

**BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD**

In the Matter of the Appeal of:

**JAFEC USA, INC.
2025 GATEWAY PLACE, SUITE 180
SAN JOSE, CA 95110**

Employer

Inspection No.
1290383

**DECISION AFTER
RECONSIDERATION**

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

JURISDICTION

JAFEC USA, Inc. (Employer or JAFEC) is a company involved in the construction industry. On January 19, 2018, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer James Carmichael,¹ commenced an accident investigation of Employer's work site located at the northbound exit ramp on Highway 101 at Willow Road in Menlo Park, California (jobsite).

On July 3, 2018, the Division issued one citation to Employer, alleging one Serious Accident-Related violation of California Code of Regulations, title 8², section 1592, subdivision (e) [failure to control earth-moving or hauling operations in such a manner as to ensure that equipment operators know the location of workers on foot in the area of operations].

Employer filed a timely appeal of the citation. The matter was heard by Christopher Jessup, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (the Board), in Oakland, California, on August 28 and 29, 2019, and January 22, 23, and 24, 2020. Karen F. Tynan and Robert C. Rodriguez, attorneys at Ogletree, Deakins, Nash, Smoak & Stewart, P.C., represented Employer. Denise Cardoso, Staff Counsel, represented the Division. Following the hearing, the ALJ affirmed the Citation in a Decision dated August 5, 2020.

Employer timely filed a Petition for Reconsideration of the ALJ's Decision on September 4, 2020, and the Division filed a timely Answer. The Board took Employer's petition under submission on October 16, 2020. Issues not raised in the Petition for Reconsideration are deemed waived. (Lab. Code, § 6618).

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

² All section references are to California Code of Regulations, title 8 unless otherwise specified.

In making this decision, the Board has engaged in an independent review of the entire record. The Board additionally considered the pleadings and arguments filed by the parties. The Board has taken no new evidence. All matters not raised in Employer's Petition for Reconsideration are considered waived. (Lab. Code § 6618.)

ISSUES

1. Did the Division establish a violation of section 1592, subdivision (e), by a preponderance of the evidence?
2. Did the Division establish that the violation was properly classified as Serious?
3. Did Employer rebut the presumption that the violation was Serious by demonstrating that it did not know, and could not, with the exercise of reasonable diligence, have known of the existence of the violation?
4. Did the Division establish that the citation was properly characterized as Accident-Related?
5. Is the proposed penalty reasonable?

FINDINGS OF FACT³

1. On January 6, 2018, Brian Taylor (Taylor) was an employee of Employer and was injured while working at Employer's jobsite.
2. Taylor suffered serious physical harm as defined by Labor Code section 6432, subdivision (e), and a serious injury as defined by Labor Code section 6302, subdivision (h), and California Code of Regulations, title 8, section 330, subdivision (h).
3. Taylor's serious injury was caused by the accident that occurred on January 6, 2018, during his employment with Employer.
4. Taylor's leg was broken when he was knocked over by an auger stem that was moved by the excavator.
5. Jose Valdelamar (Valdelamar) was Employer's site superintendent who was present at the jobsite at the time of the accident and Taylor's supervisor at the jobsite.
6. Employer's policy, training, and code of safe practices required on-foot employees to ensure that they avoided the blind spots of machinery or heavy equipment.
7. The operator of the excavator involved in the accident was unaware of Taylor's presence at the time of the accident.

³ Finding of fact numbers 2 and 3 are pursuant to stipulations by the parties.

8. Employer did not rely on a spotter or radios to ensure that the excavator operator was informed of the on-foot workers at the time of the accident.
9. Taylor did not knowingly violate Employer's safety rules at the time of the accident.
10. Valdelamar was aware of Employer's safety policy and was aware of on-foot employees in the area of the excavator's hauling operation.

DISCUSSION

1. **Did the Division establish a violation of section 1592, subdivision (e), by a preponderance of the evidence?**

Section 1592, subdivision (e), provides:

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

The Division's Alleged Violation Description states:

Prior to and during the investigation on January 19, 2018, the employer failed to ensure that hauling operations at the location were sufficiently controlled in a manner such that the operator of an excavator knew of the presence of a worker on foot in the area of operations. As a result, on January 6, 2018[,] an employee was seriously injured when his leg was struck by an auger stem/auger rod being pushed by the excavator.

