsafe or unhealthy condition. The method, namely, using the safety chain, was not implemented in a timely manner. As a result, the Division established a violation of section 3203, subdivision (a)(6).

⁵ Alberro was a route driver who discovered the deceased worker's body.

Instance 4

Section 3203, subdivision (a)(7) requires that an employer must provide training and instruction whenever equipment is introduced to the workplace and represent a new hazard (see subdivision (a)(7)(D)) and for supervisors to familiarize themselves with the safety and health hazards for exposed employees under their immediate direction and control (see subdivision (a)(7)(F) above). The purpose of section 3203(a)(7) is to provide employees with the knowledge and ability to recognize, understand and avoid the hazards they may be exposed to by a new work assignment through training and instruction. (*Siskiyou Forest Products*, Cal/OSHA App. 01-1418, Decision After Reconsideration (Mar. 17, 2003).) Loupe testified that Hernandez had worked for Employer for nine years. Here, the Division has not provided sufficient evidence to show that driving the waste truck from the right side without a safety chain or strap was a new work assignment. The Division has not established the applicability of the safety order. Therefore, the Division has not sustained the burden of proof as to section 3203, subdivision (a)(7).

The Division established that Employer failed to comply with section 3203 subdivisions (a)(4)(C), and (a)(6).

2. Did the Division correctly classify Employer's violation of section 3203, a General violation?

The Division classified Citation 1, as a General violation. A General violation is defined as "a violation which is specifically determined not to be of a serious nature, but has a relationship to occupational safety and health of employees." (Cal. Code Regs., tit. 8, § subd. (b).) Here, Employer's failure to effectively implement its IIPP directly relates to its employees safety and health. The violation is properly classified as General.

3. Did Employer fail to comply with section 3702, subdivision (q) by allowing employees to not use the safety chain in lieu of a door on trash trucks during stop to stop operations?

Section 3702, subdivision (q) provides:

Where chains or cables are used in lieu of doors on regular means of entrance or exit, the chains or cables shall be securely attached on each side of the opening and be equipped with a quick-release mechanism.

The Division alleged the following:

On March 21, 2011, at approximately 09:50 AM an employee belonging to Waste Management was operating a 1998 VOLVO (Ca Lic# 8H0938) and transporting himself along his trash collection route in the Harbor Point Condominium complex in Carlsbad, California. The victim was working alone and operating the vehicle from the standing position on the right side of the cab when he fell out of the vehicle and sustained fatal crushing injuries when the vehicle rolled over him. The Cal/OSHA investigation determined the right side door had been removed and that the employer was not requiring the use of the factory installed restraint system (safety chain) to protect employees from falling out of the vehicle while being transported.

In order to establish the violation, the Division must prove the following: 1) a chain or cable was to be used in lieu of a door; 2) the chain or cable was not securely attached; and, 3) the chain or cable did not have a quick-release mechanism. Associate Safety Engineer Loupe observed 1998 Volvo trash truck with no right door and took photographs.⁶ District Manager Ken Ryan (Ryan), told Loupe that the Volvo trash truck comes to Employer's facility with no right door and with the safety chain in lieu of a door but the use of the safety chain was not practicable. Additionally, Edgar Ivan Alberro (Alberro) discovered the body of Pablo Hernandez. Alberro testified that when he discovered the body of Hernandez, the Volvo truck engine was running and the safety chain was not attached. Employer does not argue to the contrary. The chain was not used here by this Employer because according to the testimony of District Manager Ken Ryan it was not practicable. Here, the Employer did not dispute whether the safety chain did not have a quick release mechanism. Employer presented neither evidence nor argument to rebut this evidence. Where the Division presents evidence, which if believed would support a finding if unchallenged the burden of producing evidence shifts to the Employer to present convincing evidence to avoid an adverse finding (*Paramount Scaffold, Inc.* Cal/OSHA app. 01-4564, Decision After Reconsideration (Oct. 7, 2014).)

In order to establish a violation, employee exposure to a hazard must be established. Here, Employer stipulated that the practice of this Employer was to operate the trash truck without the safety chain attached. It is undisputed that Employer was not requiring the use of the restraint system (safety chain). Employer provided testimony that reduced speed at less than 25 miles per hour for no more than a ¼ of a mile was the safety method. There is no such exception in the safety order.

