BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1192534**
SHIMMICK CONSTRUCTION COMPANY, INC. **8201 Edgewater Drive, Suite 202** **Oakland, CA 94621**	**DECISION AFTER RECONSIDERATION**
Employer	

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

On November 21, 2016, the Division of Occupational Safety and Health, through Associate Safety Engineer Lorenzo Zwaal (Zwaal), commenced an accident inspection of a worksite maintained by Shimmick Construction Company, Inc. (Employer). On April 26, 2017, the Division issued four citations to Employer alleging six violations of safety orders contained in California Code of Regulations, title 8.[1] Employer appealed the citations.

The matter was heard by Rheeah Yoo Avelar, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (Appeals Board) on March 18, 2021, and August 3 and 4, 2021. Lisa Prince, of The Prince Firm, represented Employer. William Cregar, Staff Counsel, represented the Division.

ALJ Avelar issued a Decision on November 19, 2021. The Decision made the following findings: it affirmed Citation 1, Item 1, a Regulatory violation of section 14300.29, subdivision (b)(1) [failure to properly complete Form 300s for calendar years 2015 and 2016]; it affirmed Citation 1, Item 2, a General violation of section 3650, subdivision (t)(15) [failure to ensure that forks on a forklift were carried as low as possible, consistent with safe operation]; it vacated Citation 1, Item 3, a General violation of section 3650, subdivision (t)(33) [failure to ensure an employee wore a seat belt]; it affirmed Citation 2, Item 1, as a General violation of section 3328, subdivision (a)(2) [failure to ensure an employee did not operate a forklift under speeds, stresses or loads contrary to the manufacturer's recommendations]; it affirmed Citation 3, Item 1, a Serious violation of section 3650, subdivision (t)(14)(A) [failure to ensure a forklift operating on a grade

[1] Unless otherwise specified, references are to California Code of Regulations, title 8.

in excess of 10 percent was driven with the load upgrade]; and, it vacated Citation 4, Item 1, a Serious violation of section 3650, subdivision (t)(11) [failure to ensure that a forklift with an obstructed forward view was driven with the load trailing].

Following issuance of the Decision, Employer filed a Petition for Reconsideration (Petition). Employer's Petition challenges only the Serious classification for Citation 3 Item 1. The Division filed an Answer. Issues not raised in the petition are deemed waived. (Lab. Code, § 6618.)

In making this Decision After Reconsideration, the Board engaged in an independent review of the entire record. The Board considered the pleadings and arguments filed by the parties. The Board has taken no new evidence.

ISSUES

1. **Did the Division establish a rebuttable presumption of a Serious violation for Citation 3?**

2. **Assuming the Division met its initial burden, did Employer rebut the presumption of a Serious violation?**

FINDINGS OF FACT

1. Jorge Fonseca (Fonseca) worked for Employer as a supervisor.

2. Fonseca held safety responsibilities; he could address safety issues with personnel and could fire personnel for safety infractions.

3. On November 16, 2016, Employer's Superintendent, Eric Lightle (Lightle), instructed Fonseca to compact an area of Employer's worksite using a compactor.

4. Fonseca retrieved the compactor, which had been placed in Employer's laydown yard behind some other equipment.

5. Fonseca utilized a "telehandler" construction forklift to lift the compactor out of the laydown area from behind the other equipment.

6. He suspended the compactor from the elevated forks of the forklift with a chain.

7. The operator's manual states that operators are not to suspend loads from the forks.

8. Employer's management witnesses also said that such use of chains violated Employer's rules and did not constitute proper rigging.

9. Fonseca thereafter drove the forklift to the compaction location with the load suspended from the forks.

10. Fonseca drove until he reached a ramp with a grade in excess of 10 percent, which he proceeded to travel down.

11. The ramp was bordered by a trench or ditch on one side that was several feet deep.

12. As Fonseca traversed down the ramp, the forklift load (i.e. the compactor) was pointed downgrade.

13. In traveling with the load downgrade, not only was there a violation of a relevant safety order, Employer's witnesses testified Fonseca broke another one of Employer's rules, which required Fonseca to back down the grade when the forklift was carrying a load.

