BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1237932**
SACRAMENTO COUNTY WATER AGENCY **DEPARTMENT OF WATER RESOURCES** **10151 Florin Road** **Sacramento, CA 95829** **Employer**	**DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board, acting pursuant to authority vested in it by the California Labor Code and having taken the petition for reconsideration filed in this matter by Sacramento County Water Agency Department of Water Resources (Employer) under submission and after reviewing the entire record, renders the following decision after reconsideration.

DECISION AFTER RECONSIDERATION

Before the Appeals Board is a decision dated August 14, 2019, by an administrative law judge (ALJ) of the Board, denying Employer's appeal of a serious violation of section 4999(d)(2)[1] [failure to ensure a large grate being lifted by a jib crane was properly secured].

On September 13, 2019, Employer filed a petition for reconsideration regarding the 4999(d)(2) violation. On October 10, 2019, the Division of Occupational Safety and Health (Division) filed an opposition to the petition for reconsideration. On October 24, 2019 the Board took the petition under submission and stayed the decision of the ALJ pending a decision on the petition by the Board.

BACKGROUND

Employer is a public entity involved in water treatment. The Division cited Employer for failure to ensure a load was well secured and properly balanced before it was lifted in compliance with section 4999(d)(2).

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

FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

The Appeals Board has considered the decision of the ALJ and the record in light of Employer's petition for reconsideration and affirms the ALJ's summary of evidence, rulings, findings, and conclusions and adopts the decision in its entirety. Accordingly, the ALJ's decision is attached and incorporated herein by reference.

DECISION AFTER RECONSIDERATION

The decision of the ALJ dated August 14, 2019, denying Employer's appeal and imposing a civil penalty, is reinstated and affirmed.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

Ed Lowry, Chairman
Judith S. Freyman, Board Member
Marvin P. Kropke

FILED ON: 05/14/2020

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In the Matter of the Appeal of:	Inspection No. **1237932**
SACRAMENTO COUNTY WATER AGENCY **DEPARTMENT OF WATER RESOURCES** **10151 FLORIN ROAD** **SACRAMENTO, CA 95829** **Employer**	**DECISION**

Statement of the Case

Sacramento County Water Agency Department of Water Resources (Employer) is a public entity involved in water treatment. On June 7, 2017, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Shannon Lichty, commenced an accident investigation of Employer's work site located at 5112 El Paraiso Avenue, Sacramento, California (jobsite). On November 1, 2017, the Division issued one citation to Employer alleging: failure to ensure that a load was well secured and properly balanced in its sling or lifting device before it was lifted more than a few inches.

Employer filed a timely appeal of the citation on the basis that the classification was incorrect and that the penalty was unreasonable. Employer also asserted the Independent Employee Action Defense as an affirmative defense. As discussed herein, Employer also discussed the Newbery defense but did not seek to amend its appeal to include the Newbery defense as an alternate affirmative defense.

This matter was heard by Christopher Jessup, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (the Appeals Board), in Sacramento, California, on February 26 and 27, 2019, April 23, 24, and 25, 2019, and May 23, 2019. William Burke, Deputy County Counsel, represented Employer. Allyce Kimerling, Staff Counsel, represented the Division. The matter was submitted for Decision on August 9, 2019.

Issues

1. Did Employer establish the Independent Employee Action Defense?

2. Does the Newbery defense provide Employer an alternate defense to the violation?

3. Did the Division establish that Citation 1 was properly classified as Serious?

4. 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?

5. Did the Division establish that the citation was properly characterized as Accident-Related?

6. Is the proposed penalty reasonable?

Findings of Fact[1]

1. On May 4, 2017, a grate fell on Jason Hoffman (Hoffman).

2. Hoffman suffered multiple broken and fractured bones when the grate fell on him.

3. Hoffman was hospitalized for the period of May 4, 2017, to May 17, 2017, and then transferred to a rehabilitation facility on May 17, 2017, where he remained until his discharge on May 31, 2017.

4. On May 4, 2017, Hoffman was the lead operator for Employer's sump annual[2] at site D-33 and, at the time of the accident, Hoffman was directing the lift of the grate.

5. As the lead operator, Hoffman was responsible for ensuring the safety of other employees because he was in control of the jobsite, he had the ability to stop and start operations, and he was charged with making sure the work at the jobsite was done safely.

