BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1466722**
BRAGG INVESTMENT COMPANY INC. **6251 NORTH PARAMOUNT BOULEVARD** **LONG BEACH, CA 90805**	**DECISION**
Employer	

Statement of the Case

Bragg Investment, Inc. (Employer) provides crane services. Beginning February 28, 2020, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Arsen Sanasaryan (Sanasaryan), conducted an inspection arising from a collision at a construction site located at 898 South Prairie Street, in Inglewood, California (the site).

On August 27, 2020, the Division issued two citations to Employer alleging two violations of California Code of Regulations, title 8.[1] Citation 1 alleges Employer failed to ensure employees were effectively trained. Citation 2 alleges Employer failed to effectively control the travel of a crane.

Employer filed timely appeals of the citations, contesting the existence of the violations, their classifications, the reasonableness of abatement requirements, and the reasonableness of the proposed penalties. Employer asserted numerous affirmative defenses as to both citations.[2]

This matter was heard by Rheeah Yoo Avelar, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (Appeals Board) on April 26 through April 28, 2023. ALJ Avelar conducted the hearing with the parties and witnesses appearing remotely via the Zoom video platform. Michael Rubin, of Ogletree, Deakins, Nash, Smoak & Stewart, represented Employer. Lisa Wong, Staff Counsel, represented the Division. The parties stipulated to an amendment to the alleged violation description in Citation 1 wherein the crane model number "275" is corrected to "278." The matter was submitted on December 1, 2023.

[1] Unless otherwise specified, all references are to sections of California Code of Regulations, title 8.
[2] Except as otherwise noted in the Decision, Employer did not present evidence in support of its affirmative defenses, and said defenses are therefore deemed waived. (*RNR Construction, Inc.*, Cal/OSHA App 1092600, Denial of Petition for Reconsideration (May 26, 2017).)

Issues

1. Did Employer fail to effectively train employees to recognize, understand, and avoid the hazards of moving an unloaded crane?

2. Did Employer fail to effectively control the travel of a crane?

3. Did Employer establish any affirmative defenses?

4. Is Citation 1 properly classified as General?

5. Did the Division establish a rebuttable presumption that Citation 2 was properly classified as Serious?

6. 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?

7. Are the abatement requirements for Citations 1 and 2 reasonable?

8. Are the proposed penalties reasonable?

Findings of Fact

1. Employer's foreman Gary Bruns (Bruns) instructed employees Dieter Bandorf (Bandorf) and James Jonathan Kimes (Kimes) to move a Link-Belt HC-278H crane (Crane) so that it could serve another location at a construction site.

2. Bandorf and Kimes (the crew) were members of a labor union which provided them general crane training but did not give them training specific to the Crane.

3. The crew relied on Employer to provide on-the-job Crane-specific training.

4. Kimes completed a crane and site conditions inspection checklist prior to receiving instructions to move the crane but he did not perform another crane and site check after receiving the instructions.

5. Kimes, a journeyman crane oiler, drove the Crane, and Bandorf, a journeyman crane operator, spotted the Crane for him.

6. Kimes was permitted to drive the Crane under Bandorf's supervision.

7. The manufacturer's operation manual (manual) requires application of a load chart when the Crane moves with a load, and a travel chart when it moves without a load.

8. The Crane was unloaded but the crew followed the load chart.

9. Kimes was not aware that the travel chart set a maximum speed of one mile per hour for unloaded travel.

10. Bandorf elevated the Crane's boom beyond the maximum angle permissible for unloaded travel. Kimes was not aware that the boom was over-elevated.

11. The crew did not remove or stow the Crane's unrigged hook blocks for unloaded travel as the manual required.

12. The Crane's travel path at the site was outside and busy with active construction, parked vehicles, and moving traffic.

13. Upon reaching a turn in the travel path, the crew observed the boom of another, stationary, crane and they agreed they needed to lower their Crane's boom to avoid this overhead obstruction.

14. The crew made no specific plan to avoid the overhead obstruction other than to rely on visual estimation without travel chart consultation or measurements.

15. The crew did not lower their boom before proceeding on the travel path.

16. As Kimes drove the Crane around the corner, he could no longer see the overhead obstruction from the driver's cab. Meanwhile, Bandorf was spotting from a location where the Crane itself blocked his entire right field of vision, including the stationary crane and its boom to the right of the Crane.