14. As Fonseca traversed down the ramp, an accident occurred. The forklift entered into the ditch or excavation adjacent to the ramp.

15. Fonseca exited the cab and was ultimately pinned in a standing position between the forklift and the trench wall, resulting in his death.

DISCUSSION

The sole issue raised in Employer's Petition is whether to affirm the Serious classification for Citation 3; the existence of the violation is not in dispute.[2] That Citation asserted a violation of section 3650, subdivision (t)(14)(A), which provides:

> (t) Industrial trucks and tow tractors shall be operated in a safe manner in accordance with the following operating rules:
> […]
> (14) Grades shall be ascended or descended slowly.
> (A) When ascending or descending grades in excess of 10 percent, loaded trucks shall be driven with the load upgrade.

Employer's petition argues that the Decision erred when it affirmed the Serious classification, because, among other things: 1) no sufficient foundation existed for Zwaal's testimony regarding the classification, 2) the Division failed to demonstate the existence of an actual hazard created by the violation; 3) the Division failed to establish a realistic possibility that death or serious physical harm could result from the actual hazard; and 4) factual errors exist in the Decision.

In evaluating whether the citation was properly classified as Serious, our analysis is guided by the text of Labor Code section 6432, which states:

[2] Issues not raised in the petition for reconsideration are waived. (Lab. Code, § 6618.)

> (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 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:
> (1) A serious exposure exceeding an established permissible exposure limit.
> (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.
> […]
>
> (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 employer did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation.[…]

We review and interpret this statute using the rules of statutory construction. The Board's objective is to ascertain and effectuate legislative intent. (*Katz v. Los Gatos-Saratoga Joint Union High School Dist.* (2004) 117 Cal.App.4th 47, 54; *Department of Industrial Relations v. Occupational Safety & Health Appeals Bd*. (2018) 26 Cal.App.5th 93, 101.) In determining intent, the Board first looks to the plain language of the statute itself, which is generally the most reliable indicator of intent. (*Ibid*; see also *Borikas v. Alameda Unified School Dist.* (2013) 214 Cal.App.4th 135, 146; *Neville v. County of Sonoma* (2012) 206 Cal. App. 4th 61, 70.) Words should be given their ordinary and usual meaning and construed in context. If the plain, commonsense meaning of the words is unambiguous, the plain meaning controls. (*Ibid*.) The Board may look to the dictionary definition of a word to ascertain its ordinary and usual meaning. (*Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1122.) However, the plain meaning rule does not prohibit the Board from determining whether the literal meaning of the statute comports with its purpose. (*Department of Industrial Relations v. Occupational Safety & Health Appeals Bd*., *supra*, 26 Cal.App.5th 93, 101 [other citations omitted].) Furthermore, where a word of common usage has more than one meaning, the one which will best attain the purposes of the statute should be adopted to avoid absurdity or injustice. (*Ibid*.)

After indepedently reviewing the record, and the relevant statute, we conclude that Citation 3 was properly classified as Serious; however, we affirm the classification based on our own independent analysis herein (and depart from some portions of the ALJ's analysis).

1. **Did the Division establish a rebuttable presumption of a Serious violation for Citation 3?**

When determining whether a citation is properly classified as Serious, Labor Code section 6432, requires application of a burden shifting analysis. As noted above, 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.

An actual hazard exists:

For the Division to meet its initial burden, the record must support the existence of an "actual hazard" created by the violation.

The record demonstrates Employer violated section 3650, subdivision (t)(14)(A), when Fonseca descended a grade in excess of 10 percent, without driving with the load upgrade. In determining whether an actual hazard was created by the violation, we consider the language of the statute. An "actual hazard may consist of, among other things," "[t]he 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." (Lab. Code, § 6432, subds. (a), (a)(2).) Parsing that definition, and applying the plain language of the statute, an actual hazard may exist if: (1) there exists in a place of employment: (2) one or more practices, means, methods, operations or processes that have been adopted or in use; and (3) which are unsafe or unhealthful.