6. Employer's policy required that employees lift loads to waist height before engaging or disengaging a safety latch to secure or unsecure a load. The hook and latch was the only mechanism employed to secure the grate being lifted at the jobsite.

7. Hoffman failed to secure the safety latch in the process of lifting the grate, immediately prior to the accident, but his failure was not intentional.

[1] Finding of fact number 2 and 3 are pursuant to stipulations put forth by the parties.
[2] Sump annual was used to describe a yearly event where equipment and facilities at Employer's jobsite were cleaned and maintained.

Analysis

1. Did Employer establish the Independent Employee Action Defense?

California Code of Regulations, title 8, [3] section 4999, subdivision (d), provides in relevant part:

> Moving the Load. The individual directing the lift shall see that:
> […]
> (2) The load is well secured and properly balanced in the sling or lifting device before it is lifted more than a few inches;
> […]

Citation 1 alleges:

> Prior to and during the course of the investigation, the employer failed to insure [*sic*] a grate being lifted by a jib crane, was secured and properly balanced in the lifting device, prior to being lifted more than a few inches. As a result, on or about 5/4/17, an employee sustained a serious injury when a grate fell on him while being lifted.

Employer did not contest the violation asserted in the alleged violation description and, therefore, the violation is established by operation of law. Rather, Employer asserted that it is not liable for the violation of section 4999, subdivision (d)(2), based on the Independent Employee Action Defense (IEAD).

In *Fedex Freight Inc.*, Cal/OSHA App. 1099855, Decision After Reconsideration (Sept. 24, 2018), the Appeals Board explained:

> 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 contrary to employer's safety rules. (*Synergy Tree Trimming, Inc.,* [Cal/OSHA App.] 317253953, Decision After Reconsideration (May 15, 2017) [other citations omitted].)

[3] All references are to California Code of Regulations, title 8, unless otherwise indicated.

As the IEAD is an affirmative defense, Employer bears the burden of proof to establish that all five elements of the IEAD are present 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. [Citations.]" (*International Paper Company*, Cal/OSHA App. 14-1189, Decision After Reconsideration (May 29, 2015).)

a. Element two: Employer does not have a well-devised safety program.

The second element of the IEAD requires the employer to have a well-devised safety program, which includes training employees in matters of safety respective to their particular job assignments. "This element should be analyzed by taking a realistic view of the written program and policies, as well as the actual practices at the workplace. [Citation.]" (*Fedex Freight Inc.*, *supra*, Cal/OSHA App. 1099855.)

At hearing, numerous witnesses testified that Employer requires that when loads are lifted with cranes using hooks, such as was the case at the jobsite, the loads must be lifted up to waist height before engaging or disengaging a safety latch to secure or unsecure the load. Section 4999, subdivision (d)(2), requires that when moving a load, an employer is required to ensure that the individual directing the lift shall see that the load is well secured and properly balanced in the sling or lifting device before it is lifted more than a few inches. There was ample testimony that indicated that the hook and latch system was the only means for securing the load at the jobsite. Therefore, Employer's method of ensuring the load was secured was limited to closing the safety latch on the hook. As Employer's policy required that employees close the safety latch at waist height, rather than before the load is lifted more than several inches, Employer's policy is in direct violation of the requirements of section 4999, subdivision (d)(2).[4] Accordingly, Employer's safety program is not well devised because it requires violation of the safety order and, therefore, Employer is unable to establish the second element of the IEAD.

b. Element three: Employer does not effectively enforce its safety program.

The Appeals Board has long held that the IEAD does not apply where a supervisor or foreperson commits the violation. (*Brunton Enterprises, Inc*., Cal/OSHA App. 08-3445, Decision After Reconsideration (Oct. 11, 2013).) The Appeals Board has explained that the issue of whether a supervisor commits the violation is not a true exception to the IEAD, but rather a

[4] In *City of Sacramento Fire Dept.*, Cal/OSHA App. 88-004, Decision After Reconsideration (Mar. 22, 1989), the Appeals Board explained that "[i]f an Employer feels a safety order is unreasonable it should apply to the Standards Board for a variance or to have the safety order repealed or amended." (See also *Morrow Meadows Corporation,* Cal/OSHA App. 09-2295, Decision After Reconsideration (Sept. 04, 2014).)

situation where the third element required under the IEAD is not met. (*Ibid.*) The weight of the determination that the employee who caused the violation was a supervisor effectively renders the inquiry as a potential threshold issue for the third element of the IEAD. Therefore, in the instant matter, it is necessary to first consider whether Hoffman was a supervisor.

