BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	**Inspection No.**
TESLA, INC. **901 Page Avenue** **Fremont, CA 94538** **Employer**	**1454931** **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code, issues the following Decision After Reconsideration in the above-entitled matter.

JURISDICTION

Tesla is a car manufacturing company. On January 8, 2020, the Division of Occupational Safety and Health (the Division), through Senior Safety Engineer, Charles Jackson (Jackson), commenced an accident investigation of Employer's manufacturing facility located at 45500 Fremont Boulevard, in Fremont, California (site or worksite).

On July 1, 2020, the Division issued two citations to Employer alleging violations of safety orders set forth in title 8 of the California Code of Regulations.[1] Citation 1, Item 1, asserted a General violation of section 1509, subdivision (a), asserting that Employer failed to implement an effective Injury and Illness Prevention Program (IIPP). Citation 2 initially alleged a Serious, Accident-Related violation of section 1632, subdivision (b)(1), asserting that Employer failed to guard floor openings. However, the Division moved to amend Citation 2 to allege, in the alternative, a violation of section 1541, subdivision (l)(2), and assert that Employer failed to provide adequate barrier protection for an excavation by means of a barricade or cover. The Division also sought to amend the alleged violation description. The motion to amend was granted by the ALJ.

Employer filed a timely appeal of each citation. Employer's appeal contested the existence of the violations, the classification, and the reasonableness of the proposed penalties. Employer also asserted numerous affirmative defenses.

This matter proceeded to hearing before Christopher Jessup (Jessup), Administrative Law Judge (ALJ). ALJ Jessup conducted the hearing over eight days on October 18, 19, and 20, 2023, on March 12, 13, and 14, 2024, and on April 24 and 25, 2024, with the parties and witnesses appearing remotely via the Zoom video platform. Alka Ramchandani-Raj, attorney with Littler Mendelson, P.C., represented Employer. Deborah Bialosky, Staff Counsel, represented the

[1] References are to title 8 of the California Code of Regulations unless otherwise specified.

Division. This matter was submitted for Decision on October 31, 2024.

On November 27, 2024, the ALJ issued a Decision that affirmed both citations, the classification, and the penalties. Employer now files a Petition for Reconsideration (Petition) challenging the ALJ's affirmance of both citations, the denial of its due diligence defense, and the Serious classification for Citation 2.[2] The Division filed an Answer.

ISSUES

1. Did Employer fail to implement and maintain an effective IIPP?

2. Did Employer fail to provide adequate barrier physical protection for an excavation by failing to ensure that it was barricaded or covered?

3. Did Employer establish the due diligence defense?

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

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

FINDINGS OF FACT

1. Employer maintains a car manufacturing facility in Fremont, California.

2. One of the structures at Employer's facility is a permanent, tent-like structure that houses an assembly line, known as the "GA4 tent" or structure. The structure is at least 200 feet long and 90-100 feet wide.

3. Employer contracted G&G Builders Inc. (G&G) to install anchors at the base of each arch or framing member supporting the GA4 tent. The project involved excavating holes ("excavations") to allow anchors to be placed around the perimeter of an existing structure.

4. Employer also contracted with Apollo Sheet Metal (Apollo) to remove, and eventually reinstall, ductwork on one side of the GA4 tent so that G&G could access the space and install the anchors.

5. Employer stipulated that it was both the controlling and correcting employer at this worksite under the multi-employer worksite regulation. Therefore, Employer had the responsibility for actually correcting the hazard.

6. Juan Romero (Romero) worked for Employer as a project manager and was involved in overseeing the project at issue in this case. Among other things, Romero managed the

[2] The petition does not specifically challenge the Accident-Related classification or the penalty; therefore, assuming a violation is found and it is found to be Serious, those additional issues are waived. (Lab. Code, § 6618.)

construction schedule, the sequence of work, oversaw the project, had the ability to correct hazards, and had authority to ensure contractors followed applicable safety regulations.

7. G&G's installation of the anchors began the last week of 2019 and continued into the new year. G&G installed one anchor on December 31, five anchors on January 2, and dug five excavations on January 3.

8. Apollo worked at the worksite on January 1, 2020, and removed ductwork on one side of the GA4 tent to allow the anchoring work to occur in that location.

9. During the first two days that G&G performed anchor installation, G&G used mechanical equipment, including a Bobcat drilling machine, to drill holes and drive the anchors into the ground. The anchors were completed the same day, without any need for additional backfilling or barrier protection.

