BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1361815**
THOMPSON PIPE GROUP **3009 N. LAUREL AVENUE** **RIALTO, CA 92376**	**DECISION**
Employer	

Statement of the Case

Thompson Pipe Group, (Employer) is a concrete pipe manufacturer. Beginning November 20, 2018, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Brent Evins (Evins), conducted an inspection of the manufacturer's site in the Dry Cast Department (hopper site) located at 3011 North Laurel Avenue, in Rialto, California (the site).

On May 3, 2019, the Division issued one citation alleging that Employer failed to identify, evaluate, and correct the hazards of removing cement from a cement hopper located in the Dry Cast Department. 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 raised a series of affirmative defenses.[1]

This matter was heard by Leslie E. Murad, II, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board. On August 12, 2022, October 11, 2022, February 14, 2023, and February15, 2023, ALJ Murad conducted the video hearing with all participants appearing remotely via the Zoom video platform. Attorney Manuel Melgoza of Donnell, Melgoza & Scates, LLP, represented Employer. Kathryn Woods, Staff Counsel, represented the Division.

The matter was submitted on April 17, 2023.

[1] Except where discussed 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 identify, evaluate, and correct the hazards of removing cement from a cement hopper?

2. Did the Division establish a rebuttable presumption that Citation 1 was properly classified as Serious?

3. Did Employer rebut the presumption that the violation in Citation 1 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 Citation 1 was properly characterized as Accident-Related?

5. Is the proposed penalty for Citation 1 reasonable?

Findings of Fact

1. On November 15, 2018, Employer directed its employee, Joseph Cervantes (Cervantes), to remove excess concrete inside a hopper in the Dry Cast Department.

2. Cervantes had never worked on cleaning this hopper before the day of the accident.

3. While Cervantes was working on cleaning this hopper chipping out concrete with a jackhammer, a large piece of concrete broke from the adjacent wall, falling on his right foot, crushing his steel-toe boot.

4. Employer conducted no inspection of the hopper prior to having Cervantes clean it.

5. The hopper contained a concrete buildup of two shifts at the time Cervantes cleaned it.

6. Employer had no written procedure for cleaning the hopper.

7. Cervantes received no written or verbal training on how to clean this hopper.

8. Cervantes relied on his prior casual observations of other employees to determine how clean the hopper.

9. Cervantes suffered partial amputations of two toes on his right foot.

10. On September 29, 2018, approximately two months prior to Cervantes' injury, another employee, Jose Hernandez (Hernandez), was injured when a piece of concrete fell on his ankle while he was cleaning a concrete hopper.

11. Employer determined that Hernandez needed restraining on safe methods of cleaning a hopper, and that Hernandez needed to prepare a job safety analysis (JSA) on the procedures to safely perform this cleaning task.

12. Thick and unstable concrete on the walls of a hopper, that is heavy enough to crush a steel-toe boot, may cause amputations and hospitalization.

13. The penalty for Citation 1 was calculated in accordance with the penalty-settling regulations.

Analysis

1. Did Employer fail to identify, evaluate, and correct the hazards of removing concrete from a cement hopper?

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

(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.

Citation 1, Item 1, the Division alleges:

Prior to and during the course of the investigation, including but not limited to November 15, 2018, the employer failed to identify/evaluate and correct the hazard of removing cement from a cement hopper located in the Dry Cast Department. As a result, an employee sustained serious injuries while chipping out the concrete inside the hopper a portion of the concrete fell and crushed the employee's foot, resulting in amputation of multiple toes.

The Division has the burden of proving a violation by a preponderance of the evidence. (*Papich Construction Company, Inc.*, Cal/OSHA App. 1236440, Decision After Reconsideration (Mar. 26, 2021).) "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. (*Nolte Sheet Metal, Inc.*, Cal/OSHA App. 14-2777, Decision After Reconsideration (Oct. 7, 2016).)

Citation 1 alleged one instance of a violation of section 3203, subdivision (a). Section 3203 requires employers to establish, maintain, and implement an effective written Illness and Injury Program (IIPP) that meets the minimum requirements set forth in subdivision (a) of the regulation. Subdivision (a)(4) of this regulation requires employers to identify workplace hazards.

While an employer may have a comprehensive written IIPP, the Division may still establish a violation by demonstrating the employer failed to effectively implement its IIPP. (*OC Communications, Inc.*, Cal/OSHA App. 14-0120, Decision After Reconsideration (Mar. 28, 2016); *Contra Costa Electric, Inc.*, Cal/OSHA App. 09-3271, Decision After Reconsideration (May 13, 2014).) Proof of implementation requires evidence of actual responses to known or reported hazards. (*National Distribution Center, LP / Tri-State Staffing*, Cal/OSHA App. 12-0391, Decision After Reconsideration (Oct. 5, 2015) (*NDC/Tri-State*).)