Employer's Petition specifically disputes the ALJ's following findings of fact:

6. Employer's policy, training, and code of safe practices required on-foot employees to ensure that they avoided the blind spots of machinery or heavy equipment.
7. The operator of the excavator involved in the accident was unaware of Taylor's presence at the time of the accident.
8. Employer did not rely on a spotter or radios to ensure that the excavator operator was informed of the on-foot workers at the time of the accident.
9. Taylor did not knowingly violate Employer's safety rules at the time of the accident.

Employer's petition also asserts that JAFEC had a well-devised safety program, that the violation was incorrectly classified as Serious and Accident-Related, and that the Independent Employee Action Defense (IEAD) was established at the hearing.

Additionally, Employer argues that Taylor’s testimony was “false, deceptive, or evasive” and that he deliberately lied on the record at the hearing in order to “portray him[self] as blameless.” (Petition, p. 9.) Employer points to inconsistencies in Taylor’s testimony regarding the safety training he received from Employer to assert that Taylor’s testimony should therefore be disregarded in its entirety.

a. Should the Board dismiss or discredit the injured employee’s testimony?

Because arguments as to Taylor’s petition represent a significant aspect of Employer’s Petition, we address this issue at the outset. We first note that Employer spends significant time and effort in its petition on a non-dispositive issue. Taylor’s credibility as a witness does not materially affect the weight of evidence in this matter. Sufficient evidence exists to support each finding herein, even if absent in his testimony. Next, even assuming, arguendo, that the credibility of Taylor’s testimony could be considered dispositive of any issue, we find no cause to discredit him as a witness.

A review of the record in consideration of Employer’s assertion that Taylor was not a credible witness does not reveal sufficient cause to discredit Taylor’s testimony. (*The Bumper Shop, Inc.*, Cal/OSHA App. 98-3466, Decision After Reconsideration (Sep. 27, 2001).) The inconsistencies in his testimony appear to result from a lack of recollection in some instances, and a failure to understand counsel’s questions in others, rather than a deliberate attempt at deception. For example, Employer points to the following exchange between Taylor and Employer’s counsel:

Q. Did you receive any on-boarding training at JAFEC on blind spots?

A. What do you mean by on-boarding?

Q. When you first came to work at JAFEC, did you get any training? Let me back up.

A. No.

Q. You didn't get any training.

A. Again, we went through the basic orientation, and from there, once I got cleared from my orientation, we -- I keep saying “we.” They had me meet with a couple of members, co-workers of the assembly crew, and immediately I started actually working. There was no actual training.

(Hearing Transcript, pp. 148-149.)

Taylor states that he went through “orientation,” while Employer’s counsel asks if he received “training” or “on-boarding.” Employer asserts that this is an example of Taylor’s “lies” that he received no safety training from JAFEC. (Petition, p. 9.) The Board declines to overturn the ALJ’s findings of witness credibility with regard to Taylor, however.

Our review does not reveal sufficient cause to find that Taylor was not credible, and we decline to do so. We also note that the ALJ had the opportunity, during the hearing, to assess Taylor’s credibility, and did not indicate any reservations in that respect in the Decision. (See

Marine Terminals Corp., Cal/OSHA App. 95-896, Decision After Reconsideration (Sep. 28, 1999), citing *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal 3d 312.)

b. Did Employer fail to ensure that hauling operations were controlled in a manner to ensure that the excavator operator knew of Taylor's presence on foot in the area of operations?

In order to establish a violation of section 1592, subdivision (e), the Division must establish that Employer failed to control hauling or earth moving operations to ensure that an equipment or vehicle operator knew of the location of employees on foot within the area of operation. The safety order places the burden on the employer to establish a method to ensure operators maintain awareness of on-foot employees' location(s). (*R & L Brosamer, Inc.*, Cal/OSHA App. 03-4832, Decision After Reconsideration (Oct. 5, 2011).)

Employer argues that it had a well-devised safety plan. While this may be so in other regards, the Division's evidence establishes that Employer's safety plan did not satisfy section 1592, subdivision (e). Employer's safety manual, IIPP, and training, contrary to the safety order, specifically direct on-foot workers to communicate with equipment operators, using eye contact and hand signals, and to stay away from blind spots and other hazards, while providing no instruction to equipment operators on remaining aware of on-foot workers.