10. During the first two days that G&G performed anchor installation, Romero spent about half the day, in various increments, observing G&G's work.

11. On January 3, 2020, G&G was directed to install the anchors in the location where Apollo had removed the ductwork. Due to limited space in the area, G&G altered the process it used to install the anchors. Excavations were dug by hand, using picks, shovels, and other equipment, without the Bobcat drilling machine. Because the excavations were dug by hand, the diameter of the excavations was much larger and the process took longer than when G&G had used mechanical equipment.

12. Romero went to the site at least two times on January 3, 2020—at approximately 10 a.m. and 12 p.m. Romero observed the holes being dug and spoke to Eric Montano (Montano), G&G's foreman.

13. After his worksite visit at approximately noon on January 3, Romero did not go back to the worksite to see if G&G had finished the work, nor did he determine whether the excavations were covered.

14. Because the excavations were dug by hand on January 3, 2020, G&G did not complete installation of the anchors the same day, as it had on prior occasions. G&G also did not cover the excavations upon its departure for the day.

15. Apollo arrived at the site, in low light conditions, on the morning of January 4, 2020, to reinstall the ductwork on one side of the GA4 tent.

16. There were approximately five excavations at the jobsite when the Apollo employees arrived on January 4, 2020, that were created by G&G Builders on January 3, 2020.

17. Apollo employees observed several unfilled and uncovered excavations and placed covers over some, but not all, of them.

18. On the morning of January 4, 2020, Robert Laney (Laney), an Apollo employee, was injured when he stepped into an uncovered excavation outside of the GA4 tent.

19. The excavation that injured Laney was not covered or barricaded prior to the accident.

20. The excavation that caused the injury measured approximately 13 inches across and was approximately three feet deep.

21. There is a realistic possibility that serious physical harm could result from an employee stepping into an uncovered excavation that is approximately 13 inches wide and approximately 3 feet deep.

22. Laney's injury consisted of a broken femur and he was hospitalized for more than medical observation.

23. Romero did not know that the excavations were left uncovered prior to the accident.

24. Employer had an adequate written IIPP requiring inspections and audits to identify and evaluate hazards when new processes, procedures, or equipment may present a new hazard or when Employer's management, supervisors, or employees discover or identify a previously unrecognized hazard.

25. Employer employs environmental health and safety (EHS) personnel. They are responsible for onboarding contractors, safety compliance and audit programs, contractor orientation, preplanning tools, and investigating accidents.

26. Laura Harting (Harting) is Employer's Director of EHS.

27. Employer requires contractors to complete an onboarding and orientation process, which includes the provision of safety information. The program covers topics such as required documentation, personal protective equipment, emergency information, stop work authority, and covering excavations. Employer also provides single-sheet safety handouts.

28. Employer requires contractors to complete a daily pre-task plan, which identifies the hazards associated with the work and appropriate mitigations. Employer also requires completion of job hazard analyses.

29. Employer generally reviewed the pre-task plans on a weekly basis.

30. Employer identified the project involved in the accident as being not high-risk and assumed that hazards would not be left behind by the project.

31. Employer reviewed subcontractors' safety histories as part of the qualification process.

DISCUSSION

1. Did Employer fail to implement and maintain an effective IIPP?

In Citation 1, Employer was cited for an alleged violation of California Code of Regulations, title 8, section 1509, subdivision (a).

Section 1509, subdivision (a), provides that "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." Section 3203, subdivision (a), in turn, states:

> (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:
> […]
> (4) Include procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices. Inspections shall be made to identify and evaluate hazards:
> (A) When the Program is first established; […]
> (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 Alleged Violation Description (AVD) for Citation 1, as amended, provides:

> Prior to and during the course of this investigation, including[,] but not limited to, on January 4, 2020, the employer did not implement and maintain an effective Injury and Illness Prevention Program in accordance with section 3203 of the General Industry Safety Orders.
>
> The employer did not conduct an inspection to identify unsafe conditions and work practices of sub-contractors at the G4 jobsite drilling area to ensure all openings were guarded and/or excavations were protected and warning signs installed.

The Division has the burden of proof to establish each element of the alleged violation by a preponderance of the evidence. (*National Distribution Center, LP, Tri State Staffing*, Cal/OSHA App. 12-0391, Decision After Reconsideration (Oct. 5, 2015) (*National Distribution*).) The Division must also prove employee exposure to the violative condition. (*Ibid*.)