⁶ Exhibits 2 and 5.

Applicability of the cited safety order

Here, Employer made three arguments: 1) Employer argued that section 3702, subdivision (q) pertaining to vehicles that have chains or cables in lieu of doors does not apply to the trash truck or their operations; 2) the Waste Management industry does not use the safety chain or cables during routine waste management collection; and, 3) the 2008 version of the American National Standards Institute (ANSI) does not require that safety chains or cables be used during waste management collection. Employer argues that section 3702 is entitled “Transporting Employees” and that only vehicles whose primary purpose is to transport employees must comply with said section, and because the primary purpose of the trash truck is to transport trash, it must not comply. Board precedents hold that the Occupational Safety and Health Act of 1973 (the Act) requires the Board’s interpretation of a safety order to be “done in a light most favorable to employee safety” (*Baldwin Contraction Company, Inc.*, Cal/OSHA App. 97-2648, Decision After Reconsideration (December 17, 2001), and” . . . in a manner that affords maximum protection to workers.” (*Beutler Heating & Air Conditioning*, Cal/OSHA App. 98-556, Decision After Reconsideration (November 6, 2001).) Additionally, the Board has held that section headings or titles may not otherwise be used for the purpose of controlling, restraining, or enlarging the positive provisions in the body of the regulation. (*Spaich Brothers, Inc. dba California Prune Packing Co.*, Cal/OSHA App. 01-1630, Decision After Reconsideration (Feb. 25, 2005), citing, *Central Coast Pipeline Construction Co., Inc.* Cal/OSHA App. 76-1342, Decision After Reconsideration (July 16, 1980); *Bryant Rubber Corp.*, Cal/OSHA App. 01-1358, Decision After Reconsideration (Aug. 21, 2003).) Here, the regulation clearly applies as the vehicle the decedent was driving did not have a door and it was transporting an employee (Hernandez) a safety chain should have been in use.

As to Employer’s argument that the Waste Management industry does not use the safety chain or cables during routine waste management collection, the Board has held that an industry practice in violation of applicable safety order requirements is not a defense to the violation. (*Lusardi Construction Company*, Cal/OSHA App. 86-1021, Decision After Reconsideration (Jan. 6, 1988).)

Finally, Employer’s third argument is that the 2008 version of ANSI does not require that safety chains or cables should be used. Here, there is no reference to any section of ANSI in section 3702(q). ANSI is not applicable. It must be found on this evidentiary record that the Division’s interpretation of the safety order existent at the time of the accident, is the one that is more favorable to employee safety and affords maximum protection to workers. Therefore, it is found that the Division established a violation of section 3702,

subdivision (q) and it applies to all vehicles that have a safety chain or strap in lieu of a door, such as the 1998 Volvo trash truck that Hernandez was driving at the time of the accident.

4. Did Employer willfully fail to comply with Section 3702, subdivision (q)?

Labor Code section 6429, subdivision (a) provides the authority for assessment of civil penalties for willful violations of not more than \$70,000 and reads in pertinent part, “Any employer who willfully ... violates any occupational safety or health standard, order, or special order ... may be assessed a civil penalty of not more than seventy thousand dollars (\$70,000) ... for each willful violation.” Pursuant to authority provided by Labor Code section 55, the Director has promulgated regulations that define willful. A willful violation is defined in section 334, subdivision (e) as:

[A] violation where evidence shows that the employer committed an intentional and knowing, as contrasted with inadvertent, violation, and the employer is conscious of the fact that what he is doing constitutes a violation of a safety law, or, even though the employer was not consciously violating a safety law, he was aware that an unsafe or hazardous condition existed and made no reasonable effort to eliminate the condition.

Loupe testified that he cited the Employer for a Willful Serious because Employer willingly and knowingly failed to address safety hazard of not using the safety chain on a trash truck without a right side door. Employer had knowledge based on requirements in their Corporate Safety Rule Book. Employer had inconsistent training practices. Employer knowingly relied on reduced speed and distance in lieu of using the safety chain and Employer knew that the Corporate office required a restraint system but ignored it. Loupe testified that Employer disregarded the Manufacturer’s recommendations to use the safety chain. Use of the restraint system is listed as a Life Critical Rule (Rule 18.4) in the Corporate Safety Rule Book, Exhibit J.