Board precedent is clear that under this safety order, the employer has an affirmative obligation to implement a plan to ensure that operators know the location of workers on foot in the immediate area. The employer may not instead rely on a plan in which workers on foot are responsible for avoiding the shifting danger zones around moving heavy machinery. (*Teichert Construction v. California Occupational Safety and Health Appeals Board* (2006) 140 Cal. App.4th 883, 891-892; *R & L Brosamer, Inc.*, *supra*, Cal/OSHA App. 03-4832; *HB Parkco Construction, Inc.* Cal/OSHA App. 07-1731, Decision After Reconsideration (Mar. 26, 2012).)

JAFEC's Code of Safe Practices in effect at the time of the accident directs employees working on foot in the area of heavy machinery to ensure that they can be seen by equipment operators, and emphasizes employee responsibility to avoid blind spots, pinch points, heavy loads, and other hazards. (Exhibit 11.) Employer's Illness and Injury Prevention Program (IIPP) Training regarding heavy equipment operations, on the hazard of blind spots and pinch points, directs workers on foot to "Always stay in communication with the operator" and "Stay away from [the] pinch point." (Exhibits 24 and 25.) Employer's safety risk assessment instructs spotters on the ground to maintain visual contact with operators and to avoid blind spots and pinch points, along with the directive that spotters should "instruct the driver to stop the vehicle [if] unable to visually see the spotter." (Exhibit 20.) Valdelamar's testimony verified that new employees were trained to avoid blind spots and maintain visual communication with operators. Employer's safety training materials contain no provisions instructing equipment or vehicle operators of the need to remain aware of on-foot workers, or procedures to ensure that operators know of the location of on-foot workers in the area. (Exhibits 11, 20, 24, and 25.)

This evidence indicates that Employer primarily relied on a safety policy that placed the responsibility on employees on foot to avoid heavy equipment and machinery, rather than

implementing a system to ensure that operators were always aware of nearby workers on foot. As the Board pointed out in *R & L Brosamer, Inc., supra*, Cal/OSHA App. 03-4832:

Telling the workers to beware of the blind spots is necessary and wise but cannot substitute for the duty placed on Employer to control operations so the *operator* knows a worker on foot is nearby. A worker cannot necessarily accurately anticipate the operator's intentions or next movement, and is not so required by § 1592(e). [Emphasis in original.]

In keeping with its internal safety policy, JAFEC's accident investigation found the cause of the accident to be Taylor's failure to communicate his position to the excavator operator, Victor Fernandes (Fernandes), and failure to avoid the excavator's blind spot. (Exhibits 18, 19, and 26.) Exhibit 19, JAFEC's memorandum on the accident, included the following statement from Valdelamar:

Mr. Taylor, when walking towards the crews who were hoisting the augur stem, failed to notify the spotter or the excavator operator that he was approaching the work area. Mr. Valdelamar said in his professional opinion, the accident was caused by an employee approaching hoisting operations while in the blind spot of the excavator equipment, causing both the spotter and the excavator operator to be unable to see the employee.

This memorandum further demonstrates that Employer's safety plan inappropriately relied on making on-foot employees responsible for avoiding the hazards posed by heavy equipment and machinery.

Nor were other controls in place, such as the use of radio communication between on-foot workers and equipment operators, or designated safety spotters. Taylor and Valdelamar testified that radios were not used for communication by workers on foot. Valdelamar testified that some equipment operators did use radios, because they needed to be in frequent contact and could not always see each other, but that workers on foot did not need radios, because "they had a clear line of sight" and could rely on hand signals. (Hearing Transcript, p. 554.) Taylor traveled into the hazard area because he interpreted a hand signal from Valdelamar to mean that he should go and assist a worker in another part of the site. Due to other equipment and activity in the area, Taylor passed the excavator on its right side, i.e., its blind side, resulting in the accident. Valdelamar testified that there was a safe route Taylor could have taken (Hearing Transcript, pp. 541, 558), but Valdelamar had no way to communicate that information to Taylor, nor could Taylor communicate with Fernandes. The Supervisor's Accident Investigation Report specifically recommended radio communication as a way to prevent future accidents. (Exhibit 18.)