To prove a violation of section 3203, subdivision (a)(4), based upon a failure of implementation, the Division must establish two basic elements: a triggering event occurred requiring an inspection to identify and evaluate hazards, and Employer failed to effectively implement its duty to inspect, identify, and evaluate the hazard. (*Hamilton Iron Works*, *Inc*.,

Cal/OSHA App. 1497263, Decision After Reconsideration (June 12, 2024) [citing *OC Communications*, *Inc*., Cal/OSHA App. 14-0120, Decision After Reconsideration (Mar. 28, 2016); *Hansford Industries*, *dba Viking Steel*, Cal/OSHA App. 1133550, Decision After Reconsideration (Aug. 13, 2021)].)

As to the first element, section 3203, subdivision (a)(4) requires that an employer perform an inspection to identify and evaluate hazards under at least three sets of circumstances: (1) when the program is first established, (2) when new substances, processes, procedures, or equipment are introduced that represent a new hazard, or (3) whenever the employer is made aware of a new or previously unrecognized hazard.[3] (§ 3203, subd. (a)(4)(A)-(C).)

The ALJ's Decision concluded that G&G's decision or election, on January 3, 2020, to dig the excavations for the anchors by hand rather than using powered equipment, constituted a new process or procedure representing a new hazard because it prevented the anchors from being completely installed on the same day and left open excavations at the end of the day. (Decision, pp. 7-9.) In contrast, Employer argues that no new hazard existed. (Petition, p. 11, 15.) Employer argues that the excavations were the hazard, and that these hazards existed on each date that G&G was at the worksite, not just on January 3, when they started digging the excavations with hand tools. (Petition, pp. 11, 15.)

After careful review of the arguments, we agree with the ALJ's analysis of the first element. Section 3203, subdivision (a)(4)(B) requires an inspection "[w]henever new substances, processes, procedures, or equipment are introduced to the workplace that represent a new occupational safety and health hazard." A process is defined as "a series of actions that produce something or that lead to a particular result."[4] Here, the shift from using mechanical equipment to manually digging the excavations with shovels, picks, and other hand tools constituted a use of new equipment. (Decision, 8.) It also constituted a new action in a series of actions (i.e., a process) to achieve a particular result (i.e., excavating a hole for the placement of the anchors). (Decision, 8.) The new process created a new hazard because it created larger excavations in the ground and prevented the anchors from being completed, and the excavations backfilled, on the same day. As the ALJ noted, "[b]ecause the process used the day before the accident resulted in excavation holes that were not completed on the same day as they were created and that process resulted in excavation holes with larger dimensions, it is apparent there was a new process or procedure in place at the jobsite." (Decision, 8.) Thus, we find the first element is satisfied.

Turning to the second element, the Decision found that Employer did not engage in sufficient efforts to identify and evaluate this new workplace process. The Decision found that Romero did not know that any holes would be left uncovered on January 3 and 4, 2020. (Decision, p. 9.) The Decision states,

[3] As a point of clarity, while our present analysis focuses on the triggering events set forth in section 3203, subdivisions (a)(4)(A)-(C), we do not necessarily hold that those are the only circumstances where an inspection is required. The safety order additionally requires "scheduled periodic inspections." (§ 3203, subd. (a)(4).)

[4] Merriam-Webster (online) <https://www.merriam-webster.com/dictionary/process> [accessed June 29, 2026].

> [B]ecause Romero was unaware that the excavation holes were left in a hazardous condition and based on Romero's testimony and the other evidence establishing that the holes were not covered prior to the accident, it is inferred that Employer did not investigate the status of the excavation holes prior to the accident. Employer's IIPP indicates that additional inspections and audits are necessary to identify and evaluate hazards when new processes, procedures, or equipment may present new hazards or when Tesla management, supervisors, or employees discover or identify a previously unrecognized hazard. Here, the failure to investigate the status of the excavation holes prior to the accident is the direct result of the failure to identify the excavation holes as a hazard despite Romero's knowledge about the creation of the excavation holes and knowledge about the safety requirements of the Cal/OSHA regulations.
>
> Accordingly, the Division has met its burden of proof to establish a violation of section 1509, subdivision (a), and Citation 1 is affirmed.

(Decision, p. 9.)

In contrast, Employer argues that Romero inspected the worksite multiple times on December 31, January 2, and January 3. (Petition, pp. 13-14.) Employer argues that the law does not and/or should not require more frequent inspections. (Petition, pp. 13-14.) Employer states, "[t]he law does not require a general contractor to conduct inspections more frequently than Romero did. The mere fact that a hole existed at 12 pm when Romero conducted his final inspection of the site on January 3, 2020, did not automatically mean that the hole would still be, or would be expected to be, present when G&G left that day . . . " (Petition, p. 13.) Employer also contends, "[t]here is no case law that specifies that a general contractor should, or should be able to, anticipate that a new process implemented by a subcontractor results in the creation of a new hazard, particularly when that new process has not been identified by the contractor, is not part of the general contractor's specialty, and is the reason that the contractor was contracted to do the work." (Petition, p. 14.)