Here, the Division was not able to meet its burden of proof regarding the first way of proving the willfulness of Employer’s conduct. There was no proof that the Employer was aware of Employer intentionally violating a safety law. Under the second prong of the willful test, DOSH must prove an employer commits a willful violation when the following occurs: 1) Employer is aware of a hazardous condition 2) and Employer fails to make reasonable efforts to remove the condition. (*Owens-Brockway Plastic Containers*, OSHAB 93-1629, Decision After Reconsideration (Sept. 25, 1997).)

Employer's Corporate Safety Rule Book (Exhibit 11 and Exhibit J), Life Critical Rule 18.4 states as follows: Ensure restraint system is working properly before leaving the yard. Always use the restraint system provided (bar and safety chains) when driving from the right-side position. Here, the Employer was aware of the hazardous condition of operating the trash truck from the right side of dual side trash truck without a door and had a written policy requiring the use of bar and safety chains when driving from the right-side position . Not having a door exposes the employees to falling out of the vehicle. The Corporate Safety Rule Book had identified this hazard and created a rule that required employees to use the safety chain while driving the trash truck from the right side. (Exhibit 11 and Exhibit J, Rule 18.4). Employer failed to make reasonable efforts to remove the hazard because it was the Employer's actual practice to not use the safety chain during stop to stop operations.

Thus, the Division has proved the violation was willful under section 334's second test.

5. Was the violation properly classified as Serious?

The Division classified the violation as serious. The elements of a serious violation are: (1) a violation exists in a place of employment, (2) a demonstration of realistic possibility of death or serious injury; and, 3) employee exposure to an actual hazard. If elements 1, 2 and 3 are established then a rebuttable presumption is established that the violation is serious, as indicated in Labor Code section 6432⁷.

"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." (*Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration

⁷ Labor Code section 6432 subdivision (e) provides as follows:

"Serious physical harm" as used in this part, means any injury or illness, specific or cumulative, occurring in the place of employment or in connection with an employment that results in any of the following:

- (1) Inpatient hospitalization for purposes other than medical observation
- (2) The loss of any member of the body.
- (3) Any serious degrees 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.

(Sep. 27, 2001), quoting *Oliver Wire & Plating Co., Inc.*, Cal/OSHA App. 77-693, Decision After Reconsideration (April 30, 1980).) In *Janco, supra*, the Board found that there was a realistic possibility of eye injury from the hazard in question, (splash in the eyes), although such an injury was unlikely and the possibility was remote. (*Id.*)

The first element of a serious violation of section 3702 (q) is established by the undisputed evidence that a violation occurred by not using the safety chain or strap for stop to stop operations. The second element of realistic possibility was provided by the testimony of Loupe. Loupe testified credibly that there is a realistic possibility of death or serious physical harm from the actual hazard posed by the violation of not using the safety chain. Loupe is current in his Cal/ OSHA mandated training and is deemed competent to render an opinion of whether a violation is serious. An inspector's opinion that is sufficiently supported by education, training, or experience, support a finding. (*Home Depot USA, Inc.*, #6617, Cal/OSHA App. 10-3284, Decision After Reconsideration (Apr. 8, 2010).) Thus, his opinion is credited. The third element of exposure was provided by the testimony of Loupe when he stated that there was employee-exposure to an actual hazard thousands of times per day as the waste truck drivers perform their stop to stop operations in trucks with no right side door and no safety chain used. Therefore, the Division met its burden to establish a rebuttable presumption that a serious violation exists. The Employer failed to present sufficient evidence to rebut the presumption that the violation was serious.

6. Did Employer establish that it did not know, and could not have known through the exercise of reasonable diligence, of its violation of not using the safety chain?

Where an employer demonstrates that "it did not, and could not have known through the exercise of reasonable diligence, known of the presence of the violation" a serious classification will not stand. (Cal. Code. Regs., tit. 8, §334, subd. (c)(2); see also, *Central Coast Pipeline*, Cal/OSHA App. 76-1342, Decision After Reconsideration (July 16, 1980).) In order to establish that it could not have known of the violation through the exercise of reasonable diligence, an employer must establish that the violation occurred at a time and under circumstances which could provide the employer with a reasonable opportunity to have detected it. (*Vance Brown, Inc.*, Cal/OSHA App. 00-3318, Decision After Reconsideration (Apr. 1, 2013).)

