BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1290383**
JAFEC USA, INC. **2025 GATEWAY PLACE, SUITE 180** **SAN JOSE, CA 95110** **Employer**	**DECISION**

Statement of the Case

JAFEC USA, Inc. (Employer) is a company involved in the construction industry. On January 19, 2018, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer James Carmichael,[1] commenced an accident investigation of Employer's work site located at the northbound exit ramp on Highway 101 at Willow Road in Menlo Park, California (jobsite). On July 3, 2018, the Division issued one citation to Employer. The citation alleges Employer failed to implement sufficient controls for hauling operations to ensure that vehicle operators knew of the presence of workers on foot in the area of operation.

Employer filed a timely appeal of the citation, contesting the existence of the violation, the classification of the citation, and the reasonableness of the proposed penalty. Employer also asserted numerous affirmative defenses, including the Independent Employee Action Defense. [2]

This matter was heard by Christopher Jessup, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (the Appeals Board), in Oakland, California, on August 28 and 29, 2019, and January 22, 23, and 24, 2020. Karen F. Tynan and Robert C. Rodriguez, attorneys at Ogletree, Deakins, Nash, Smoak & Stewart, P.C., represented Employer. Denise Cardoso, Staff Counsel, represented the Division. This matter was submitted for Decision on July 15, 2020.

[1] Carmichael testified that he retired from his employment with the Division on July 5, 2019.

[2] Except where discussed in this Decision, Employer did not present evidence in support of other affirmative defenses, and said defenses are therefore deemed waived. (*RNR Construction, Inc.*, Cal/OSHA App. 1092600, Denial of Petition For Reconsideration (May 26, 2017); see also *Western Paper Box Co.*, Cal/OSHA App. 86-812, Denial of Petition for Reconsideration (Dec. 24, 1986).)

Issues

1. Did Employer fail to control hauling operations in such a manner as to ensure that a vehicle operator knew of the presence of a worker on foot in the area of the hauling operation?

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

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

4. Did the Division establish that the citation was properly characterized as Accident-Related?

5. Is the proposed penalty reasonable?

Findings of Fact[3]

1. On January 6, 2018, Brian Taylor (Taylor) was an employee of Employer and was injured while working at Employer's jobsite.

2. Taylor suffered serious physical harm as defined by Labor Code section 6432, subdivision (e), and a serious injury as defined by Labor Code section 6302, subdivision (h), and California Code of Regulations, title 8, section 330, subdivision (h).

3. Taylor's serious injury was caused by the accident that occurred on January 6, 2018, during his employment with Employer.

4. Taylor's leg was broken when he was knocked over by an auger stem that was moved by the excavator.

5. Jose Valdelamar (Valdelamar) was Employer's site superintendent who was present at the jobsite at the time of the accident and Taylor's supervisor at the jobsite.

[3] Finding of fact numbers 2, 3, and 11 are pursuant to stipulations by the parties.

6. Employer's policy, training, and code of safe practices required on-foot employees to ensure that they avoided the blind spots of machinery or heavy equipment.

7. The operator of the excavator involved in the accident was unaware of Taylor's presence at the time of the accident.

8. Employer did not rely on a spotter or radios to ensure that the excavator operator was informed of the on-foot workers at the time of the accident.

9. Taylor did not knowingly violate Employer's safety rules at the time of the accident.

10. Valdelamar was aware of Employer's safety policy and was aware of on-foot employees in the area of the excavator's hauling operation.

11. The proposed civil penalty was calculated in accordance with the Division's policies and procedures.

Analysis

1. Did Employer fail to control hauling operations in such a manner as to ensure that a vehicle operator knew of the presence of a worker on foot in the area of the hauling operation?

California Code of Regulations, title 8,[4] section 1592, subdivision (e), provides:

> Hauling or earth moving operations shall be controlled in such a manner as to ensure that equipment or vehicle operators know of the presence of rootpickers, spotters, lab technicians, surveyors, or other workers on foot in the areas of their operations.

The Alleged Violation Description for Citation 1 provides:

Prior to and during the investigation on January 19, 2018, the employer failed to ensure that hauling operations at the location were sufficiently controlled in a manner such that the operator of an excavator knew of the presence of a worker on foot in the area of operations. As a result, on January 6, 2018[,] an employee

[4] All references are to California Code of Regulations, title 8, unless otherwise indicated.

was seriously injured when his leg was struck by an auger stem/auger rod being pushed by the excavator.