Here, after considering all arguments, we conclude that the record supports the ALJ's determination. The record demonstrates that G&G installed one anchor on December 31, 2019, five anchors on January 2, 2020, and dug five excavations on January 3, 2020. The record also demonstrates that Romero spent about half the day at the jobsite on both December 31, 2019, and January 2, 2020, observing G&G perform the work. The record further demonstrates that during the first two days G&G used mechanical equipment, including a Bobcat, to install the anchors. The anchor installation was completed on both of these days, without any need for additional backfilling or barrier protection.

However, there was a change in the process on January 3, 2020. G&G was directed to install the anchors in the location where another contractor (Apollo) had previously removed ductwork. Due to limited space in the area, G&G altered the process it used to install the anchors.

Excavations were dug by hand, using picks, shovels, and other equipment. [5] Romero admits he actually observed an employee at each of the holes digging. (HT: 669.) Because the holes were dug by hand, the diameter of the holes was much larger and the process took longer.

Notwithstanding this change in both the process and equipment used, the evidence indicates that Romero did not visit the jobsite with necessary frequency. The record indicates that Romero went to the site at least two times on January 3, 2020—at approximately 10 a.m. and 12 p.m. During his visits, Romero observed the excavations being dug and spoke to Montano. After his visit to the worksite at approximately noon on January 3, 2020, Romero did not go back to the worksite to see if G&G finished the work, nor did he determine whether they covered the excavations. Rather, despite a new process being utilized, Romero acted on the assumption that the anchor placement would proceed under the same timelines and conditions as the prior days—an assumption that proved to be erroneous.

Given the foregoing facts, we (like the ALJ) cannot conclude that Employer implemented effective procedures for identifying and evaluating workplace hazards. In sum, we agree with the ALJ that the Division met its burden of proof to establish a violation of section 1509, subdivision (a), and Citation 1 is affirmed.[6] Moreover, our conclusion is bolstered by the fact that Employer stipulated to being *both* the controlling and correcting employer, thus the inspection was particularly insufficient for such a dual role.[7] We also observe that a single instance of a violation of an essential element of an IIPP is sufficient to sustain a violation. (*OC Communications, Inc.*, Cal/OSHA App. 14-0120, Decision After Reconsideration (Mar. 28, 2016); *Arana Residential and Commercial Painting,* Cal/OSHA App. 1568252, Decision After Reconsideration (Oct. 18, 2024).)

2. Did Employer fail to provide adequate barrier physical protection for an excavation by failing to ensure that it was barricaded or covered?

For Citation 2, the Division initially alleged a violation of section 1632, subdivision (b)(1), requiring "[f]loor, roof and skylight openings shall be guarded by either temporary railings and toeboards or by covers." However, the Division subsequently moved to amend the citation to allege, in the alternative, a violation of section 1541, subdivision (l)(2). Section 1541, subdivision (l)(2), provides:

[5] Notwithstanding Employer's attack on the credibility of Eric Montano (Montano), G&G's foreman, we credit Montano's testimony asserting that the methods used to install the anchors changed on January 3, 2020, from mechanical to manual. There is other evidence corroborating that assertion. For example, on the first two days, G&G was able to completely install the anchors on the same day. However, on January 3, 2020, the record demonstrates they did not complete several anchor installations, leaving multiple holes that measured approximately 13 inches across and three feet deep. The dimensions of the excavations also differed. There were documents that support Montano's assertions. (See also, Exs. 14 and I.) Additionally, Romero's memory of the methods utilized was questionable.

[6] Employer argues also vaguely argues that the Decision imposed specific requirements on Tesla that are not explicitly mandated in the safety standard. However, we see no such imposition and reject Tesla's corresponding due process argument.

[7] Employer's Petition seeks to limit its stipulation that it was both the controlling and correcting employer. (Petition, pp. 16-17, 23.) However, the stipulation entered into by Employer was not so restricted (HT, pp. 14-15) and that stipulation is binding. (E.g., *Leonard v. City of Los Angeles* (1973) 31 Cal.App.3d 473, 477.)