Valdelamar also testified that there was a spotter at the worksite, but that the spotter's duties included tasks such as directing the movements of machinery and unloading the excavator, not specifically or exclusively watching for hazards or communicating the location of on-foot workers to equipment operators. The spotter was not watching Taylor at the time of the accident, nor was Valdelamar.

Taylor testified that he did not make eye contact with Fernandes in the moments immediately before the accident, and did not know whether Fernandes could see him. In the absence of any evidence that Fernandes knew of Taylor's presence and acted maliciously or recklessly to injure him, it is more reasonable to conclude that the excavator operator did not know of Taylor's presence.

The record indicates that Employer's policy of instructing on-foot workers to watch out for the equipment, and to communicate with operators through eye contact and hand signals, was insufficient to inform the excavator operator of Taylor's location. The ALJ concluded that, based on this evidence, Employer did not implement sufficient control measures to ensure that Fernandes knew of Taylor's presence on foot in the work area, and found that the Division established the violation of section 1592, subdivision (e).

The Board agrees with the ALJ that the Division established the violation by a preponderance of the evidence.

c. Did Employer establish all elements of the Independent Employee Action Defense?

Employer argues that the IEAD was established at the hearing. The IEAD is an affirmative defense, requiring the employer to establish all five elements by a preponderance of the evidence. "Preponderance of the evidence" is "usually defined in terms of probability of truth, or of evidence that when weighed with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence." (*Timberworks Construction, Inc.*, Cal/OSHA App. 1097751, Decision After Reconsideration (Mar. 12, 2019).)

As the Board explained in *Fed Ex Freight Inc.*, *supra*, Cal/OSHA App. 1099855:

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

The ALJ did not apply the entire analysis, finding that Employer failed to prove elements 2 and 5. A single missing element defeats the IEAD. (*RNR Construction, Inc.*, Cal/OSHA 1092600, Decision After Reconsideration (May 26, 2017).) Employer contends that each element of the defense is met. We agree with the ALJ that the IEAD fails.

To establish the first element, the employer must demonstrate that the employee had performed the specific task in question enough times to become reasonably proficient. (*Fed Ex Freight Inc.*, *supra*, Cal/OSHA App. 1099855.) In this case, Taylor had approximately ten years of experience in construction work, and approximately three years of experience working with heavy machinery, including excavators. However, he had been on Employer's job site for less than a month, and this was his first experience at demobilization. (Hearing Transcript, p. 43.) He had no prior experience at road building or soil stabilization. (Exhibits C and D.) Employer argues that Taylor was sufficiently experienced "to perform the task of safely walking near heavy equipment." (Petition, p. 17.) We agree that Taylor had sufficient experience and training working on construction sites and around heavy equipment. The first element is satisfied.

The second element of the IEAD requires the employer to demonstrate that it had a well-devised safety program that included training employees in matters of safety respective to their particular job assignments. (*Chevron U.S.A., Inc.* Cal/OSHA App. 89-283, Decision After Reconsideration (Feb. 8, 1991).) Here, the second element fails because, as discussed above, Employer's safety program was not well-devised, in that it placed the burden on on-foot workers to ensure their own safety, where the plain language of the safety order requires employers to control operations "in such a manner as to ensure that equipment or vehicle operators know of the presence of ... workers on foot in the areas of their operations." (§ 1592, subd. (e).) The Board has held that when an employer's safety program is deficient in such a manner, the employer cannot be said to have a well-devised safety program. (*National Distribution Center, LP/Tri-State Staffing*, Cal/OSHA 12-0391, Decision After Reconsideration (Oct. 5, 2015).) Because this element fails, the defense fails.

The third element, whether the employer's safety program was effectively enforced, also fails. (*National Distribution Center, LP/Tri-State Staffing*, *supra*, Cal/OSHA 12-0391.) Employer argues that its safety training satisfies this element. Because Employer's internal safety program falls short of the requirements of the safety order, however, training on that safety program is not sufficient to satisfy the third element. Even if we were to assume that Employer's safety program was well-devised, the evidence indicates that it was not effectively enforced. If anything, it provides an excellent example of the purpose of the safety order. Valdelamar testified that he did not observe Taylor walk into the excavator's blind spot. Taylor testified that after giving him the hand signal, Valdelamar turned away to attend to other business. The spotter's view of Taylor was obstructed, and Taylor was unable to make eye contact or give a hand signal to Fernandes. This runs contrary to Employer's argument that radio communication between equipment operators and on-foot workers was an unnecessary control because the workers could rely on visual contact and hand signals. Here, the system of eye contact and hand signals was not effectively enforced to notify Fernandes of Taylor's presence.