17. The boom of the Crane struck the boom of the stationary crane, which then collapsed.

18. The falling boom and its components destroyed several objects and a building.

19. Effective crane-specific training is related to employee safety and health.

20. Crane collisions and resulting falling or flying debris create a realistic possibility of serious physical harm, such as in-patient hospitalization, amputation, disfigurement, and death.

21. The crew did not intentionally violate the manual or Employer's safety requirements.

22. The Crane's boom angle, speed, and unrigged hook blocks were readily visible.

23. The crew moved the Crane in this manner many times previously on the site.

24. The abatement requirements are reasonable.

25. The proposed penalties are calculated in accordance with the Division's policies and procedures.

Analysis

1. Did Employer fail to effectively train employees to recognize, understand, and avoid the hazards of moving an unloaded crane?

Citation 1 alleges a General violation of section 1509, subdivision (a), which requires:

(a) 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.

The citation includes a reference to section 3203, subdivision (a), which requires:

(a) Effective July 1, 1991, every employer shall establish, implement and maintain an effective Illness and Injury Program (Program). The Program shall be in writing and, shall, at a minimum:
    […]
    (7) Provide training and instruction:
        (A) When the program is first established;
        (B) To all new employees;
        (C) To all employees given new job assignments for which training has not previously been received;
        (D) Whenever new substances, processes, procedures or equipment are introduced to the workplace and represent a new hazard;
        (E) Whenever the employer is made aware of a new or previously unrecognized hazard; and,

(F) For supervisors to familiarize themselves with the safety and health hazards to which employees under their immediate direction and control may be exposed.

The citation further refers to section 1618, which provides:

(a) Maintenance, inspection and repair personnel are permitted to operate the equipment only where all the following requirements are met:
(2) The personnel either:
(A) Operate the equipment under the direct supervision of an operator who meets the requirements of Section 1618.1 (Operator Qualification and Certification); or
(B) Are familiar with the operation, limitations, characteristics and hazards associated with the type of equipment.

In Citation, 1, as amended, the Division alleges:

Prior to and during the course of the inspection, including, but not limited to, on February 28, 2020, employer did not ensure employees assigned to move the Link-Belt HC-278H crane were effectively trained on all hazards of the job site travel of the crane.

The Division has the burden of proving an alleged violation by a preponderance of the evidence. (*Guy F. Atkinson Construction, LLC*, Cal/OSHA App. 1332867, Decision After Reconsideration (Jul. 13, 2022).) "'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." (*Sacramento County Water Agency Department of Water Resources,* Cal/OSHA App. 1237932, Decision After Reconsideration (May 21, 2020).)

Application

Section 1502, in relevant part, provides that section 1509 applies wherever employment exists in connection with the construction of any fixed structure. It is undisputed that the crew was working on the construction of the new Rams Stadium. The safety order is thus applicable.

Violation

Pursuant to section 3203, subdivision (a), employers are required to establish, implement, and maintain an effective Injury and Illness Prevention Program (IIPP). To establish an IIPP violation, the flaws in a program must amount to a failure to "establish," "implement," or "maintain" an "effective" program. Even when an employer has a comprehensive IIPP, the

Division may still demonstrate a violation by showing that the employer failed to implement one or more elements. (*HHS Construction*, Cal/OSHA App. 12-0492, Decision After Reconsideration (Feb. 26, 2015).)

An IIPP can be found not effectively established, maintained, or implemented on the ground of one deficiency if that deficiency is shown to be essential to the overall program. (*Hansford Industries, Inc. DBA Viking Steel*, Cal/OSHA, App. 1133550, Decision after Reconsideration (Aug. 12, 2021).) Training is essential to an overall workplace safety program. (*Mountain Cascade,* Cal/OSHA App. 01-3561, Decision after Reconsideration (Oct. 17, 2003).) The Appeals Board has repeatedly found that the purpose of section 3203, subdivision (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.'" (*Timberworks Construction*, Inc., Cal/OSHA App. 1097751, Decision After Reconsideration (Mar. 12, 2019).)

The undisputed circumstances leading to the instant appeal are that Bruns instructed the crew to move an unloaded Crane from one location to another within a busy construction site. As the crew drove the Crane around a corner, its extended trailing boom struck a stationary crane. The collision caused the stationary crane's boom to fall, damaging a structure and objects on the ground.