> Adequate barrier physical protection shall be provided at all remotely located excavations. All wells, pits, shafts, etc., shall be barricaded or covered. Upon completion of exploration and other similar operations, temporary wells, pits, shafts, etc., shall be backfilled.

The AVD for Citation 2 was also amended by order on February 1, 2022, and provides:

> Prior to and during the course of this investigation, including but not limited to, on January 4, 2020, the controlling and correcting employer (Tesla, Inc. dba Tesla Motors, Inc.) failed to ensure floor openings located at GA4 was guarded by either a temporary railing or covers. As a result, the exposing employer (Apollo Sheet Metal, Inc. dba Apollo Mechanical Contractors) employee received a serious injury when he fell into the unguarded opening. (Reference Title 8 CCR 3212(a)(1))
>
> This citation is issued under Multi-Employer worksite regulation (Title 8 CCR 336.10)[.]
>
> Or in the alternative, […] Prior to and during the course of this investigation, including but not limited to, on January 4, 2020, the controlling and/or correcting employer (Tesla, Inc. dba Tesla Motors, Inc.) failed to ensure an excavation located at GA4 was protected by either barriers or covers. As a result, the exposing employer (Apollo Sheet Metal, Inc. dba Apollo Mechanical Contractors) employee received a serious injury when he fell into an unprotected excavation.
>
> This citation is issued under Multi-Employer worksite regulation (Title 8 CCR 336.10)[.]

To prove a violation of section 1541, subdivision (l)(2), the Division must prove that Employer failed to provide adequate barrier physical protection at all remotely located excavations.

Employer's Petition does not appear to dispute the existence of a violation. Nevertheless, we, like the ALJ, easily conclude that the Division met its burden to establish the existence of a violation. The parties stipulated that on the morning of January 4, 2020, there were five excavation holes at the jobsite created by G&G on January 3, 2020. The parties stipulated that Laney stepped into an uncovered excavation. Further, the parties stipulated that Laney sustained a broken femur. In short, as stated in the Decision, "As there were excavation holes at the jobsite that were not protected by means of barricades or covers, the Division met its burden of proof to establish a violation of section 1541, subdivision (l)(2)." (Decision, p. 11.)

3. Did Employer establish the due diligence defense?

Tesla argues it established the due diligence affirmative defense. The Board recognizes a due diligence affirmative defense available to controlling employers cited under the multi-employer worksite regulation. (*McCarthy Building Companies, Inc,* Cal/OSHA App. 11-1706, Decision After Reconsideration (Jan. 11, 2016) (*McCarthy*).) This defense has its genesis in the court decision of *United Association Local Union 246, AFL-CIO v. California Occupational Safety and Health Appeals Bd.* (2011) 199 Cal.App.4th 273, where the Court of Appeal required the Board to recognize a due diligence defense for controlling employers. (*McCarthy*, *supra*, Cal/OSHA App. 11-1706.) The Appeals Board has explained the defense as follows:

> In determining whether the controlling employer exercised due diligence, the totality of circumstances will be considered. (*McCarthy*, *supra*, Cal/OSHA App. 11-1706.) Multiple factors are relevant to the determination of due diligence, including: (a) whether the controlling employer conducted periodic inspections of appropriate frequency; (b) whether the controlling employer implemented an effective system for promptly correcting hazards; (c) whether the controlling employer enforced the other employer's compliance with safety and health requirements with an effective, graduated system of enforcement and follow-up inspections; (d) whether the controlling employer researched the safety history of the subcontractor; and (e) whether the hazard was latent and unforeseeable. [8] (*Ibid*; see also *Hanover RS Construction*, *LLC*., Cal/OSHA App. 1205077, Decision After Reconsideration (May 26, 2011) (*Hanover*).)
>
> [….]
>
> In resolving whether to apply the defense, when some factors favor and others disfavor the defense, "[t]he Board does not consider or apply the foregoing factors mechanically." (*Hanover*, *supra*, Cal/OSHA App. 1205077; *McCarthy*, *supra*, Cal/OSHA App. 11-1706.) "Rather, the respective weight assigned to each factor, or combination thereof, will properly depend on the circumstances of each case, including the type and severity of the hazard presented." (*Ibid*.)

(*Lennar Corporation*, Cal/OSHA App. 1340561, Decision After Reconsideration (Sept. 26, 2023).)

