BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of: **Ventura Coastal, LLC** **Employer**	Inspection No. **317808970** **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code, and having taken the Decision of the ALJ under reconsideration on its own motion, and having taken the petition for reconsideration filed by Ventura Coastal, LLC (Employer) under submission, renders the following decision after reconsideration.

JURISDICTION

On September 19, 2014, the Division of Occupational Safety and Health (the Division) conducted an inspection of Employer's facility, located in Visalia, California. On February 26, 2015, the Division issued a citation to Employer alleging a violation of section 3999, subdivision (a) [Screw conveyors 7 feet or less above floor or other working level shall be completely covered with substantial lids except that screw conveyors the top of which are 2 feet or less above the floor or other working level, or below the floor level may be guarded by standard railing guards having toeboards of midrail height or shall be guarded by substantial covers or gratings.]

Employer timely appealed the citations.

On September 20, 2016, a hearing was held before Administrative Law Judge (ALJ) J. Kevin Elmendorf of the Board. The ALJ issued a Decision on March 7, 2017, upholding the single, serious citation of the safety order, but amending the penalty to $10,800.

The Board took the Decision under reconsideration on its own motion on April 11, 2017. Employer also filed a timely petition for reconsideration on April 10, 2017, which the Board took under submission.

ISSUES

1. Did the Division establish a violation of section 3999, subdivision (a), by a preponderance of the evidence?
2. Assuming a violation is found, has the Employer established the *Newbery*[1] defense?

[1] This is a reference to the defense discussed in *Newbery Elec. Corp. v. Occupational Safety and Health Appeals Board* (1981) 123 Cal.App.3d 641, 650. (See also *Gaewhiler v. Occupational Safety and Health Appeals Board* (1983) 141 Cal.App.3d 1041, 1045.)

3. Assuming a violation is found, is the violation properly classified as serious?
4. Did the ALJ properly modify the penalty?

FINDINGS OF FACT

1. Cal/OSHA Associate Safety Engineer (ASE) Ron Harris (Harris) conducted an inspection at Employer's worksite located in Visalia on September 19, 2014.

2. On the date of the accident, August 30, 2014, Employer's employee, Isaul Alvarado (Alvarado), was employed as a laborer. Alvarado's job duties included sweeping and loading fruit and materials that had fallen onto the ground into a wheelbarrow, and then placing the load into a dump chute.

3. During the course of his duties, Alvarado stepped into an exposed screw conveyor (or "auger"), which had been located below ground level.

4. The screw conveyor was not properly covered at the time of the accident.

5. Employer's plant supervisor, Manuel Sierra (Sierra), was present at the time of the incident, standing atop a platform with direct line of sight of the exposed screw conveyor.

6. An employee had removed the grate covering the auger on at least two occasions during a two-month period prior to the incident.

7. Sierra had seen the grates removed from the auger in the past, and had reported the unsafe condition to upper management.

8. The incident of August 30, 2014 resulted in Alvarado sustaining serious physical harm.

9. With adequate supervision and a thorough inspection of the area, Employer could have known of the existence of the exposed screw conveyor on August 30, 2014.

10. The Division failed to show via evidence or testimony that the proposed penalty was calculated in accordance with the Division's penalty-setting regulations.

DISCUSSION

1. Did the Division establish a violation of section 3999, subdivision (a), by a preponderance of the evidence?

Title 8, section 3999, subdivision (a) states the following:

> Screw conveyors 7 feet or less above floor or other working level shall be completely covered with substantial lids except that screw conveyors the top of which are 2 feet or less above the floor or other working level, or below the floor level may be guarded by standard

> railing guards having toeboards of midrail height or shall be guarded by substantial covers or gratings.

In its alleged violative description, the Division alleges:

> Prior to and during the course of the investigation, the screw conveyor's metal grate had been removed and unguarded during clean-up operations in the production area. During the operation, the screw conveyor located below ground level was unguarded causing a crushing injury to the employee's left leg.

Employer argues in its petition for reconsideration that the Division has failed to establish a violation of the safety order by a preponderance of the evidence. However, the testimony and stipulated facts support the ALJ's finding of a violation. The parties agree that Alvarado stepped into a screw conveyor that was below ground level. No cover or railings guarded the screw conveyor at the time of the accident. The Board is in agreement with the ALJ that a prima facie violation of the safety order is established. (Decision, 3.)

2. Assuming a violation is found, has the Employer established *Newbery* defense?

Employer also argues that it met the requirements of the *Newbery* Unforeseeable Employee Act defense. That defense requires several elements to be met:

> A violation is deemed unforeseeable, therefore not punishable, if none of the following four criteria exist:
> (1) that the employer knew or should have known of the potential danger to employees;
> (2) that the employer failed to exercise supervision adequate to assure safety;
> (3) that the employer failed to ensure employee compliance with its safety rules; and
> (4) that the violation was foreseeable.
>
> (*Gaehwiler v. Occupational Safety & Health Appeals Bd.* (1983) 141 Cal.App.3d 1041, 1045.)