Kimes testified that their two-cab Crane required two workers. He testified that as an oiler, he was responsible for maintaining the Crane, and that he could drive a crane as a vehicle under the direction of a certified crane operator. Kimes testified that Bandorf, an operator, solely controlled the boom and upper works of the Crane. Conrad Weidenkeller (Weidenkeller), Employer's Corporate Safety Officer, explained that union contract terms for two-cab cranes require task separation between two differently qualified workers. The Division contends that Kimes was insufficiently trained and therefore not familiar with the Crane as required by section 1618, subdivision (a)(2)(B), referenced in the citation above. However, there is no dispute that Bandorf was a certified operator (Hearing Transcript Volume (TR Vol) II 23, 193) and that Kimes was thus permitted to drive the Crane under Bandorf's supervision.

Kimes was a journeyman oiler and Bandorf was a journeyman operator, each with over ten years of experience with this Crane or similar cranes. They both had union certification showing they were qualified to work in their relative positions as oiler and operator on the Crane. (TR Vol II 85, 89, 137, 197-200.) (Exhibits I and J.) However, their union training did not provide instruction on the Crane specifically, thus they relied on Employer to provide on-the-job Crane-specific training. (TR Vol II 84, 88.) Employer's on-the-job training for the Crane does not appear to be documented but this does not necessarily establish a violation. The Division must show that

Employer's training failed to provide the crew with the knowledge, ability to recognize, understand, and avoid the hazards of executing travel of the Crane on the site.

The operator's manual (manual) provides a load chart applicable when the Crane carries loads, and a jobsite travel chart (Exhibit 25) applicable when the Crane does not carry loads. (TR Vol I 90, 114.) The Crane was not loaded but testimony and investigation interviews demonstrated that the crew applied the load chart rather than the travel chart. The crew's reliance on the wrong chart reflected their unfamiliarity with the manual's requirements, indicating ineffective training.

The evidence also demonstrated that the crew failed to adhere to other requirements in the manual. (TR Vol I 86; Vol II 22.) (Exhibit 15.) The travel chart sets a clear and broadly applicable speed limit of one mile per hour for unloaded travel. Employer's accident investigation report shows that the crew did not know their Crane's speed, estimating it to be "walking speed" or "two to three miles per hour." (Exhibit 19.) In testimony, despite being the Crane's driver, Kimes required exaggerated efforts to deduce and validate that its speed must have been one mile per hour. (TR Vol II 79-82.) The travel chart requires the Crane's boom and jib to be positioned between zero and 46 degrees from the horizontal for its particular length. (TR Vol I 115, 162.) The boom was at 69 degrees and Bandorf knew it exceeded the angle limit but rationalized, "per crane's load chart it was safe to move the crane in that configuration." (TR Vol II 185-186.) (Exhibit 16.) Finally, the travel chart requires the hook block to be stowed or removed when the Crane travels. However, the inspection interview notes establish that the crew left two hook blocks on the boom.

The crew's ongoing focus on the load chart shows their inability to distinguish between the manual's charts. Their other failures to recognize or understand the significance of the manual's requirements, demonstrate deficiencies in Employer's training. For these reasons, the Division has established a violation of section 1509, subdivision (a), by a preponderance of the evidence.

2. Did Employer fail to effectively control the travel of a crane?

The Division cited Employer for an alleged Serious violation under section 1616.1 which, at the time of the inspection, required:[3]

> (t) Travel.
>
> (1) The travel of cranes or boom-type excavators shall be controlled so as to avoid collision with persons, material, and equipment. The cabs of units (of the revolving type) traveling under their own power shall be turned so as to provide the least obstruction to the operator's vision in the direction of travel, unless receiving signals from someone with an unobstructed view.

[3] In 2022, section 1616.1 was repealed and replaced by section 4991.

In Citation 2, the Division alleges:

> Prior to and during the course of the inspection, including, but not limited to, on February 28, 2020 the employer did not effectively control the travel of a Link-Belt Model: HC-278H crane resulting in the crane colliding with a stationary Manitowoc Model: MLC-300 crane.