To begin with, it is important to note that the due diligence defense applies only to controlling employers. (*McCarthy*, *supra*, Cal/OSHA App. 11-1706.) Here, however, Tesla stipulated to being *both* the *controlling* and the *correcting* employer under the multi-employer

[8] The Board may also consider factors set forth by the state of Washington in WISHA Regional Directive 27.00. (*McCarthy*, *supra*, Cal/OSHA App. 11-1706.)

worksite regulation. A correcting employer is defined as "[t]he employer who had the responsibility for actually correcting the hazard (the correcting employer)." (§ 336.10.) Neither the courts nor the Board have extended the due diligence defense to correcting employers and we decline to do so now. The due diligence defense recognizes that "[t]he general contractor is not normally required to inspect for hazards as frequently or to have the same level of expertise and knowledge of applicable standards as the subcontractor it hired." (*Harris Construction Company*, Cal/OSHA App. 03-3914, Decision After Reconsideration (Feb. 26, 2015).) That rationale, however, does not apply equally to correcting employers, who must necessarily have heightened duties of inspection, expertise, and knowledge to ensure that hazards are appropriately corrected.[9]

However, even assuming, *arguendo*, that the defense could apply in this circumstance, we agree with the ALJ's Decision, which concluded (after evaluating multiple factors) that Employer failed to meet its burden of proof to establish the defense.

(a) Whether the controlling employer conducted periodic inspections of appropriate frequency allowing it to discover and control recognized hazards.

Here, the ALJ found that Employer did not engage in sufficient inspections to discover and control the hazards that were created on January 3, 2020. (Decision, p. 13.) The Decision states, "the evidence shows that Romero observed the creation of the hazard that injured Laney and did not take action to inspect the jobsite before other employees were exposed to the hazard." (Decision, p. 13.)

Employer, in contrast, argues that Romero engaged in inspections of appropriate frequency. (Petition, p. 20.)

Here, we simply disagree (as we have already explained) with Employer's assertion that it engaged in effective or adequate inspections and inquiries on January 3, 2020. Romero visited the site on January 3, 2020, and must have necessarily[10] observed that the excavations were being dug by a new process. However, as discussed above, there is no evidence that either he nor any EHS employees confirmed that the anchors were completed that day (or at least the holes covered) prior to Apollo's arrival, nor evidence that Romero made sufficient inquiries or inspections regarding the new process—a critical oversight where Employer stipulated that it was the correcting employer.[11]

Ultimately, on this record, we agree with the ALJ and conclude that the record evidence preponderates to the conclusion that Employer failed to conduct periodic inspections of

[9] This, of course, does not mean that a correcting employer cannot attempt to avail itself of other defenses, including for example, the independent employee act defense or logical time defense.

[10] Romero said that he visited the site multiple times on December 31 and January 2—spending as much as half the day on each of those days in various increments. It follows, at least by inference, that he must have had occasion to view the methods utilized on the first two days, and observed how they changed on January 3.

[11] Employer's Petition indicates that if G&G and Apollo had complied with its policies, including but not limited to covering the holes, contacting Romero or Tesla EHS, then the accident would not have occurred. (Petition, p. 8.) Even if true, it does not automatically relieve Employer of responsibility to adequately inspect the work and ensure compliance with its policies and procedures, particularly under the multi-employer worksite regulation. (§ 336.10.) We also see no need to take official notice of the citations purportedly levied against Apollo and G&G.

appropriate frequency allowing it to discover and control recognized hazards. As noted by the ALJ, "On this basis, Employer's lack of further inspection of the jobsite to ensure that the hazard was resolved and lack of action to resolve the hazard is deficient on its face." (Decision, p. 13.) However, we emphasize that this conclusion is case specific.

(b) Whether the controlling employer implemented an effective system for promptly correcting hazards.

The ALJ's Decision found that Employer failed to implement an effective system for promptly correcting hazards. In particular, the ALJ concluded that Employer failed to identify and correct the hazard posed by the uncovered excavations, notwithstanding that there was a change in the process and the resulting excavations were neither hidden nor unknown to Employer. (Decision, p. 13.) The Decision states, "Employer's failure to identify a readily apparent hazard in plain view renders its system for promptly correcting hazards ineffective." (Decision, p. 13.) The Decision further states, "Employer was responsible for both correcting the hazard and for ensuring that the hazard was corrected because of its dual role as the correcting and controlling employer. Further, because of this dual role, Employer's failure to identify the hazard caused it to fail at both correcting the hazard and taking action to ensure correction of the hazard in a timely manner." (Decision, p. 14.)