In order to establish a violation of section 1592, subdivision (e), the Division must establish that an employer failed to implement control procedures for hauling or earth moving operations to ensure an equipment or vehicle operator knew of the location of employees on foot within the area of operation. (*R & L Brosamer, Inc*., Cal/OSHA App. 03-4832, Decision After Reconsideration (Oct. 5, 2011), citing *Teichert Const. v. California Occupational Safety and Health Appeals Bd*. (2006) 140 Cal.App.4th 883, 891-892).) In *R & L Brosamer, Inc*., *supra,* Cal/OSHA App. 03-4832, the Appeals Board explained "[t]he safety order places the onus on the Employer to establish a method to ensure operators maintain awareness of on-foot employees' location(s)." Further, in *Teichert Const. v. California Occupational Safety and Health Appeals Bd*., *supra,* 140 Cal.App.4th 891-892, the Court explained:

> The hazard contemplated under the regulation is the exposure of workers on foot to dangers of hauling or earth moving equipment. The safety order is designed to protect workers on foot and imposes an affirmative obligation upon an employer to control such operations. Hauling and earth moving operations inherently involve movement of equipment and vehicles in the defined area and the location of such vehicles changes within the area of operation. Only where control measures are used by the employer to ensure that operators know of workers on foot in their immediate vicinity will the safety order have the intended effect of protecting workers on foot from the hazards of hauling and earth moving equipment.

In *R & L Brosamer, Inc*., *supra,* Cal/OSHA App. 03-4832, the employer implemented a procedure where workers on foot were responsible for avoiding the movement of an excavator boom, relying on a system of communication where the excavator operator was only contacted when operations needed to cease. Further, the safety records in that case demonstrated that the employer's plan relied upon workers attempting to stay out of the way of loads. (*Id.*) The Appeals Board noted that such a plan "in no way 'ensures' the operator 'knows' of the location of the employees." (*Id.*) The Appeals Board explained that such a situation is worse than a mere general warning to people possibly on foot near the equipment because it created a situation where the plan effectively told the operator that it was not necessary to watch for ground personnel. (*Id.*) Further, the plan was found to be insufficient to control earth moving operations to ensure that operators knew of the presence of workers on foot in the immediate vicinity of equipment. (*Id.*)

Additionally, in *HB Parkco Construction, Inc*., Cal/OSHA App. 07-1731, Decision After Reconsideration (Mar. 26, 2012), the employer relied on a plan for controlling vehicle operations

that required operators and on-foot workers to make eye contact and acknowledge each other through waiving or other clear method, but left that to employees to devise. The Appeals Board explicitly noted that in *R & L Brosamer, Inc., supra,* Cal/OSHA App. 03-4832, it rejected the employer's argument that placed responsibility on the on-foot employees to inform the operators of their presence as a method of fulfilling the employer's requirement to implement the required control of operations. (*HB Parkco Construction, Inc., supra,* Cal/OSHA App. 07-1731.) The Appeals Board explained that the method relied upon by the employer in *HB Parkco Construction, Inc., supra,* Cal/OSHA App. 07-1731, was the same ineffective system in place in *R & L Brosamer, Inc., supra,* Cal/OSHA App. 03-4832, and it did not ensure the operators were actually aware of on-foot workers.

In the instant matter, Employer's safety policy appears to bear similarities to the policy described in *R & L Brosamer, Inc., supra,* Cal/OSHA App. 03-4832. Valdelamar, Employer's site superintendent who was at the jobsite at the time of the accident, testified about both Employer's safety policy and the implementation of the safety policy at the jobsite. Exhibit 11 was identified as Employer's code of safe practices in effect at the time of the accident. The code of safe practices emphasizes employee responsibility to ensure loads, machinery, and blind spots are avoided. Valdelamar testified that new employees are trained about the risks of blind spots during their orientation and other trainings. Employer's safety risk assessment provides as an engineering control that employees must always maintain a visual communication with the operator and not approach vehicles from a blind spot. (Ex. 20.) The evidence presented at hearing demonstrated that Employer primarily relied upon a safety policy that charged employees with avoiding the heavy equipment. Such an inference is further supported by Employer's memorandum regarding the accident. (Ex. 19.)