To establish a violation of section 3203, subdivision (a)(4), the Division must demonstrate that the employer failed to effectively implement its duty to inspect, identify, and evaluate workplace hazards when (1) the program was first established, (2) new substances, processes, procedures, or equipment were introduced, or (3) the employer was made aware of a new or previously unrecognized hazard. (*Hansford Industries, Inc. dba Viking Steel,* Cal/OSHA App.1133550, Decision After Reconsideration (Aug. 13, 2021).) Employers must include procedures for identifying and evaluating workplace hazards in the IIPP. These procedures must include "scheduled periodic inspections to identify unsafe conditions and work practices." (*Brunton Enterprises, Inc.*, Cal/OSHA App. 08-3445, Decision After Reconsideration (Oct. 11, 2013).) "To prove a violation of section 3203, subdivision (a)(4), based upon a failure of implementation, the Division must establish that the employer failed to effectively implement its duty to inspect, identify, and evaluate the hazard." (*DPR Construction, Inc. et al dba DPR Construction, supra*, Cal/OSHA App. 1206788.)

Here, there is one hazard at issue: the failure of Employer to identify and evaluate the buildup of concrete in the hopper in the Dry Cast Department that an employee was given the task of cleaning.

Cervantes testified that he was a general laborer for Employer on the day of the incident. One of his responsibilities was to clean up after a shift was over. This included cleaning the hoppers in his department, the Packer Head Department (Packer Head). He cleaned the hoppers in his department two or three times per week. He learned how to clean hoppers without any formal training from Employer.

Cervantes testified that his supervisor in the Dry Cast Department was Jason Moe (Moe). On November 15, 2018, Moe instructed Cervantes and the rest of the crew from Packer Head to go and clean the Dry Cast Department. The Dry Cast Department is a section of Employer's facility that makes concrete pipe. Cervantes and Evins both testified that the liquified cement is piped into a hopper device that looks like a giant funnel, open at the top and narrowing at the bottom of the hopper, with a conveyor belt running under the hopper (Exhibits 19, 20). Cement clings to the sides of the hopper as it dries into concrete. The dried concrete will build up on the walls of the hopper impeding the process. The dried concrete is chipped off the walls of the hopper to clean it. The hopper was to be cleaned normally between each shift.

Cervantes, as a more experienced member of the cleaning crew, took on the task and agreed to be responsible for cleaning the hopper in the Dry Cast Department on the day of the incident. Cervantes testified that this was his first day in the Dry Cast Department. He had never cleaned this type or size of hopper before.

Cervantes testified that cleaning a hopper requires an employee to get inside the hopper and chip the concrete off the walls with a small jackhammer or air chisel working from the top down. Once he accepted the task, Cervantes testified that he was told to clean the hopper. He was not aware of, nor was he given any written or oral procedure as to how to clean hoppers. Cervantes further testified that he used common sense to get in the hopper. He watched others clean the hoppers in the past and followed what they did.

The cleaning was performed from the inside of the hopper. Cervantes testified that on the day of the incident, he used a rolling stair to get up to the level of the hopper. He then crawled along the conveyor, and then used the ladder attached to the hopper to get to the top of the hopper. There was another ladder with hooks hanging on the side of the hopper. He put this ladder inside the hopper and used this ladder to climb down and get inside the hopper. He then stood on the conveyor belt at the bottom of the hopper. He was not instructed as to how he was to get up to or inside the hopper.

Once inside the hopper he used a jackhammer to chip the concrete off the walls of the hopper. There was a lot of buildup on the walls of the hopper. Cervantes testified that he had never seen so much buildup in a hopper ever before at Employer's plant. He explained that as an employee uses the jackhammer, chipped concrete falls off the walls of the hopper. He explained that he would stand back to keep his feet and body away from the falling debris. There were no

witnesses to the incident. Cervantes testified that while he was using the jackhammer to chip out the concrete, he believes that the vibration of the jackhammer broke free the concrete on the opposite wall from the wall he was working on. A large chunk of concrete then came off that opposing wall and fell onto his right foot. He had been in the hopper for less than a minute when the concrete chunk fell, crushing the steel-toe in his right boot into his toes, resulting in partial amputation of two toes.

Evins testified that Employer's Plant Manager, Moe, told Evins in his interview, that the hopper had not been inspected prior to Cervantes cleaning the hopper. Employer's Environmental Health and Safety Director, Mario Olmos (Olmos), also told Evins in his interview that Employer had not conducted an evaluation regarding excess buildup of concrete in the hopper before Cervantes went to clean the hopper, and that the hopper was normally cleaned by the day shift and that it was not cleaned by the day shift that day, resulting in the excess buildup of concrete on the hopper walls.