Employer has failed to demonstrate that it did not know or should not have known of the potential danger. Sierra, as a management official, testified that he had previously reported the removal of the grates to his supervisor, giving the Employer actual knowledge of a potential danger to its employees through both the plant superintendent and plant manager. Given that the grates had been removed at least two times in the past, it cannot be said to be unforeseeable that the grates would be removed again, creating the hazard of an employee inadvertently stepping into the auger and suffering serious injuries.

3. Assuming a violation is found, is the violation properly classified as serious?

In its petition, Employer disputes the serious classification of the citation. Labor Code Section 6432 provides:

> (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.
> […]

There is no question that failure to guard the screw conveyor pursuant to the terms of the safety order created a realistic possibility that death or serious physical harm could result from the actual hazard of an employee accidentally stepping or falling into the conveyor. Indeed, Alvarado did experience serious physical harm.

Employer argues that it rebutted the presumption of a serious citation because "there was no evidence that Ventura Coastal knew that any weld on the cover in issue had been popped and the cover removed on two previous occasions." (Petition, p. 11.) Section 6432, subdivision (c) provides the following mechanism for rebutting the presumption of a serious citation:

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

The record establishes that both Alvarado and plant supervisor Sierra had seen the grates removed on prior occasions, despite the grates being welded. Alvarado testified that the grate would be removed contra to the Employer's safety rules in order to speed along the process of shoving the

materials into the auger. Sierra also testified that he had seen the grate removed at least twice in the receiving area. Sierra's responsibilities for safety are described in the IIPP excerpt found at Exhibit 11. The plant supervisor has enumerated responsibilities for safety, including conducting periodic inspections, correcting unsafe and unhealthful work practices, and ensuring employees are aware of and abide by safety rules.

Sierra testified that he immediately reported the violation the first time he saw the grates removed from the auger, because he was new to the job at that time, and therefore was especially cautious. (Tr. 138.) His claim that he reported the violative condition up the management chain is supported by Alvarado, who stated that when he was visited in the hospital by plant manager Steve Morrison (Morrison), "he [Morrison] was pretty upset because they could have avoided it and didn't really fix it on time actually." (Tr. 32, 48-49.) Although this statement by Morrison to Alvarado is hearsay which does not qualify as an authorized admission, the statement may be considered to supplement or explain other evidence in the record. (*Sherwood Mechanical, Inc*., Cal/OSHA App. 08-4692, Decision After Reconsideration (Jun. 28, 2012), writ denied, August 2013, Section 376.2 [hearsay may be used to supplement or explain other evidence]). While Sierra may have alerted Employer to the hazard, no testimony or evidence suggests that the Employer took steps to abate the hazard after Sierra first reported it, and the statement of Morrison as reported by Alvarado further leads to the conclusion that no steps had been taken at the time of the accident. Furthermore, at the time of the accident, Sierra was present at the worksite, on top of the receiving platform supervising the cleanup crew. With reasonable diligence, it would have been possible for Sierra to notice the missing cover, and either fix it or remove workers from the zone of danger.

As the Board stated in *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. (*Webcor Construction LP*, Cal/OSHA App. 08-2499, Denial of Petition for Reconsideration (Oct. 12, 2009).) 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 knowledge of both Sierra and Morrison as supervisory employees is imputed to the Employer, meaning that the Employer cannot rebut the presumption of a serious injury by claiming it was unaware that the guarding was sometimes removed. The serious classification was properly established.

4. Did the ALJ properly modify the penalty?

The Board reviews the penalty determinations of an ALJ using an abuse of discretion standard. (*Shiho Seki dba Magical Adventure Balloon Rides*, Cal/OSHA App. 11-0477, Denial of Petition for Reconsideration (Aug. 31, 2011).) Generally, where the Division, by introducing its proposed penalty worksheet and testifying to the calculations being completed in accordance with the appropriate penalties and procedures, will be found to have met its burden of showing the penalties were calculated correctly. (*M1 Construction, Inc.*, Cal/OSHA App. 12-0222, Decision After Reconsideration (Jul. 31, 2015).) Here, the Division, in presenting its case, failed to introduce evidence, such as a C-10 penalty worksheet, to show that it correctly calculated the proposed penalty. Having failed to provide such evidence, the ALJ had discretion to recalculate the penalties, and the Board will not disturb the ALJ's penalty determinations.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

Art R. Carter, Chairman

Ed Lowry, Board Member

Judith S. Freyman, Board Member

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