Employer's memorandum regarding the accident includes a statement from Valdelamar regarding the accident. (Ex. 19.[5]) At hearing, Valdelamar testified that his statements in the memorandum reflected both an accurate representation of what Valdelamar told the author of the memorandum and that the statements were truthful and based on Valdelamar's observations on the day of the accident. Exhibit 19 states, in relevant part:

> Mr. Valdelamar stated that prior to the accident, he had instructed the injured worker (Mr. Brian Taylor) to assist employees who were assigned to move an

[5] It is noted that Employer objects to Exhibit 19 by asserting, amongst other things, that it contains hearsay. Exhibit 19 was admitted at hearing in accordance with section 376.2. Retired Associate Safety Engineer James Carmichael testified that, during the investigation, he received Exhibit 19 from Stanley Llaban, identified as Employer's Corporate Safety and Risk Manager, who also signed the document. Valdelamar testified that he reported to Llaban after the accident, as indicated in Exhibit 19. Evidence Code sections 1220, 1221, and 1222 support a finding that the affirmed statements of Valdelamar in Exhibit 19, as discussed herein, regarding the accident constitute exceptions to the hearsay rule as they are statements of Employer's authorized representative and adoptive admissions. Accordingly, pursuant to section 376.2, the use of Valdelamar's statements is not restricted to exclusively supplementing or explaining other evidence.

> auger stem from Rig 2 to a safer location for the preparation of the de-mobilization of Rig 2. Mr. Valdelamar further stated that Mr. Taylor, when walking towards the crews who were hoisting the auger stem, failed to notify the spotter or the excavator operator that he was approaching within the work area. Mr. Taylor approached the area within the blind spot of the excavator and he was pinched by the auger stem. Mr. Valdelamar said in his professional opinion that the accident was caused by an employee approaching hoisting operations while in the blind spot of the excavator equipment, causing both the spotter and excavator operator to be unable to see the employee.

Employer's memorandum demonstrates that Employer relied upon employee action to avoid the hazard rather than ensuring that the excavator operator knew the location of employees on foot, in a similar manner to the plan described in *R & L Brosamer, Inc*., *supra,* Cal/OSHA App. 03-4832 and *HB Parkco Construction, Inc*., *supra,* Cal/OSHA App. 07-1731. Valdelamar opined that Taylor was in a blind spot of the excavator and to conclude otherwise would suggest that the excavator operator was aware of Taylor's presence and acted without heed to Taylor's presence. As there was no evidence supporting that the excavator operator acted intentionally to injure Taylor and there is evidence supporting that the excavator operator was unaware of Taylor's presence, it is improper to conclude that the excavator operator was aware of Taylor's location at the time of the accident. Accordingly, an inference is drawn that the excavator operator was unaware of the location of Taylor at the time of the accident.

Additionally, Valdelamar testified that a spotter was present at the jobsite, but that the spotter's duties were limited to: directing the excavator to move, waiting for the load to be laid down, going over to the place where the load was laid down, and removing the load from the excavator. Further, Employer's initial appeal forms alleged that Taylor failed to use a handheld radio to communicate with the excavator operator. However, Valdelamar testified that the handheld radios were not being used by workers on foot. While neither a spotter nor a handheld radio is explicitly required, the totality of the circumstances supports the inference that Employer charged its on-foot employees with ensuring that they avoid the excavator rather than ensuring that the excavator operator was aware of the presence of the employees.

Employer contests the sufficiency of the evidence presented by the Division. More specifically, Employer alleges that the Division failed to establish that the operator was unaware of Taylor's location at the time of the accident. However, in *R & L Brosamer, Inc*., *supra,* Cal/OSHA App. 03-4832, the Appeals Board addressed the issue of sufficiency of the evidence of the violation. The Appeals Board stated:

> While the specific requirements of ensuring the operator is aware of the exact location of on-foot workers will vary from one setting to another, here Employer

> offered no evidence to contradict Reynolds's statements that there were no measures used to inform the operator of where she and Castro were located when they were in the pit, entering the pit, or re-entering the pit. For example, a spotter using hand signals, a short range walkie-talkie-type radio communicator used by the on foot workers to signal they were clear of the bucket's path, or a system to inform the operator when the root pickers were entering the excavation, would likely have avoided the fatal accident in this case. Without any evidence to rebut the Division's evidence that the only method used to avoid the hazard addressed by section 1592(e) was instruction to the on-foot workers to avoid being hit by the bucket, it is proper to uphold the citation.

(Id.)