The Appeals Board has long held that a supervisor means someone who has the authority or responsibility for the safety of other employees. (*PDM Steel Service Centers, Inc.,* Cal/OSHA App. 13-2446, Denial of Petition for Reconsideration (June 10, 2015).) Further, in *City of Sacramento, Dept. of Public Works,* Cal/OSHA App. 93-1947, Decision After Reconsideration (Feb. 5, 1998), the Appeals Board discussed a series of prior cases to explain that the determination of supervisor is based on a factually specific analysis and is not determined by title or job description alone. In *Granite Construction Company,* Cal/OSHA App. 84-648, Decision After Reconsideration (Mar. 13, 1986), the Appeals Board held that an employee was a supervisor where he was deemed in charge of the work site because he was responsible for controlling the work site, bringing materials to the work site, and where work did not begin until that employee instructed the crew on what was to be done. In *Contra Costa Electric, Inc.,* Cal/OSHA App. 90-470, Decision After Reconsideration (May 8, 1991), the Appeals Board held that it is the cumulative nature of an employee's responsibilities, rather than the traditional power to hire and fire, that determines whether an employee is a supervisor. Finally, in *Jerry W. Winfrey, dba: Jerry's Electrical Service,* Cal/OSHA App. 91-1287, Decision After Reconsideration (July 29, 1993), the Appeals Board found an employee to be a supervisor where he ordered the other employees to work outside a building shortly before an accident, because that employee was empowered by the employer to determine the means to be used to reach overhead conduits and fixtures. In these cases, the Appeals Board has made it clear that it is not necessary for a supervisor to have particular tasks or responsibilities beyond the threshold issue of authority or responsibility for safety of other employees. (*City of Sacramento, Dept. of Public Works*, *supra*, Cal/OSHA App. 13-2446.)

In the instant matter, Hoffman was designated by Employer as a lead operator on the day of the accident. Hoffman testified that part of being a lead meant he was responsible to coordinate with other operators to make sure people show up.

Additionally, Employer's witness Randy Lightle (Lightle), a water treatment plant manager for Employer who supervised Hoffman's direct supervisor, provided a great deal of testimony on the responsibilities of a lead operator generally and with regards to Hoffman's role as a lead on the day of the accident. Lightle testified that, as a lead operator, the employee is "ultimately the guy in charge." Lightle expanded on the term "in charge," to explain:

> When somebody is in charge, they're in charge. They stop it. They – whatever the evolution, whatever is going on, there's one person that can stop it and start it and

> that person is in charge. He's our lead operator. If he sees something that's dangerous, something that somebody is doing wrong, something that's a training opportunity, something – any and everything that's – whatever is involved in that evolution, the person is in charge is… the overall say at that point in time.

Lightle also explained that, even when Employer has employees with the designated title of supervisor at a job site, the supervisors are there to make sure that the lead operator is doing the job but not take over the lead operator's job. Lightle offered, with specific reference to Hoffman, "when [Hoffman's supervisor] walks on that jobsite, that does not – they don't stop listening to Jason Hoffman in this case. Jason Hoffman is still calling the shots, still going through." Lightle testified that Hoffman was "in charge of everything. He could – he could have stopped that whole job, continue the whole job, anything that he – he would be the most senior guy there because he's the guy running it." Lightle also testified that, as the lead operator on the day of the accident, Hoffman had the authority to stop another employee from entering the pit at the jobsite without fall protection.

Adam Wilkinson (Wilkinson), Hoffman's direct supervisor, also testified regarding the responsibilities of a lead operator. Wilkinson testified that being a lead operator meant "they're responsible, one, for holding the safety meeting, ensuring all the work is done, done and done properly, coordinating with the other departments, and just kind of – kind of being in charge of the – the whole site." Wilkinson also testified that on the day of the accident Hoffman was the lead operator and was acting in that capacity by "directing any of the other drainage crew, water system operators, and he's the one running the crane…." Further, Wilkinson testified that the lead, as operator of the crane, was in charge of making sure the safety latch on the crane's hook was engaged when the load was above the deck. Finally, Wilkinson testified that, by designating Hoffman as the lead operator, he charged Hoffman with making sure the job was done safely.