Employer advances several arguments. Employer argues that it recognized the hazard of uncovered excavations from the outset. (Petition, pp. 20-21.) Employer states that when Romero observed the holes employees were actively working on them and were therefore not a hazard. (Petition, pp. 20-21.) Employer argues the hazard was not in plain view. (Petition, pp. 20-21.) Employer argues that it acted promptly to address the hazard of the uncovered holes once the hazard was identified. (Petition, pp. 20-21.) Employer also argues that it has a robust program to ensure that hazard identification and correction occurs. (Petition, pp. 21.)

At the outset, we do recognize that, on paper, Employer had many aspects of a well-devised plan. For example, Employer requires contractors to complete daily pre-task plans, which identify the hazards associated with the assigned tasks and appropriate mitigations.[12] Employer also requires completion of job hazard analyses. Employer also employs EHS personnel and project managers to perform safety compliance inspections and audits. Project managers have the ability to correct hazards. (HT: 1180-81.) Romero is authorized to remove unsafe employees. (HT: 640-641.) Romero testified that if he observed any employees engaging in unsafe actions, he immediately addressed it with an appropriate supervisor. (HT: 640.) Likewise, EHS personnel would also address observed hazards. (HT: 1180.)

However, in analyzing this factor we do not consider Employer's policies and procedures in a vacuum. Rather, we must consider whether Employer *implemented* an effective system for promptly correcting hazards as applied to the facts on January 3 and 4, 2020. With the inquiry so

[12] As discussed below, while Employer requires contractors to prepare pre-task plans, there were flaws in implementation of this procedure. They are only reviewed on a weekly basis for completeness and substance. Harting, Employer's EHS Director, admitted that they had not yet collected any pre-task plans from G&G because they had not been working at the worksite for more than a week. (HT: 1182, 1305, 1308-1309.)

framed, we agree with the ALJ that Employer failed to implement an effective system for promptly correcting hazards.

Romero saw excavations being dug on January 3, 2020, must necessarily have seen that a new procedure or process was employed, and knew that Apollo employees would work in the area the next day. However, neither Romero nor any of Employer's EHS personnel engaged in adequate efforts to confirm that the anchors were either completed or the holes were covered prior to the Apollo employee's arrival. Under these specific facts, we cannot find that employer implemented an effective system for promptly correcting hazards, particularly where Employer also stipulated to being the correcting employer. We, like the ALJ, find that this factor does not support application of the due diligence defense.

(c) Whether the controlling employer enforced the other employer's compliance with safety and health requirements with an effective, graduated system of enforcement and follow-up inspections.

The ALJ found that Romero observed the holes and that "Employer's lack of correction and lack of follow-up inspection of the hazard renders its enforcement ineffective." (Petition, p. 14.) The ALJ also took issue with the Employer's delayed review of the pre-task plans. The Decision stated,

> Harting explained the pre-task plans were forms Employer required subcontractors to complete before commencing work to identify tasks, hazards, and controls. Pursuant to Harting's testimony, the pre-task plans are completed by subcontractors daily, but are typically only submitted to Employer weekly. Harting testified that coaching or direction is provided if there are problems with the form completion. The process described requires hazard identification, but the review of that information by Employer is not completed until days later. Notably, Harting testified that she did not believe that the Environmental Health and Safety staff member assigned to the project audited the pre-task plans prior to the accident because the project had not been at the jobsite for a week at the point of the accident. Weekly collection and review creates a situation where employees are exposed to hazards prior to the point where Employer, as the correcting and controlling employer, can take appropriate action to correct those hazards. This process is not effective for ensuring other employers' compliance with health and safety requirements.

(Decision, p. 14.) The ALJ also indicated that the EHS field inspections were deficient because this task was not considered a high-risk project. (Decision, p. 15.)

In contrast, Employer argues that the ALJ's Decision ignored important facts. Employer argues that Romero visited the site multiple times over three days and never observed any hazards requiring correction during his visits. (Petition, p. 21.) Employer argues that Romero immediately

addressed the uncovered holes once he learned of them and terminated G&G's contract. (Petition, p. 21.) Employer also notes that it has a robust safety program for its subcontractors. (Petition, pp. 21-22.)

On this factor, we acknowledge that there are facts that point in both directions. Nevertheless, on balance, we agree with the ALJ that there were flaws with the *implementation* of Tesla's safety program as to this particular project. As we have already noted, Employer's inspections were insufficient on January 3, 2020. Further, while Employer did have its contractors complete pre-task plans, it did not review them until days later. We therefore conclude that this process was not effective for enforcing the other employer's compliance with safety and health requirements. As such, we find that this factor does not support application of the due diligence defense.