Therefore, the Appeals Board identified that the focus of section 1592, subdivision (e), is whether an employer implemented sufficient controls for hauling or earth moving operations. In the instant matter, as discussed above, the evidence does not support the conclusion that Employer implemented sufficient controls. The Division has met its burden of proof to establish a violation of section 1592, subdivision (e).

a. The Independent Employee Act Defense

Employer asserted the Independent Employee Act defense (IEAD). In *Fedex Freight Inc.*, Cal/OSHA App. 1099855, Decision After Reconsideration (Sept. 24, 2018), the Appeals Board explained:

> There are five elements to the IEAD, all of which must be shown by an employer in order for the defense to succeed: (1) the employee was experienced in the job being performed; (2) the employer has a well-devised safety program; (3) the employer effectively enforces the safety program; (4) the employer has a policy of sanctions which it enforces against employees who violate the safety program; and (5) the employee caused the safety violation which he knew was contrary to employer's safety rules. (*Synergy Tree Trimming, Inc.*, [Cal/OSHA App.] 317253953, Decision After Reconsideration (May 15, 2017) [other citations omitted].)

As the IEAD is an affirmative defense, Employer bears the burden of proof to establish that all five elements of the IEAD are present by a preponderance of the evidence. "'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. [Citations.]" (*International Paper Company*, Cal/OSHA App. 14-1189, Decision After Reconsideration (May 29, 2015).) Additionally, where there are multiple employees involved, the employer must prove all elements as to all employees. (*Fedex Freight Inc.*, *supra*, Cal/OSHA App. 1099855.)

In the instant matter, Employer alleges that Taylor is responsible for the violation of section 1592, subdivision (e). As discussed above, Employer's safety policy charged on-foot workers with ensuring their own safety. Such a policy cannot be described as part of a well-devised safety program as such policies have been found insufficient by the Appeals Board. (See *R & L Brosamer, Inc*., *supra*, Cal/OSHA App. 03-4832; see also *HB Parkco Construction, Inc*., *supra*, Cal/OSHA App. 07-1731.) Additionally, Taylor testified that he did not knowingly violate Employer's safety rules at the time of the accident. Therefore, Employer failed to establish that it had a well-devised safety program and that Taylor caused a safety violation that he knew was contrary to Employer's safety rules. As such, Employer failed to establish the IEAD with regards to Taylor.

Additionally, Taylor was not the only employee involved in the accident because the excavator operator was an employee involved in the accident as well. The excavator operator was not summoned as a witness. Therefore, no evidence was presented about the excavator operator's experience. Moreover, as discussed above, it is not established that Employer had a well-devised safety program. Further, to the extent that the excavator operator's actions could be the basis for the IEAD, Employer failed to present any evidence that he acted in a manner that was an intentional and knowing violation of Employer's safety policy. As such, Employer has not established the IEAD for the excavator operator because it did not establish the first, second, and fifth elements of the affirmative defense. As such, Employer failed to establish the IEAD with regards to the excavator operator.

Pursuant to the foregoing, Employer failed to meet its burden of proof to establish the IEAD.

2. Did the Division establish that the citation was 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 actual hazard may consist of, among other things:
> […]

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

[…]

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

(1) Inpatient hospitalization for purposes other than medical observation.
(2) The loss of any member of the body.
(3) Any serious degree of permanent disfigurement.
(4) Impairment sufficient to cause a part of the body or the function of an organ to become permanently and significantly reduced in efficiency on or off the job, including, but not limited to, depending on the severity, second-degree or worse burns, crushing injuries including internal injuries even though skin surface may be intact, respiratory illnesses, or broken bones.

(Lab. Code §6432, subd. (e).)

The Appeals Board has defined the term "realistic possibility" to mean a prediction that is within the bounds of human reason, not pure speculation. (*Sacramento County Water Agency Department of Water Resources*, Cal/OSHA App. 1237932, Decision After Reconsideration (May 21, 2020).)

The parties stipulated that Taylor suffered serious physical harm as defined in Labor Code section 6432, subdivision (e), and a serious injury as defined in Labor Code section 6302, subdivision (h), and California Code of Regulations, title 8, section 330, subdivision (h). Additionally, the parties stipulated that Taylor's serious injury was caused by the accident that occurred on January 6, 2018, during his employment with Employer. Taylor testified that he was knocked over by an auger stem that was moved by the excavator and that, as a result, his leg was broken. Therefore, there is no dispute that Taylor suffered serious physical harm and that it resulted from the hazard caused by the violation of section 1592, subdivision (e). As such, serious physical harm was not merely a realistic possibility, but an actuality. Accordingly, the Division established a rebuttable presumption that the citation was properly classified as Serious.