Application

At the time of the issuance of the citation, section 1610.1 provided the scope of application for the regulation:[4]

> a) This Article applies to power operated equipment, when used in construction, that can hoist, lower and horizontally move a suspended load. Such equipment includes, but is not limited to: Articulating cranes (such as knuckle-boom cranes); crawler cranes; […] derricks; and variations of such equipment. […]

Bandorf testified that the Crane was a 450-ton crawler crane and also considered a conventional crane with a lattice. (TR Vol II 196.) The regulation thus applies to the Crane.

Violation

It is undisputed that the Crane was travelling with the driver's cab turned to provide the least obstructed view when it struck and broke the boom of another crane, which fell, damaging several objects and a structure. To establish a violation of the safety order, the Division must show that Employer did not control the travel of the Crane so as to avoid collisions.

Employer took insufficient steps to control the Crane's travel at several stages. The travel path was obstructed and busy with traffic. Kimes assessed the Crane's condition and its environs before the workday began but did not reassess them after receiving instructions to move the Crane. (TR Vol II 104; TR Vol III 44.) (Exhibit 19.) Kimes and Bandorf walked the travel path after reaching a corner, saw that another crane's boom was an obstruction, and agreed to lower the Crane's boom, but made no plan or measurements for lowering it, and in fact did not lower it. (TR Vol II 56-58, 142-145.) Bandorf placed faith in "eyeballing" instead of measurements and calculations to conform to the travel chart, and Kimes was accustomed to reliance on visual estimations to position the boom. (TR Vol II 144-146, 150.) Finally, Bandorf served as the sole spotter for the last segment of travel but positioned himself along the 45- to 50-foot-long Crane so that it blocked his entire right-hand view. Kimes could not see the parked crane from his cab once

[4] In 2022, section 1610.1 was repealed. Some provisions are preserved in section 4990.

he began to turn the corner, yet the crew moved the Crane in the same manner numerous times. (TR Vol II 47, 155-156.) (Exhibit 19.)

Pursuant to the foregoing, the evidence supports the conclusion that Employer failed to effectively control the travel of a crane, resulting in its collision with another crane. The Division established a violation of section 1616.1, subdivision (t), by a preponderance of the evidence.

3. Did Employer establish any affirmative defenses?

In its post-hearing brief, Employer asserted both the Independent Employee Action Defense (IEAD) and *Newbery* Defense were applicable to Citation 2. Each defense shall be reviewed below.

Independent Employee Action Defense

In *Sacramento County Water Agency Department of Water Resources*, *supra*, Cal/OSHA App. 1237932, citing *FedEx Freight Inc.*, Cal/OSHA App. 1099855, Decision After Reconsideration (Sept. 24, 2018), the Appeals Board explained there are five elements to the Independent Employee Action Defense (IEAD), all of which must be shown by an employer 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.

The IEAD is an affirmative defense, thus Employer bears the burden of proof and must establish that all five elements of the IEAD are present by a preponderance of the evidence. (*Sacramento County Water Agency Department of Water Resources*, *supra,* Cal/OSHA App. 1237932; see also *Mercury Service, Inc.,* Cal/OSHA App. 77-1133 Decision After Reconsideration (Oct. 16, 1980.)) As Employer must prove all elements, it is only necessary to discuss elements two, three, and five below because those elements most clearly demonstrate Employer's shortcomings in meeting its burden of proof to establish the IEAD.

Element two: Did Employer have a well-devised safety program?

The second element of the IEAD requires an employer to have a well-devised safety program which includes training employees in matters of safety respective

to their particular job assignments. (See *Sacramento County Water Agency Department of Water Resources*, *supra,* Cal/OSHA App. 1237932.) As set forth above, Employer's safety program was lacking because the crew was not sufficiently trained in the operation of the Crane. Thus, it cannot be concluded that Employer has a well-devised safety program. For the foregoing reasons, Employer did not establish the second element of IEAD.

Element three: Did Employer effectively enforce its safety program?

Providing a level of supervision reasonably necessary to detect and correct hazardous conditions and practices is essential to effective enforcement, and the adequacy of supervision is a fact-intensive inquiry that requires a case-by-case determination. (*Fed Ex Ground, Inc.,* Cal/OSHA App. 1199473, Decision After Reconsideration (Apr. 20, 2020).) While it may be true that one-to-one supervision is neither practical nor required, supervision must be adequate. (*Signal Energy, LLC*, Cal/OSHA App. 1155042, Decision After Reconsideration (Aug. 19, 2022).)