The fourth element requires the employer to demonstrate a policy of sanctions enforced against employees who violate safety rules. (*Martinez Steel Corp.*, Cal/OSHA App. 97-2228, Decision After Reconsideration (Aug. 7, 2001).) Employer argues that this element is met because it had a policy of disciplinary action against employees who violated safety rules, and did enforce that policy. (Exhibits 11 and L.) Although Taylor himself was not disciplined for any violation of safety rules, Employer's Petition insists that this was only because JAFEC "would have been accused of retaliation" had it disciplined Taylor. (Petition, p. 18.) We assume without deciding that the fourth element is satisfied.

Finally, the fifth element fails. The purpose of the IEAD is to relieve employers from liability for "the consequences of willful or intentional violation of one of its safety rules." (*Macco Constructors, Inc.*, Cal/OSHA App. 83-147, Decision After Reconsideration (Oct. 2, 1987).) To satisfy the fifth element, the employer must show that an employee's actions were "intentional and knowing, as opposed to inadvertent." (*Synergy Tree Trimming, Inc.*, *supra*, Cal/OSHA App. 317253953.) Taylor testified that he did not intentionally violate Employer's safety rules (Hearing Transcript, pp. 143, 266); the ALJ found this testimony credible. Employer argues that Taylor intentionally violated his safety training by approaching the excavator on its blind side.

At the hearing, Taylor testified that he did not believe that he was in the zone of danger when he approached the excavator and at the moment immediately before he was struck. When shown a diagram of the worksite illustrating the zone of danger around the excavator (Exhibits 3 and 4), Taylor admitted that he did enter that area. (Hearing Transcript, p. 198.) Employer presented no evidence that Taylor willfully or intentionally violated Employer's safety rules by deliberately positioning himself in the excavator's blind spot. Employer's own post-accident investigation reports (Exhibits 18, 26) indicate that Taylor's actions were "an unfortunate one-time error," resulting from poor judgment rather than willful disregard for safety rules. (*Synergy Tree Trimming, Inc.*, *supra*, Cal/OSHA App. 317253953.) Even if the Board were to conclude that Taylor did knowingly violate safety rules by attempting to pass the excavator on its blind side, the IEAD still fails because Employer failed to establish the second and third elements.

In addition, the excavator operator, Fernandes, was also involved in the accident. Where there are two actors involved, the employer must prove all elements as to both employees. (*Fed Ex Freight Inc.*, *supra*, Cal/OSHA App. 1099855; *Paramount Farm, Kings Facility*, Cal/OSHA App. 2009-864, Decision After Reconsideration (March 27, 2014).) As the ALJ pointed out, Fernandes was not summoned as a witness. Employer failed to present any evidence regarding his experience. Employer failed to present any evidence that Fernandes knowingly and intentionally violated Employer's safety policy. In its Petition, Employer does not address the IEAD with regard to Fernandes. The ALJ found, and we agree, that the IEAD was not established with regard to the second employee involved in the accident.

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

Employer also disputes the classification of the violation as Serious. Labor Code section 6432, subdivision (a), provides 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 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 Board has defined a “realistic possibility” to mean a prediction that is within the bounds of human reason, not pure speculation. (*Sacramento County Water Agency Department of Water Resources*, Cal/OSHA App. 1237932, Decision After Reconsideration (May 21, 2020).)

The parties stipulated that Taylor suffered serious physical harm as defined by Labor Code section 6432, subdivision (e), and a serious injury as defined by Labor Code section 6302, subdivision (h), and California Code of Regulations, title 8, section 330, subdivision (h). There is no dispute that Taylor was injured when he was struck by an auger stem being moved by an excavator during the course of his employment by Employer. The ALJ found, and we agree, that the injury resulted from Employer’s violation of section 1592, subdivision (e). More than being a realistic possibility, serious harm actually occurred. The Division accordingly established a rebuttable presumption that the citation was properly classified as Serious.