Zwaal's testimony, and the record evidence, sufficiently demonstrate the existence of an actual hazard created by this violation. As to the first element, it is clear that Fonseca's relevant conduct, in traveling with the load downgrade, occurred at Employer's worksite, a place of employment.[3] As to the second element, Fonseca's action of driving the forklift down a grade in excess of 10 percent with load pointed downgrade can be construed as one means, method, operation or practice. Finally, as to third element, the record evidence indicates that the operation or practice was unsafe and unhealthful. The plain meaning of the term "unsafe" means "able or likely to cause harm, damage, or loss."[4] Zwaal offered credible testimony that descending a grade in excess of 10 percent, without driving with the load upgrade, is unsafe or unhealthful. The specific testimony was as follows:

> Q: BY ATTORNEY CREGAR: All right. Let's move -- and, again, this was serious; why?

[3] Labor Code section 6303 defines a "Place of employment" as "any place, and the premises appurtenant thereto, where employment is carried on, except a place where the health and safety jurisdiction is vested by law in, and actively exercised by, any state or federal agency other than the division."

[4] Merriam-Webster Dictionary (Online), https://www.merriam-webster.com/dictionary/unsafe [as of August 3, 2022].

A: BY WITNESS ZWAAL: Again, the load could shift. Also, he had the load trailing, so it obstructed his view as well. And I think it's a contributing factor to the accident.
Q: When you say the load trailing, what do you mean?
A: I mean the load in front of the forks. As he's driving downward, the load is in front of him.
Q: Okay. What's the problem with that?
A: It can obstruct his view.
Q: And so what can result from this if he can't see where he's going?
A: He could go into a ditch, a trench, and it could cause an accident, like it did.
(TR,[5] pp. 70-72.)

The Board credits Zwaal's testimony that if a forklift operator proceeds downgrade with the load in front of him or her, it could cause the load to shift, and it could obstruct the driver's vision and cause the driver to go into a trench and it could cause an accident, which would be an unsafe or unhealthful otucome. (TR 70-72.) Based on the foregoing testimony, which the Board credits (with one reservation[6]), the Division established the existence of an actual hazard created by the violation.

Employer's petition argues that it was error to credit any portion of Zwaal's testimony as to the Serious classification. We disagree. Although Zwaal, whose training was not current, could not benefit from the statutory presumption that he was competent to offer testimony regarding the Serious classification under Labor Code section 6432, subdivision (g), that does not necessarily mean his testimony must be entirely disregarded. A Division safety engineer may still offer opinion testimony regarding the serious classification, provided there is otherwise a valid evidentiary foundation for the opinion, such as expertise on the subject, reasonably specific scientific evidence, an experience-based rationale, or generally accepted empirical evidence. (See, e.g., *Forklift Sales of Sacramento, Inc.*, Cal/OSHA App. 05-3477, Decision After Reconsideration (Jul. 7, 2011); *Sherwood Mechanical, Inc.,* Cal/OSHA App. 08-4692, Decision After Reconsideration (June 28, 2012).) A compliance officer's relevant experience has often been deemed to constitute a sufficient foundation for testimony on the Serious classification. (*Davis Brothers Framing, Inc.*, Cal/OSHA App. 05-634, Decision After Reconsideration (Apr. 8, 2010); *Davis Brothers Framing*, Cal/OSHA App. 03-0114, Decision After Reconsideration (Jun. 10, 2010); *Forklift Sales of Sacramento, Inc.*, *supra*, Cal/OSHA App. 05-3477.) Furthermore, circumstantial and direct evidence, as well as common knowledge and human experience, may also support the serious classification. (*Home Depot USA, Inc*., Cal/OSHA App. 10-3284, Decision After Reconsideration (Dec. 24, 2012).)