The Crane's boom angle, travel speed, and hook blocks were in plain view. Further, Bruns testified that he was present during the Crane's travel. The evidence supports a finding that Employer provided inadequate supervision to detect or correct clearly observable unsafe conditions. For the foregoing reasons, Employer did not establish the third element of the IEAD.

Element five: Did the crew intentionally violate Employer's safety requirements?

In *Synergy Tree Trimming, Inc.,* Cal/OSHA App. 317253953, Decision After Reconsideration (May 15, 2017), the Appeals Board explained:

> The final element requires the employer to demonstrate that the employee causing the infraction knew he was acting contra to the employer's safety requirements. [Citation.] In *Macco Constructors*, Inc. Cal/OSHA App. 83-147, Decision After Reconsideration (Oct. 2, 1987), the Board describes the purpose of the IEAD as follows:
>
> > The independent employee action defense is designed to relieve an employer from the consequences of willful or intentional violation of one of its safety rules by non-supervisory employees, when specified criteria are met. See *Mercury Service, Inc.*, [Cal/OSHA App.] 77-1133, Decision After Reconsideration (Oct. 16, 1980).
>
> [...]
> Whether an action was inadvertent or constituted a conscious disregard of a safety rule is a question that must be examined in each case, in light of all facts and circumstances.

Bandorf deliberately raised the Crane's boom higher than usual to avoid construction site obstructions such as other cranes, streetlights, and construction in progress. (TR Vol II 145, 176.) When prompted, he testified that he was aware that the travel chart did not permit the higher angle of the boom. (TR Vol II 185-186.) However, as discussed above, the crew was unfamiliar with the travel chart. Bandorf believed he could safely move the Crane relying on tire bulges, the load chart, and years of experience. (TR Vol II 144-145, 148.) Kimes was accustomed to these informal practices. The evidence in the records does not support a finding that the crew acted willfully to violate safety rules. Employer thus failed to establish the fifth element of the IEAD.

As a failure to prove a single element of the IEAD defeats the defense, the defense is not available to Employer for Citation 2.

Newbery Defense

In *Newbery Electric Corp. v. Occupational Safety & Health Appeals Bd.* (1981) 123Cal.App.3d 641, the Court of Appeal recognized that where an employee's violation of a safety order was unforeseeable, the employer was not held responsible for the violation. In *Gaehwiler v. Occupational Safety & Health Appeals Bd.* (1983) 141 Cal.App.3d 1041, 1045, the elements of the defense recognized in *Newbery Electric Corp. v. Occupational Safety & Health Appeals Bd.*, *supra,* 123 Cal.App.3d (*Newbery* Defense), were articulated. As explained by the Appeals Board in *Brunton Enterprises, Inc*., Cal/OSHA App. 08-3445, Decision After Reconsideration (Oct. 11, 2013):

> A violation is deemed unforeseeable, therefore not punishable, if none of the following four criteria exist:
> (1) that the employer knew or should have known of the potential danger to employees;
> (2) that the employer failed to exercise supervision adequate to assure safety;
> (3) that the employer failed to ensure employee compliance with its safety rules; and
> (4) that the violation was foreseeable.

"The key factor in *Newbery* is unforeseeability, based upon independent action by an employee or employees in contravention of an employer's well-designed safety program." (*Bellingham Marine Industries, Inc.,* Cal/OSHA App. 12-3144, Decision After Reconsideration (Oct. 16, 2014).)

Element One: Did Employer know of the potential danger to employees?

Bandorf testified that the site was busy. Obstructions on the Crane's open air travel path would be obvious to an observer, and Bruns ostensibly walked the travel path with the crew. The knowledge of the foreman is imputed to the Employer. (*Brunton Enterprises, Inc*., *supra*, Cal/OSHA App. 08-3445.) Employer is thus imputed with the knowledge of the potential for

collisions. Even if Bruns had not walked the path with the crew, the site, the travel path, and the Crane were openly visible. Employer thus knew or should have known of the potential danger to employees by allowing the Crane to travel without: positioning the boom, removing hook blocks, managing local traffic, assigning sufficient spotters, etc. Employer thus cannot establish the first element of the *Newbery* Defense.

Element Two: Did Employer fail to supervise adequately to assure safety?