Employer concedes in its closing brief: "the lead simply has the authority to call out the violation, instruct the co-worker to cease the violative action, and report the incident to an actual supervisor." Pursuant to the foregoing, the evidence overwhelmingly demonstrates that Hoffman, as a lead operator, was responsible for the safety of other employees and was in charge of the operation at the jobsite. Hoffman had the ability and responsibility to implement Employer's safety program at the jobsite on the day of the accident. Therefore, he was a supervisor. Accordingly, Employer fails to establish element three of the IEAD.

It is noted that the parties stipulated that Employer effectively enforces its safety program and, therefore, satisfied its burden of proving the third element the IEAD. However, the parties did not stipulate that Hoffman was not a supervisor. Ample evidence was adduced regarding the responsibilities of Hoffman as the lead operator at the jobsite. In *Safeway #951*, Cal/OSHA App. 05-1410, Decision After Reconsideration (July 6, 2007), the Appeals Board considered the effect

of party stipulations in the proceedings before the Appeals Board. In that case, the Appeals Board concluded that: (1) it is necessary to consider all relevant facts in determining an issue, and (2) the Appeals Board is bound to consider stipulations as part of the relevant facts except to the extent that the stipulations are contrary to law, policy, or Appeals Board procedure. (*Ibid.*)[5] Interpreting the parties' stipulation, that Employer effectively enforces its safety program, to mean that Hoffman was not a supervisor would be contrary to the law to the extent that it would potentially allow for the IEAD to be applied in a situation where a supervisor committed the violation. Therefore, that stipulation cannot be considered relevant in the determination as to whether Hoffman was a supervisor and cannot overcome the weight of such a determination in evaluating the outcome of the third element of the IEAD.

c. Element five: Employee did not intentionally violate Employer's safety rules.

Additionally, in *Synergy Tree Trimming, Inc.*, *supra,* Cal/OSHA App. 317253953, 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.

In the instant matter, Hoffman testified that he did not intentionally fail to secure the latch in the process of lifting the grate. As discussed above, Employer is the party with the burden of proof. Although Employer provided testimony from both Wilkinson and Lightle suggesting that they believed Hoffman's act was intentional, Employer provided no additional evidence that

[5] In *Safeway #951, supra*, Cal/OSHA App. 05-1410, the parties presented a Stipulation of Facts for the ALJ to consider in lieu of an evidentiary hearing. As such, the record was based on stipulated facts and there was no evidence adduced at hearing contrary to the stipulations of the parties.

called into doubt the direct testimony of Hoffman and provided no additional evidence warranting an inference that Hoffman's action, or lack thereof, was intentional. As Employer bears the burden of proof, it has failed to demonstrate by a preponderance of the evidence that it is more likely than not that Hoffman's action was intentional. Accordingly, Employer failed to establish the fifth element of the IEAD.

As set forth above, Employer has failed to meet the burden of proof to establish three elements of the IEAD. Accordingly, as failure to prove a single element of the IEAD defeats the defense, Employer has failed to establish the IEAD.

2. Does the Newbery defense provide Employer an alternate defense to the violation?

Employer's appeal did not assert the Newbery defense. Further, at no time did Employer seek leave to amend its appeal to assert the Newbery defense. Instead, Employer alleges that the Newbery defense is part of the IEAD. Employer first presented its argument for considering the defenses as integrated the day before the hearing was set to commence. Employer's post-hearing brief argues that, because the Court of Appeals equated the Newbery defense to a negative statement of the IEAD, Employer should be relieved from "any alleged procedural error for failing to expressly state the Newbery Defense in its appeal form."[6]

In *Davey Tree Surgery Co. v. Occupational Safety & Health Appeals Bd.* (1985) 167 Cal.App.3d 1232 (*Davey Tree*), the court provided a list of the factors considered for the IEAD and then stated:

> Stated another way, and in the negative, the rule provides that ". . . the 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." (*Gaehwiler v. Occupational Safety & Health Appeals Bd.* (1983) 141 [Cal.]App.3d 1041, 1045 […], citing *Newbery Electric Corp. v. Occupational Safety & Health Appeals Bd.* (1981) 123 Cal.App.3d 641, 649 […].)