On September 29, 2018, approximately two months prior to the Cervantes incident, Jose Hernandez (Hernandez), an employee working in the Wet Cast Department, was cleaning concrete from the inside of a hopper using a chipping gun when a piece of concrete fell and injured his right ankle. Hernandez confirmed to Evins that Employer had no written procedure for cleaning a hopper. (Exhibit 8).

Employer, in its incident investigation of the Hernandez accident (Exhibit AH), determined that Hernandez had his leg too deep in the hopper and had not cleared the chunk of concrete that was above his ankle before placing his leg in that position. Employer determined that the corrective measures to be taken included having Hernandez retrained on the safe methods of cleaning a hopper. Employer required Hernandez to prepare and submit to Employer a Job Safety Analysis (JSA), on the procedure necessary to implement safety during this cleaning task.

The Division presented testimony and photographic evidence showing that the worksite was comprised of a cement hopper located in the Dry Cast Department. Employer admitted that the hopper to be cleaned by Cervantes had not been cleaned by the day shift earlier that day so there was a double layer of dried concrete that needed to be removed from the hopper walls. The concrete buildup is greater especially with a double coating of concrete. When the concrete is removed in the chipping process, pieces come off the walls of the hopper. As a result, employees could suffer serious injuries, such as what Cervantes suffered when chipping out the walls of the hopper. Further, Employer admitted to the Division, through Plant Manager Moe, and Environmental Health and Safety Director, Olmos, that it did not inspect nor identify and evaluate the hazard of excess buildup of concrete in the hopper in the Dry Cast Department before having Cervantes perform this task.

As a result of the Hernandez incident, Employer was aware of the need to identify and evaluate the hazard of cleaning concrete from hoppers before Cervantes conducted his cleaning of a hopper. Employer had a plan to check each time for the hazard of cleaning a hopper from the Hernandez incident, but in the Cervantes case, Employer failed to do so.

Here, Employer's own investigative report of the Cervantes accident concludes that Cervantes did not properly assess the potential hazards involved with the cleaning of the hopper. Management was to write a Standard Operating Procedure (SOP), followed up by a JSA and train all affected employees immediately in how to clean a hopper. (Exhibit 13).

Cervantes testified that he had never cleaned the Dry Cast Department hopper before the day of the incident. Cervantes further testified that he had not been trained in how to clean this hopper before the day of the incident. Employer did not evaluate the hazard by not inspecting the hopper nor evaluating the proper process to be used before it was cleaned. Cervantes was exposed to this hazard and suffered a serious injury with the partial amputation of two toes when the heavy concrete chunk crushed his steel-toe boot into his toes, resulting in the partial amputations. Also, Employer did not offer any testimony or a case in chief in its appeal in the defense of the citation at hearing.

Based on the evidence presented, the Division has met its burden by showing that Employer did not inspect the hopper for the hazard of excess concrete buildup before having Cervantes's attempt to chip out the excess concrete from the walls of the hopper. For these reasons, Citation 1 is affirmed.

2. Did the Division establish a rebuttable presumption that Citation 1 was properly classified as Serious?

Labor Code section 6432, subdivisions (a) and (b), provide, in relevant part:

> (a) 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:
> [...]
> (b) The existence in the place of employment of one or more unsafe or unhealthful practices that have been adopted or are in use.

Further, 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.

"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.

(Labor Code section 6432, subdivision (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. (A. *Teichert & Son, Inc. dba Teichert Aggregates*, Cal/OSHA App. 11-1895, Decision After Reconsideration (Aug. 21, 2015), citing *Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (Sep. 27, 2001).) 'Serious physical harm' is defined as an injury or illness occurring in the place of employment that results in, among other possible factors, "inpatient hospitalization for purposes other than medical observation" or "the loss of any member of the body." (Lab. Code § 6432, subd. (e).)

Evins testified he was current with his Division-mandated training. As such, Labor Code section 6432, subdivision (g), is applied to deem Evins presumptively competent to testify regarding the serious classification of Citation 1.

Evins interviewed the injured employee, Cervantes, and took photographs of the partial amputation of the first knuckle of the second and third toes of Cervantes' right foot. Cervantes told Evins they tried to save his toes, but that did not work. He was hospitalized as a result of the accident and had the first knuckles on two toes amputated.

The partial toe amputations demonstrates that there was not only a realistic possibility of serious physical harm, but the violation resulted in actual serious physical harm.

Accordingly, the Division has met its burden to establish a rebuttable presumption the violation cited in Citation 1 was properly classified as Serious.

3. Did Employer rebut the presumption that the violation in Citation 1 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 that:

> (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.

Labor Code section 6432, subdivision (b), provides that the following factors may be taken into account:

> (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; and
> (D) Procedures for communicating to employees about the employer's health and safety rules and programs.