As determined in the prior section discussing IEAD, Employer did not assure safety through adequate supervision. Based on the foregoing, Employer cannot establish that it exercised adequate supervision to establish the second element of the *Newbery* Defense.

Element Three: Did Employer fail to ensure compliance with its safety rules?

Weidenkeller testified that the manual's requirements are equivalent to Employer's rules that employees must follow. (TR Vol III 28.) However, as discussed above, Employer did not provide the Crane-specific training necessary as a prerequisite for any compliance. Additionally, Employer refers only to the load chart on its incident reporting form. The exclusion of other charts is indicative of Employer's own uneven focus on compliance with load requirements. (Exhibit 21.) Employer thus fails to establish the third element of the *Newbery* Defense.

Element Four: Was the violation foreseeable?

When employees are inadequately trained and are unfamiliar with a manufacturer's requirements, violations of those requirements are foreseeable. Further, the crew's unfamiliarity with the travel chart was on display as they moved the Crane around the site numerous times in a similar manner.

As noted above, to establish the *Newbery* Defense, Employer must establish that none of the four elements exist. Therefore, the existence of just one element is sufficient to find that the *Newbery* Defense does not apply. All four elements are found to have existed. Accordingly, Employer failed to meet its burden of proof for the *Newbery* Defense.

4. Is Citation 1 properly classified as General?

Section 334, subdivision (b), provides, "General Violation – is a violation which is specifically determined not to be of a serious nature, but has a relationship to occupational safety and health of employees."

Here, the Division determined that the ineffective training regarding the hazards of crane travel has a relationship to the occupational safety and health of employees and was not of a

"serious nature." Employer did not address the issue in argument or post-hearing briefing. The effectiveness of training regarding the hazards of a crane travelling in a busy construction site is demonstrably related to the occupational safety and health of employees. Therefore, the General classification is affirmed.

5. Did the Division establish a rebuttable presumption that Citation 2 was properly classified as Serious?

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

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

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, supra,* Cal/OSHA App. 1237932.)

"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).)

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

> A division safety engineer or industrial hygienist who can demonstrate, at the time of the hearing, that his or her division-mandated training is current shall be deemed

competent to offer testimony to establish each element of a serious violation, and may offer evidence on the custom and practice of injury and illness prevention in the workplace that is relevant to the issue of whether the violation is a serious violation.

When determining whether a citation is properly classified as Serious, Labor Code section 6432 requires application of a burden shifting analysis. The Division holds the initial burden to establish "a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation." (Lab. Code, § 6432, subd. (a).) The Division's initial burden has two parts. First, the Division must demonstrate the existence of an "actual hazard created by the violation." Second, the Division must demonstrate a "realistic possibility" that death or serious physical harm could result from that actual hazard. (*Shimmick Construction Company*, Cal/OSHA App. 1192534, Decision after Reconsideration (Aug. 26, 2022).) In addition to an inspector's testimony, circumstantial and direct evidence, as well as common knowledge and human experience, may also support the serious classification. (*Id.*)

The actual hazard created by the failure to control crane travel is its collision with people or objects. Sanasaryan testified that he was current on his Division-mandated training. As such, he was competent to offer testimony as to the classification of Citation 2 as Serious. He testified that the serious physical harm employees could suffer from a crane collision could include, in-patient hospitalization, amputation, disfigurement, and death. There is a realistic possibility that collision with a crane that is at least 45 feet long with a protruding boom and jib 215 feet long could result in death or serious physical harm from its impact, or from impact debris. Here, the travelling Crane struck a parked crane, resulting in the collapse of the parked crane's boom. The boom fell, severely damaging a building, a vehicle, and a concrete traffic barrier. Its hook block embedded itself into the asphalt pavement like an anvil. (Exhibits 8-14.)

There is a realistic possibility that impact from the travelling Crane, the descent of the falling boom of the parked crane, or airborne fragments from wrecked objects could cause serious injury or death on an active and busy construction site. Accordingly, the Division established a rebuttable presumption that the citation was properly classified as Serious.

6. 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.

To rebut the presumption, an employer must demonstrate:

(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.