In the instant matter, Employer asserts that because the Court of Appeals in *Davey Tree* referred to the elements of the Unforeseeability Defense, also referred to as the Newbery

[6] It is noted that Employer did not add to this argument that it desires to amend its appeal to include the Newbery defense.

defense, as a negative statement of the IEAD, it is able to assert both defenses by only putting forth the IEAD in its appeal.

a. The Appeals Board has distinguished the Independent Employee Action Defense from the Newbery defense.

The Appeals Board has explicitly distinguished the Newbery defense from the IEAD since the Court of Appeals decided *Davey Tree*. In *Synergy Tree Trimming, Inc.*, *supra,* Cal/OSHA App. 317253953, the Appeals Board states, "[t]he Board also notes that a separate affirmative defense, known as the Newbery defense, may be applicable in cases such as this, and can be asserted and argued concurrently with the IEAD." (See also *Brunton Enterprises, Inc*., *supra,* Cal/OSHA App. 08-3445.)

The Appeals Board's decision to distinguish the IEAD and Newbery defense is well reasoned. The IEAD and the Newbery defense have different purposes. In *Macco Constructors, Inc., supra,* Cal/OSHA App. 83-147, the Appeals Board described 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. [Citation.]

Alternatively, the Newbery defense is also known as the Unforeseeability Defense because it is designed to relieve an employer from unforeseeable acts. (*Brunton Enterprises, Inc*., *supra,* Cal/OSHA App. 08-3445.) As these purposes are distinct, the evidence and analysis involved the defenses are distinct as well. For example, the fifth element of the IEAD remains unaddressed by the elements of the Newbery defense, and, although the Newbery defense may ultimately consider similar facts, the intent of an employee is not essential to the analysis or determinative of the result. An interpretation of the IEAD that would exclude the consideration of the intent of the employee involved in the violation would eviscerate the announced purpose of the IEAD. Therefore, it cannot be concluded that the IEAD encompasses the Newbery defense.

b. The facts at issue in the instant matter do not support a finding that the Newbery defense is a viable defense for Employer.

Even assuming, arguendo, that the Newbery defense has been properly raised, it would offer Employer no assistance.

The factors of the Newbery defense are:

(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

(*Synergy Tree Trimming, Inc.*, *supra,* Cal/OSHA App. 317253953.)

As a preliminary consideration, the Newbery defense is unavailable where the violation is caused by a supervisor. In *Brunton Enterprises, Inc*., *supra,* Cal/OSHA App. 08-3445, the Appeals Board explained:

> However, an employer cannot utilize the Newbery defense when a supervisor commits the violation. (*Davey Tree Surgery Co. v. Occupational Safety & Health Appeals Bd.* (1985) 167 Cal.App.3d 1232, 1243 [employer necessarily fails the second prong of the Newbery defense when a supervisor violates a safety order].) The Board has also previously considered this issue and denied the Newbery defense when a supervisor committed the violation. (See *Hollander Home Fashions*, Cal/OSHA App. 10-3706, Denial of Petition for Reconsideration (Jan. 13, 2012), citing *MCI Worldcom, Inc.*, Cal/OSHA App. 00-440, Decision After Reconsideration (Feb. 13, 2008) [Newbery defense fails since supervisor's knowledge is imputed to employer].)

As discussed above, Hoffman was a supervisor. As such, a violation by Hoffman establishes that Employer failed to exercise supervision adequate to assure safety. Further, Employer requires loads at the jobsite to be lifted up to waist height before securing the loads, in direct contravention to section 4999, subdivision (d)(2). As such, a violation of the safety order is foreseeable as it is required by Employer's policy. Because Employer was aware of its policy requiring loads to be secured after they were lifted more than several inches, Employer was aware of the potential danger to its employees. Therefore, even if Employer had properly asserted the Newbery defense, the facts at hand demonstrate that Employer would have failed to meet its burden of proof to establish the requisite elements of the defense.

3. Did the Division establish that Citation 1 was properly classified as Serious?

Labor Code section 6432, subdivision (a), states:

> There shall be a rebuttable presumption that a "serious violation" exists in a place of employment if the division demonstrates that there is a realistic possibility that

> death or serious physical harm could result from the actual hazard created by the violation. The actual hazard may consist of, among other things:
> […]
> (2) The existence in the place of employment of one or more unsafe or unhealthful practices that have been adopted or are in use.
> […]

"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).)