The burden is on Employer to rebut the presumption that the citation was properly classified as Serious. (*Bigge Crane & Rigging, Co.*, Cal/OSHA App. 1380273, Decision After Reconsideration (Apr. 7, 2023). Further, the Board has held that a failure to exercise supervision adequate to ensure employee safety is equivalent to failing to exercise reasonable diligence and will not excuse a violation on a claim of lack of employer knowledge. (*Stone Container Corporation*, Cal/OSHA App. 89-042, Decision After Reconsideration (Mar. 9, 1990). See also *Gateway Pacific Contractors*, Cal/OSHA App. 10-R2D3-1502-1508, Decision After Reconsideration (Oct. 4, 2016).)

On September 29, 2018, approximately two months prior to the Cervantes incident, Jose Hernandez (Hernandez), an employee working in the Wet Cast Department, was cleaning concrete from the inside of a hopper using a chipping gun when a piece of concrete fell and injured his right ankle (Exhibit 8).

Employer determined (Exhibit AH), as set forth in this incident report, that the corrective measures to be taken included having Hernandez retrained on the safe methods of cleaning a hopper, and have the employee prepare a Job Safety Analysis (JSA), on the procedure necessary to implement safety during this cleaning task. The Employer was thus aware of the need to identify and evaluate the hazard of cleaning concrete from hoppers before the Cervantes incident.

Employer did provide training records regarding Cervantes to the Division in response to a document request, but none of those documents were relevant to cleaning a cement hopper. No testimony or evidence was presented by Employer about training on the cleaning of concrete off the walls of a cement hopper. The only testimony provided on training was by the Division, through Evins and the injured employee Cervantes. Cervantes testified he knew of no procedure on how to clean a hopper but his own common sense and what he had seen other employees perform the chipping task by getting inside the hopper and start chipping concrete off the walls. Employer did not present any testimony in its defense of the citation.

Therefore, Employer did not meet its burden to establish that it did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation. Employer has not rebutted the presumption that the citation was properly classified as Serious. Accordingly, Citation 1, was properly classified as Serious and is affirmed.

4. Did the Division establish that Citation 1 was properly characterized as Accident-Related?

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." (*Webcor Construction LP dba Webcor Builders,* Cal/OSHA App. 317176766, Denial of Petition for Reconsideration (Jan. 20, 2017).) 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." (*Id.*, citing *MCM Construction, Inc.*, Cal/OSHA App. 13-3851, Decision After Reconsideration (Feb. 22, 2016).)

The violation was Employer’s failure to identify, evaluate, and correct a hazard prior to cleaning the cement hopper. There was a thick buildup of concrete on the walls of the hopper making it more likely to have large chunks of chipped concrete falling. There was no inspection conducted before Cervantes went into the hopper to clean it. He started cleaning and a large chunk of concrete fell on his foot, resulting in partial amputation of two toes. This failure to

inspect, identify and evaluate any potential hazard in the hopper cleaning task before any cleaning took place was a cause of the accident. As such, Cervantes' injury was caused by the violation.

Therefore, Citation 1 is properly characterized as Accident-Related.

5. Is the proposed penalty for Citation 3 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. (*Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).)

Evins testified that the penalty for Citation 1 was calculated in accordance with Division policies. The Base Penalty of $18,000 for a Serious violation was not reduced because it was characterized as an Accident-Related violation and the only permissible reduction for Accident-Related violations is Size. (§ 336, subd. (d)(7).) Here, Employer's size precludes such a reduction. The Division submitted its Proposed Penalty Worksheet (Exhibit 2), which was admitted into evidence. Employer did not present evidence that the calculations were incorrect. Accordingly, the proposed penalty is affirmed.

Citation 1 is a Serious Accident-Related citation. Based upon the evidence presented, the penalty set for Citation 1, was calculated within the Division's policies and procedures.

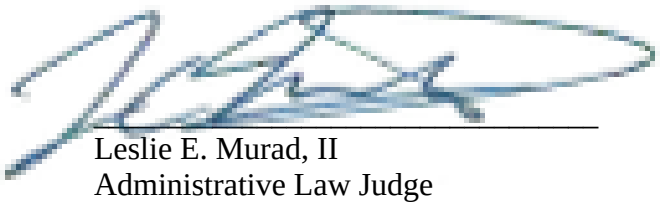
Accordingly, the penalty of $18,000.00 is reasonable.

Conclusions

The Division established that Employer violated section 3203, subdivision (a) (4), by failing to identify, evaluate and correct a hazard. The violation was properly classified as Serious Accident-Related. The proposed penalty is reasonable.

Order

Citation 1 is affirmed, and the penalty is sustained, as set forth in the attached Summary Table incorporated herein.



Dated: 05/15/2023

Leslie E. Murad, II
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.**