Factors included in Labor Code section 6432, subdivision (b), referenced in subdivision (c)(1), above, include:

(1) Before issuing a citation alleging that a violation is serious, the division shall make a reasonable effort to determine and consider, among other things, all of the following:
  (A) Training for employees and supervisors relevant to preventing employee exposure to the hazard or to similar hazards.
  (B) Procedures for discovering, controlling access to, and correcting the hazard or similar hazards.
  (C) Supervision of employees exposed or potentially exposed to the hazard.
  (D) Procedures for communicating to employees about the employer's health and safety rules and programs.
  (E) […]

The significant size of the Crane and its boom, the presence of numerous stationary and moving obstacles on the construction site, and the challenges of moving such a crane through a busy site would be obvious to any observer. Employer's practices such as completion of Daily Crane/Site Inspection forms, walking the travel path before moving the Crane, and spotting the Crane show that Employer was aware of the need to control the Crane's travel. As such, Employer prudently anticipated the challenges in ensuring controlled travel at the site.

However, Employer did not take all the steps that a reasonable and responsible employer in like circumstances should be expected to control the Crane's travel and avoid collisions. A reasonable employer conducts audits to catch failures to update a Daily Crane/Site Inspection form after a new job is assigned. A responsible employer observes the open travel of a crane through a busy construction site and would correct an over-elevated boom, a spotter's compromised field of vision, and any improperly attached hook blocks. Employer did not show it had procedures to discover or correct the continuously observable hazard of ongoing uncontrolled travel.

For these reasons, Employer offered insufficient evidence to rebut the presumption that Citation 2 was properly classified as Serious. Accordingly, the Serious classification is affirmed.

7. Are the abatement requirements for Citations 1 and 2 reasonable?

In order to establish that abatement requirements are unreasonable, an employer must show that abatement is not feasible or is impractical or unreasonably expensive. (See *The Daily Californian/Calgraphics*, Cal OSHA/App. 90-929, Decision After Reconsideration (Aug. 28, 1991).)

Employer appealed the reasonableness of abatement requirements of Citation 1 and Citation 2. Employer presented no argument or evidence to establish that abatement of the citations was unfeasible, impractical, or unreasonably expensive. Thus, for all the foregoing reasons, Employer did not establish that abatement requirements for Citation 1 or Citation 2 are unreasonable.

8. Are the proposed penalties reasonable?

Penalties calculated in accordance with the penalty-setting regulations set forth in sections 333 through 336 are presumptively reasonable and will not be reduced absent evidence that the amount of the proposed civil penalty was miscalculated, the regulations were improperly applied, or that the totality of the circumstances warrant a reduction. (*Sacramento County Water Agency Department of Water Resources, supra*, Cal/OSHA App. 1237932.) Generally, the Division, by introducing its proposed penalty worksheet and testifying to the calculations being completed in accordance with the appropriate penalties and procedures, will be found to have met its burden of showing the penalties were calculated correctly. (*Ontario Refrigeration Service, Inc.*, Cal/OSHA App 1327187, Decision After Reconsideration, citing *M1 Construction, Inc.*, Cal/OSHA App. 12-0222, Decision After Reconsideration (Jul. 31, 2014).)

The Division presented its Proposed Penalty Worksheet and Sanasaryan testified that penalties were calculated in accordance with the Division's policies and regulations. (Exhibit 26.) Employer did not present evidence or argument that the penalties were not calculated in accordance with the penalty setting regulations. Accordingly, the proposed penalties for Citations 1 and 2 are found reasonable and are, therefore, affirmed.

Conclusion

The evidence supports a finding that Employer violated section 1509, subdivision (a), by failing to provide effective training. The citation is properly classified as General, and the abatement requirements and the proposed penalty are reasonable.

The evidence supports a finding that Employer violated section 1616.1, subdivision (t), by failing to control a crane's travel to avoid collision. The citation is properly classified as Serious, and the abatement requirements and the proposed penalty are reasonable.

Order

It is hereby ordered that Citations 1 and 2 are affirmed, and their associated penalties are assessed as set forth in the attached Summary Table.

Dated: 12/29/2023

Rheeah Yoo Avelar
Administrative Law Judge

The attached decision was issued on the date indicated therein. If you are dissatisfied with the decision, you have thirty days from the date of service of the decision in which to petition for reconsideration. Your petition for reconsideration must fully comply with the requirements of Labor Code sections 6616, 6617, 6618 and 6619, and with California Code of Regulations, title 8, section 390.1. **For further information, call: (916) 274-5751.**