[5] Transcript references or (TR) refer to the transcript dated August 3, 2021.
[6] Zwaal effectively testified that the compactor, carried downgrade, actually obstructed the view of Fonseca, leading to the fatal accident. (TR, pp. 71-72.) The Board finds insufficient evidence to conclude that the compactor in this case actually created a visual obstruction that resulted in the accident. However, it is unnecessary to make such a finding to reach the result herein.

The Board concludes that Zwaal's many years of experience as a safety professional, as well as previous experience with forklifts, qualified him to offer the opinion that if forklift drivers proceed downgrade with the load in front of them, the load could shift and obstruct the drivers' vision, which could cause them to go into a trench and/or otherwise cause an accident. Zwaal had many years of experience as a safety professional. (TR, pp. 10-13.) From 2012 to 2019, Zwaal worked for the Division as an associate safety engineer, where he did approximately 55 inspections per year. (*Ibid*.) He was involved in 15 to 20 inspections involving forklifts, and approximately five of those involved injuries. (*Ibid*.) He had completed all required training during his tenure with the Division. (TR, p. 52.) Further, from 2019 to the present, he worked for the State Compensation Insurance Fund (SCIF) as an associate safety engineer. (TR, pp. 10-13.) He also had additional experience with forklifts outside his work for SCIF and the Division. (*Ibid*.) In sum, we conclude a sufficient experiential foundation existed for his aforementioned testimony. Further, the opinion given was not particularly complex or novel; therefore, the foundation required for the opinion need not be particularly robust.[7]

Realistic possibility of death or serious physical harm:

Having ascertained the existence of an actual hazard created by the violation, we now turn to the question of whether the Division demonstrated "a realistic possibility that death or serious physical harm could result from the actual hazard..." (Lab. Code, § 6432, subd. (a).) The term "realistic possibility" means that the Division's demonstration must be within the bounds of reason, and not purely speculative. (*Langer Farms, LLC*, Cal/OSHA App. 13-0231, Decision After Reconsideration (Apr. 24, 2015).) Labor Code section 6432, subdivision (e), provides that "serious physical harm," means any injury or illness, specific or cumulative, occurring in the place of employment or in connection with any employment that results in inpatient hospitalization for purposes other than medical observation, the loss of any member of the body, any serious degree of permanent disfigurement, or significant and permanent physical impairment. (*Ontario Refrigeration Service, Inc*., Cal/OSHA App. 1327187, Decision After Reconsideration (March 22, 2022).)

Ultimately, this part of the statutory inquiry asks, assuming the actual hazard created by the violation, i.e. shifting of the load, a visual obstruction and subsequent accident, were to come to occur, did the Division demonstrate it is realistically possible that the result of such an accident "could" be serious physical harm or death. (*Ontario Refrigeration Service, Inc*., *supra*, Cal/OSHA App. 1327187, citing *MDB Management, Inc.*, Cal/OSHA App. 14-2373, Decision After Reconsideration (Apr. 25, 2016).) In other words, we interpret the "realistic possibility" portion of the statute to refer not to the probability that an accident will occur, but to the possibility, if an accident occurred, that death or serious physical harm could result from the accident. (See *Ontario*

[7] We additionally note that the conclusion that a hazard was present is also supported, at least inferentially, by Employer's own forklift safe practices, which required forklift operators to back down grade when carrying load. (TR, p. 165; Exhibit C.) If backing down a grade when carrying the load is a safe practice, it follows that the failure to comply with this rule is an unsafe practice. Further, the conclusion is supported by common sense and human experience. (*Home Depot USA, Inc*., *supra*, Cal/OSHA App. 10-3284.) It is clear that an accident involving such a large forklift could certainly be unsafe or unhealthful.

Refrigeration Service, Inc., *supra*, Cal/OSHA App. 1327187.) The aforementioned interpretation is supported by the plain language of the statute, which does not ask whether there is a realistic possibility that there will be an accident or violation, but rather asks is there "a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation." (Lab. Code, § 6432, subd. (a) [underline added].)