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).)

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.

Associate Safety Engineer Shannon Lichty (Lichty) testified that she was current on her division-mandated training at the time of the hearing. As such, she was competent to offer testimony regarding the classification of the citation as Serious. Lichty testified that employee exposure to an unsecured load created a realistic possibility of serious physical harm or death. In fact, in the instant matter, Hoffman suffered broken and fractured bones when the grate fell on him, which required hospitalization for the period of May 4, 2017, to May 17, 2017. Accordingly, the Division established a rebuttable presumption that the citation was properly classified as Serious.

4. **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 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) [; 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.

In *Ventura Coastal, LLC,* Cal/OSHA App. 317808970, Decision after Reconsideration (Sept. 22, 2017), the Appeals Board reaffirmed the principle from *Levy Premium Foodservice Limited Partnership dba Levy Restaurants*, Cal/OSHA App. 12-2714, Decision After Reconsideration (Aug. 25, 2015):

> A supervisor's knowledge of a hazard is imputed to the employer. [Citation.] In *Lift Truck Services Corporation*, Cal/OSHA App. 93-384, Decision After Reconsideration (March 14, 1996) the Appeals Board provided the rationale for the knowledge requirement employers may use to rebut the presumption of a serious injury: "With the purpose of the Act in mind, the Board reads the knowledge element of Labor Code section 6432 to encourage employers to conduct reasonably diligent inspections for violative conditions in the workplace so that the hazard associated with that condition can be timely corrected or, otherwise, face the prospect of a serious violation and heightened civil penalty."

The violation was foreseeable because Employer's policy requires employees to lift loads more than several inches before securing the loads in direct contravention to the safety order. Additionally, as discussed above, Hoffman was a supervisor and was directing the lift. Therefore, Hoffman's failure to secure the load and ensure compliance with the safety order constitutes Employer's knowledge of the specific violation at issue in this matter. As such,

Employer cannot rebut the presumption of a Serious classification and the Serious classification was properly established.

5. Did the Division establish that the citation was properly characterized as Accident-Related?

In *RNR Construction, Inc.,* Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017), the Appeals Board explained:

> 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." [Citation.] 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." [Citations.]

Labor Code section 6302, subdivision (h), provides that a "serious injury" includes, among other things, any injury or illness occurring in a place of employment or in connection with any employment which requires inpatient hospitalization for a period in excess of 24 hours for other than medical observation. In the instant matter, pursuant to the stipulation of the parties, Hoffman was hospitalized more than 24 hours for treatment of his injuries. Therefore, Hoffman suffered a serious injury. Hoffman was injured when the unsecured load, the grate, fell on him. The evidence adduced at hearing supported that a causal nexus existed between Employer's failure to ensure the load was well secured and the resulting injury and hospitalization in excess of 24 hours. Accordingly, the citation was properly characterized as Accident-Related.

6. 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. (*Stockton Tri Industries, Inc*., Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).)

Section 336, subdivision (c), provides that the base penalty for a Serious violation shall be assessed at $18,000. Section 336, subdivision (d)(7), provides that the penalty for a Serious violation causing death or serious injury, illness, or exposure, may only be reduced for Size. As discussed above, the citation is properly classified as Serious and the violation resulted in a serious injury.

Section 335, subdivision (b), and section 336, subdivision (d)(1), provide that no adjustment may be made for Size when an employer has over 100 employees. Lichty testified credibly that Employer has more than 100 employees. Therefore, no adjustment is warranted for Size.

Accordingly, the proposed penalty is affirmed in the amount of $18,000.

Conclusion

Employer violated section 4999, subdivision (d)(2), by failing to ensure that a load was well secured and properly balanced in its sling or lifting device before it was lifted more than a few inches. Employer failed to establish the Independent Employee Action Defense and the Newbery defense. The violation was properly classified as Serious and properly characterized as Accident-Related. The proposed penalty is found reasonable.

ORDER

It is hereby ordered that Citation 1 is affirmed and the associated penalty is affirmed and assessed as set forth in the attached Summary Table.

/s/

Dated: 08/14/2019

Christopher Jessup
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.**