(d) Whether the controlling employer researched the safety history of the subcontractor.

The evidence demonstrates that Employer considers a subcontractor's safety history when hiring subcontractors. Employer utilized a prequalification process, which includes a review of the contractor's history. Therefore, we find that this factor weighs in favor of application of the due diligence defense.

(e) Whether the hazard was latent and unforeseeable.

The ALJ held that the hazard was not latent because Romero saw the excavations being created and was aware of them. (Decision, p. 15.) The Decision states,

> Romero saw the excavation holes as they were being created and was aware of the holes. Employer did not conduct a follow-up inspection to confirm the status of the holes and did not ensure that the hazard was corrected before other employees entered the area. Employer's failure to identify the hazard is not the same question as whether the hazard itself was latent and unforeseeable. Romero's testimony establishes that he was aware of the holes and that they were readily apparent. This is further supported by Laney's testimony that he noticed several uncovered holes at the jobsite when he arrived in the area of the accident. As such, the hazard was readily apparent.

(Decision, p. 15.)

In contrast, Tesla argues that the hazards were latent because Romero did not know, and had no reason to know, the holes would still be present at the end of the day, particularly since G&G had completed the anchor installations on the same day on all prior visits. (Petition, 22.) Tesla also argues the hazard was latent because it trains the contractors to cover the holes. (Petition, p. 22.) It also contends that the holes were behind barriers.

Here, we agree with the ALJ that the hazard was readily apparent. Romero actually observed the excavations being dug by hand. Thus, the hazard was not latent or unforeseeable. We find this factor does not support application of the due diligence defense.

In sum, even if the due diligence defense were to apply here, it would not relieve Employer of liability. We affirm the ALJ's denial of the defense. As the ALJ noted, "[t]he majority of the factors weigh against finding that the due diligence defense was established and, notably, Employer was aware of the creation of the hazard and failed to conduct sufficient follow-up inspections to ensure the hazard was resolved." (Decision, p. 16.)

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

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

> There shall be a rebuttable presumption that a "serious violation" exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation. The demonstration of a violation by the division is not sufficient by itself to establish that the violation is serious. The actual hazard may consist of, among other things: […]
> (2) The existence in the place of employment of one or more unsafe or unhealthful practices that have been adopted or are in use.

The parties stipulated that there is a realistic possibility that serious physical harm could result from an employee stepping into an uncovered excavation hole with the dimensions of approximately 13 inches in width and approximately 3 feet in depth. (HT: 922-924.) Further, it was undisputed that Laney actually sustained serious physical injury, a broken femur requiring hospitalization for more than medical observation. Further, Jackson also testified that the hazard could cause serious physical harm. (HT: 913-914.)

Therefore, we conclude that the Division established a rebuttable presumption that a "Serious violation" occurred.

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

Labor Code section 6432, subdivision (c), provides a mechanism for Tesla to rebut the presumption of a Serious violation. It states:

> (c) If the division establishes a presumption pursuant to subdivision (a) that a violation is serious, the employer may rebut the presumption and establish that a violation is not serious by demonstrating that the Interline did not know and could not, with the exercise of reasonable diligence, have known of the presence of

> the violation. The employer may accomplish this by demonstrating both of the following:
> (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).
> (2) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered.

Here, we find that Employer failed to rebut the presumption of a Serious violation. We concur with the analysis in the ALJ's Decision, which noted:

> As discussed above, Romero observed the creation of the hazard, the hazard was obvious, Employer did not ensure that the hazard was corrected prior to Laney's exposure to the hazard, and Employer failed to follow up on the status of the hazard despite its role as the correcting and controlling employer. It cannot be concluded that Employer took all the steps that a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation because of these failures

(Decision, p. 19.) Additionally, although not raised in the Petition, it is evident that the Accident-Related classification was properly affirmed as there is a "causal nexus between the violation and the serious injury." (*Sacramento County Water Agency Department of Water Resources*, Cal/OSHA App. 1237932, Decision After Reconsideration (May 21, 2020).)

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DECISION

The Division established a violation of section 1509, subdivision (a) and Citation 1 is affirmed. The penalty was not challenged and is affirmed.

The Division established a violation of section 1541, subdivision (l)(2) and Citation 2 is affirmed. The Serious, Accident-Related classification is affirmed. The penalty was not challenged and is also affirmed.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

/s/ Ed Lowry, Chair
/s/ Judith S. Freyman, Board Member
/s/ Marvin Kropke, Board Member

FILED ON: 08/13/2026