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

Labor Code section 6432, subdivision (c), provides that an employer may rebut the presumption that a serious violation exists by demonstrating that the employer did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation. In order to rebut the presumption, the employer must demonstrate both:

(1) The employer took all the steps a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation, taking into consideration the severity of the harm that could be expected to occur and the likelihood of that harm occurring in connection with the work activity during which the violation occurred. Factors relevant to this determination include, but are not limited to, those listed in subdivision (b).

(2) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered.

A supervisor's knowledge of a hazard is imputed to Employer. (*Sacramento County Water Agency Department of Water Resources, supra*, Cal/OSHA App. 1237932; *MCM Construction, Inc.*, Cal/OSHA App. 13-3851, Decision After Reconsideration (Feb. 22, 2016).)

The Division established that Employer was aware of the danger to workers on foot in the area of heavy machinery. (Exhibits 20, 24, and 25.) Additionally, Valdelamar knew, or reasonably should have known, of the hazard when he directed Taylor to travel across the site, with no way to communicate the safe route to Taylor, no one observing Taylor, and no way for Taylor to communicate with the excavator operator. In rebuttal, Employer argues that the accident was the result of Taylor's "own unsafe actions," which happened too quickly to "give employer sufficient knowledge to act and respond to the hazard." (Petition, p. 16.) Employer's argument neglects that the hazard alleged was not Taylor's poor choice of path through the worksite, but Employer's failure to implement a system of controls to ensure that equipment operators knew the location of nearby on-foot workers. In this instance, not only did Employer fail to have an appropriate system placing the onus of compliance on the operator, Employer failed to effectively implement its own system of hand signals and eye contact, causing Fernandes to be unaware that Taylor had entered the zone of danger around the excavator.

Employer therefore did not take all the steps a responsible and reasonable employer in like circumstances should be expected to take to anticipate and prevent the violation. For these reasons, Employer failed to rebut the presumption that the citation was properly classified as Serious.

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

To establish the classification of a citation as accident-related, there must be a causal nexus between the violation of the safety order and the injury. (*MCM Construction, Inc., supra*, Cal/OSHA App. 13-3851; *Webcor Construction*, Cal/OSHA App. 3176766, 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." (*Sacramento County Water Agency Department of Water Resources, supra*, Cal/OSHA App. 1237932.)

The parties in this case stipulated that Taylor suffered a serious physical injury in the course of his employment with Employer, as a result of the accident that occurred on January 6, 2018. Employer's accident investigation reports state that the accident was caused by a lack of communication between Taylor and the operator, which resulted in the operator being unaware of Taylor's position in the work area. (Exhibits 18, 19, and 26.) The Division's accident report described the accident as occurring when Taylor walked into an "area where a section of augur was being pushed by an excavator bucket and was struck by augur onto leg. The equip[ment]

operator and spotter did not see him.” (Exhibit 14.) This evidence indicates that sufficient controls were not in place to ensure that the excavator operator knew of Taylor’s location in the work area, supporting a causal nexus between Employer’s violation of section 1592, subdivision (e), and Taylor’s injury. The ALJ correctly concluded that the Citation was properly characterized as Accident-Related.

5. Is the proposed penalty reasonable?

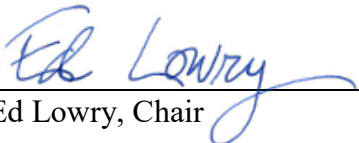
Penalties calculated in accordance with the penalty setting regulations set forth in sections 333 through 336 are presumptively reasonable and will not be reduced absent evidence that the amount of the proposed civil penalty was miscalculated, the regulations were improperly applied, or that the totality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


The parties stipulated that the penalty was calculated in accordance with the Division’s policies and procedures. As the citation’s classification is upheld, the proposed penalty is affirmed.

DECISION

For the foregoing reasons, the Serious, Accident-Related Citation is upheld. The associated penalty is affirmed.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD


Ed Lowry, Chair


Judith S. Freyman, Board Member


Marvin Kropke, Board Member



FILED ON: **06/02/2021**