Employer asserted an affirmative defense of lack of employer knowledge. Employer had knowledge of the violation since District Manager Ryan knew that the Volvo came with no door and a safety chain. Employer stipulated that they did not use the safety chain. District Manager Ryan knew that Employer was not requiring the use of the factory installed safety chain. Failure to exercise supervision adequate to ensure employee safety is equivalent to failing

to exercise reasonable diligence, and will not excuse a violation. (See *Stone Container Corporation*, Cal/OSHA App. 89-042, Decision After Reconsideration (March 9, 1990).) Knowledge of a supervisor, such as Ryan, will be imputed to the employer. (*Tri-Valley Growers, Inc.*, Cal/OSHA App. 81-1547, Decision After Reconsideration (July 25, 1985), citing *Greene & Hemly Inc.*, Cal/OSHA App. 76-435, Decision After Reconsideration (Apr. 7, 1978).) Thus, the Employer did not establish the affirmative defense of lack of employer knowledge.

7. Was Citation 2 properly characterized as Serious Accident Related?

The Division also characterized the violation as accident-related. A violation is “accident-related” when there is a causal nexus between the violation and the serious injury. (*Obayashi Corporation*, Cal/OSHA App. 98-3674, Decision After Reconsideration (June 5, 2001).) To find that a violation is accident-related, the violation does not have to be the only cause of the accident, but only a contributing cause, as long as causal nexus exists between the violation and the serious injury. (*Id.*) Loupe’s opinion that if the safety chain had been used Hernandez would not have fallen out of the vehicle, is credited. Here, Hernandez fell out of the trash truck because the safety chain was not used. Loupe testified credibly, based on his experience as a traffic accident reconstructionist. Therefore, the violation is found to be accident-related.

8. The penalty was reasonable.

The Division has a rebuttable presumption that its proposed penalties are reasonable once it establishes that they were calculated in accordance with the Division’s policies, procedures and regulations. (*Stockton Tri Industries, Inc.*, Cal/OSHA pp. 02-4946, Decision After Reconsideration (Mar 27, 2006).)

Loupe rated the severity as “high” because the severity of a Serious violation is considered to be high and because of the extreme gravity of a Serious violation an initial base penalty of \$18,000 shall be assessed. Extent was rated as high because there were more than 26 employees operating the trash vehicles without using the safety chain and all of the operators of said trash vehicles were exposed to the violation daily.. High extent pertains to the degree to which a safety order is violated. As a result, \$4,500 was added to the penalty. The likelihood was rated as medium and therefore nothing was added to the penalty based on likelihood. The gravity based penalty was \$22,500. Employer’s actions were willful and therefore the penalty is multiplied by five. Loupe did not give credit for history, good faith, or abatement because it was a willful violation and not subject to credit. Employer has more than 100 employees. No size adjustment is allowed. The cap of the penalty is \$70,000. As a result the proposed penalty was \$70,000.

The proposed penalty of \$70,000 is found reasonable and is assessed.

9. Were the abatement requirements of using a restraint system or requiring two people in the vehicle reasonable?

An employer may appeal from a citation by challenging the “reasonableness of the changes required by the division to abate the condition.” (Cal. Lab. Code, section 6600.) The Board will affirm required changes if they are deemed “reasonable”. (See, e.g. *Southern California Rapid Transit District*, Cal/OSHA App. 85-974, Decision After Reconsideration (Nov. 6, 1987).) Loupe testified that abatement would consist of using a restraint system when performing curb side pick-up on right side with one person in the vehicle. According to Loupe abatement could also consist of using two people in the vehicle with one person always in control of the vehicle and the other person doing curbside pickup.

Conclusion

Citation1 is affirmed. Citation 2 is affirmed.

Order

Citation 1 is sustained and a penalty of \$450 is assessed. Citation 2 is sustained and a penalty of \$70,000 is assessed.

Dated: February 5, 2016

JJ:ml

JACQUELINE JONES
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 Section 6616, 6617, 6618 and 6619, and with Title 8, California Code of Regulations, Section 390.1.

For further information, call: (916) 274-5751.