Here, the record evidence, on balance, demonstrates a realistic possibility of serious physical harm or death if an accident were to occur as a result of the actual hazard created by violation. Even assuming Fonseca's fatal injury was not causally related to the violation in Citation 3, or the actual hazard created by that violation, his accident nonetheless demonstrates the kind of harm that can realistically occur in the event of an accident. The record demonstrates that death or serious physical harm are a realistic possibilities when such accidents occur, since it is undisputed that Fonseca was fatally injured by the accident.[8]

The Division accordingly establised a rebuttable presumption of a Serious violation.

2. Did Employer rebut the presumption of a Serious violation for Citation 3?

After the Division establishes a presumption, "the employer may rebut the presumption and establish that a violation is not serious 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." (Lab. Code, § 6432, subd. (c).) An 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).[9]
> (2) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered.

[8] Further, neither the Board, nor the ALJ, need ignore common sense. As the Board has previously noted, the probable consequences of injuries resulting from a violation may also be demonstrated by common knowledge and human experience. (*Home Depot USA, Inc*., *supra*, Cal/OSHA App. 10-3284.)

[9] Labor Code section 6432, subdivision (b), includes the following factors: training for employees and supervisors relevant to preventing employee exposure to the hazard or to similar hazards; procedures for discovering, controlling access to, and correcting the hazard or similar hazards; supervision of employees exposed or potentially exposed to the hazard; procedures for communicating to employees about the employer's health and safety rules and programs; and other information that the employer wishes to provide.

(Lab. Code, § 6432, subds. (c), (c)(1), (c)(2).)

Employer's petition argues it rebutted the presumption of a Serious violation. Employer argues it presented evidence of due diligence. (Petition, pp. 6-7.) Employer specifically argues it was not aware of the violation and that it took reasonable steps to anticipate and prevent the violation. (*Ibid*.) Employer cites to evidence regarding its safety programs, training, and job observation procedures, among other record citations. (*Ibid*.)

However, after a careful review of the record, we conclude that Employer did not rebut the presumption. The evidence demonstrates Fonseca was a supervisor. Fonseca worked for Employer as a labor foreman or lead. (TR, pp. 182-183, 197-198, 210-211.) In his capacity as a lead or foreman, Fonseca held safety responsibilities; he could address safety issues with personnel and could fire personnel for safety infractions. (*Ibid*.) "The Appeals Board has long held that a supervisor means someone who has the authority or responsibility for the safety of other employees." (*Sacramento County Water Agency Department of Water Resources*, Cal/OSHA App. 1237932, Decision After Reconsideration (May 21, 2020), citing *PDM Steel Service Centers, Inc.*, Cal/OSHA App. 13-2446, Denial of Petition for Reconsideration (June 10, 2015).)

The evidence demonstrates that Fonseca broke at least two of Employer's rules: he failed to drive with the load upgrade when descending the grade, and he used a chain to suspend the load from the forks. (TR, pp. 165, 169-170.) Since Fonseca was a supervisor, his violation of safety rules is attributed to Employer and supports the conclusion that an Employer failed to enforce its safety program. (*PDM Steel Service Centers, Inc.*, *supra*, Cal/OSHA App. 13-2446.) Further, because Fonseca was a supervisor, the Board may find that his knowledge of these hazards is imputed to Employer, which demonstrates that the violation was not unforseeable. (*Sacramento County Water Agency Department of Water Resoruces*, *supra*, Cal/OSHA App. 1237932.) As such, Employer did not rebut the presumption.

DECISION

For the reasons stated herein, the Division established that Citation 3, Item 1 was properly classified as Serious. Since Employer's petition asserts no challenge to the ALJ's assessment of penalty for Citation 3, the penalty amount of $3,375 discussed in the Decision is affirmed.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

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

FILED ON: 08/26/2022