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

Labor Code section 6432, subdivision (c), provides that an employer may rebut the presumption that a serious violation exists by demonstrating that the employer did not know and

could not, with the exercise of reasonable diligence, have known of the presence of the violation. In order to satisfactorily rebut the presumption, the employer must demonstrate both:

> (1) The employer took all the steps a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation, taking into consideration the severity of the harm that could be expected to occur and the likelihood of that harm occurring in connection with the work activity during which the violation occurred. Factors relevant to this determination include, but are not limited to, those listed in subdivision (b) [; and]
> (2) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered.

In *Sacramento County Water Agency Department of Water Resources, supra,* Cal/OSHA App. 1237932, citing *Ventura Coastal, LLC,* Cal/OSHA App. 317808970, Decision after Reconsideration (Sept. 22, 2017), the Appeals Board explained:

> A supervisor's knowledge of a hazard is imputed to the employer. [Citation.] In *Lift Truck Services Corporation*, Cal/OSHA App. 93-384, Decision After Reconsideration (March 14, 1996) the Appeals Board provided the rationale for the knowledge requirement employers may use to rebut the presumption of a serious injury: "With the purpose of the Act in mind, the Board reads the knowledge element of Labor Code section 6432 to encourage employers to conduct reasonably diligent inspections for violative conditions in the workplace so that the hazard associated with that condition can be timely corrected or, otherwise, face the prospect of a serious violation and heightened civil penalty."

As discussed above, Employer had an ineffective safety policy. Employer failed to take all the steps a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation by failing to establish an effective safety policy. Further, Valdelamar, a supervisor, was aware that there was an employee working in the area of the excavator and knew that Employer did not have a means of controlling the operations to ensure that the excavator operator knew of the employee's presence. As such, Employer failed to rebut the presumption of a Serious classification and the Serious classification was properly established.

4. Did the Division establish that the citation was properly characterized as Accident-Related?

In *Sacramento County Water Agency Department of Water Resources, supra,* Cal/OSHA App. 1237932, citing *RNR Construction, Inc., supra,* Cal/OSHA App. 1092600, the Appeals Board explained:

> In order for a citation to be classified as accident-related, there must be a showing by the Division of a "causal nexus between the violation and the serious injury." The violation need not be the only cause of the accident, but the Division must make a "showing [that] the violation more likely than not was a cause of the injury."

(Citations omitted.)

Labor Code section 6302,[6] subdivision (h), provides that a "serious injury" includes, among other things, any injury or illness occurring in a place of employment or in connection with any employment which requires inpatient hospitalization for a period in excess of 24 hours for other than medical observation. In the instant matter, pursuant to the stipulation of the parties, Taylor suffered a serious injury pursuant to Labor Code section 6302, subdivision (h), and California Code of Regulations, title 8, section 330, subdivision (h). Further, the parties stipulated that Taylor's serious injury was caused by the accident that occurred on January 6, 2018, during his employment with Employer. Additionally, the evidence adduced at hearing, and discussed above, supports that a causal nexus exists between the violation and the serious injury. Accordingly, the citation is properly characterized as Accident-Related.

5. Is the proposed penalty reasonable?

Penalties calculated in accordance with the penalty setting regulations set forth in sections 333 through 336 are presumptively reasonable and will not be reduced absent evidence that the amount of the proposed civil penalty was miscalculated, the regulations were improperly applied, or that the totality of the circumstances warrant a reduction. (*Sacramento County Water Agency Department of Water Resources, supra,* Cal/OSHA App. 1237932, citing *RNR Construction, Inc., supra,* Cal/OSHA App. 1092600.)

The parties stipulated that the penalty was calculated in accordance with the Division's policies and procedures. As the citation is affirmed and no additional evidence was presented regarding the penalty calculations to call them into question, the proposed penalty is affirmed.

[6] Labor Code section 6302 was amended effective January 1, 2020. However, the analysis relied upon herein for the definition of "serious injury or illness" uses the definition effective on the date of issuance of the citation, July 3, 2018.

Conclusion

The evidence supports a finding that Employer violated section 1592, subdivision (e), by failing to implement sufficient controls for hauling operations to ensure that vehicle operators knew of the presence of workers on foot in the area of operation. The violation was properly classified as Serious and properly characterized as Accident-Related. The proposed penalty is found reasonable.

ORDER

It is hereby ordered that Citation 1 is affirmed and the associated penalty is affirmed and assessed as set forth in the attached Summary Table.

Dated: 08/05/2020

Christopher Jessup
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.**