SUMMARY TABLE DECISION

In the Matter of the Appeal of:

COAST WASTE MANAGEMENT, INC.
Dockets 11-R3D2-2385 and 2386

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

IMIS No. 312686264

DOCKET	C I T A T I O N	I T E M	SECTION	T Y P E	MODIFICATION OR WITHDRAWAL	A F F I R M E D	V A C A T E D	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT HEARING	FINAL PENALTY ASSESSED BY BOARD
11-R3D2-2385	1	1	3203(a)	G	ALJ affirms citation	X		\$450	\$450	\$450
11-R3D2-2386	2	1	3702(q)	S W	ALJ affirms citation	X		\$70,000	\$70,000	\$70,000
Sub-Total								\$70,450	\$70,450	\$70,450

Total Amount Due*

(INCLUDES APPEALED CITATIONS ONLY)

\$70,450

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

Accounting Office (OSH)
 Department of Industrial Relations
 P.O. Box 420603
 San Francisco, CA 94142

*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: JJ/ml
 POS: 02/05/2016

**APPENDIX A
SUMMARY OF EVIDENTIARY RECORD**

**COAST WASTE MANAGEMENT, INC.
Dockets 11-R3D2-2385 and 2386**

**DATES OF HEARING: October 1, 2014, February 24, 2015, February 25,
2015 and February 26, 2015**

DIVISION'S EXHIBITS- Admitted

<u>Exhibit Number</u>	<u>Exhibit Description</u>
1.	Jurisdictional documents
2.	Photo of right side of truck
3.	Photo of accident site
4.	Diagram of police sketch of scene
5.	Photo of truck
6.	Photo of close-up of right side of truck
7.	Photo of the scene of accident
8.	Photo of Truck-Front-Collection receptacle
9.	Photo of Inside of Front Mounted Trash Bin
10.	Document request form
11.	Dual/Right Side Drive Truck
12.	Volvo Operator's Manual
13.	Safety awareness training
14.	Safety awareness
15.	Cal/OSHA Form10 Penalty worksheet
16.	1BY form

17. Info plate
18. E-mail from Gregg Weiss, dated August 10, 2011
19. Section 4355 (DOSH withdrew)
20. Notice of Proposed Modifications
21. Section 3702 Transporting Employees

EMPLOYER'S EXHIBITS

- A. Photo of driver & Truck
- B. Police report
- C. County of San Diego (4 pages)
- D. IIPP
- E. ER's training schedule 2010
- F. Safety and housekeeping checklist
- G. Safety training sign in
- H. Safe driver/helper
- I. Gate Inspection form
- J. Rule Book
- K. Employee Safety Survey
- L. American National Standard
- M. Minutes of Standards Board
- N. Minutes of Public Mtg.
- O. VPP letter

- P. Letter dated 2-7-2011
- Q. E-mail from Martha Curtis to Raymond Bizal dated January 22, 2009

Witnesses Testifying at Hearing

1. Edgar Ivan Alberro
2. Michael Loupe
3. Stella Lopez
4. William Martin
5. Kurt Stauffer
6. Kenneth Ryan
7. Joel Foss

CERTIFICATION OF RECORDING

I, Jacqueline Jones, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hearing the above-entitled 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.

Dated: February 5, 2016

JACQUELINE JONES
Administrative Law Judge

DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my place of employment and business address is Occupational Safety and Health Appeals Board, 100 North Barranca Street, Suite 410, West Covina, California, 91791.

On February 5, 2016, I served the attached **DECISION** by placing a true copy thereof in an envelope addressed to the persons named below at the address set out immediately below each respective name, and by sealing and depositing said envelope in the United States Mail at West Covina, California, with first-class postage thereon fully prepaid. There is delivery service by United States Mail at each of the places so addressed, or there is regular communication by mail between the place of mailing and each of the places so addressed:

James T. Dufour, Esq.
LAW OFFICES OF JAMES T. DUFOUR
831 F Street
Sacramento, CA 95814-1305

District Manager
DOSH – San Diego
7575 Metropolitan Drive, #207
San Diego, CA 92108

Chief Counsel
DOSH - Legal Unit
1515 Clay Street, 19th Floor
Oakland, CA 94612

Tuyet-Van Tran, Staff Counsel
DOSH – Legal Unit
320 W. Fourth Street, Suite 400
Los Angeles, CA 90013

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 5, 2016, at West Covina, California.

Declarant