BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1431672**
A. TEICHERT & SON, INC. **dba TEICHERT WATER WORKS SERVICES** **P.O. BOX 15002** **SACRAMENTO, CA 95851** **Employer**	**DECISION**

Statement of the Case

A. Teichert & Son, Inc. (Employer or Teichert), is a construction company. On September 18, 2019, the Division of Occupational Safety and Health (Division), through Safety Engineer Travis Haskins, commenced an inspection of a work site located at 1901 11th Avenue, Sacramento, California, after receiving a report of injury.

On February 5, 2020, the Division issued one citation to Employer. The citation alleges that Employer failed to lock out or de-energize a horizontal directional drill during the repair of the drill rod vise clamp. Employer filed a timely appeal of the citation on the grounds that the safety order was not violated, the classification is incorrect, and the proposed penalty is unreasonable. Employer asserted the affirmative defense of Independent Employee Action.[1]

This matter was heard by Jennie Culjat, Administrative Law Judge for the California Occupational Safety and Health Appeals Board (Appeals Board) on September 7 and 8, 2022, from Sacramento, California, with the parties and witnesses appearing remotely via the Zoom video platform. Matthew S. McMillan, attorney at Donnell, Melgoza, & Scates, LLP, represented Employer. Jennifer Martin, Staff Counsel, represented the Division. The matter was submitted on November 14, 2022.

Issues

1. Did Employer fail to ensure that a Vermeer D10x15 horizontal directional drill was locked out or de-energized during a repair?

[1] Except where discussed in this Decision, Employer did not present evidence in support of its affirmative defenses, and said defenses are therefore deemed waived. (*RNR Construction, Inc.*, Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017).)

2. Did Employer establish that the Independent Employee Action Defense relieved it of liability for the violation?

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

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

6. Is the proposed penalty for Citation 1 reasonable?

Findings of Fact

1. On August 30, 2019, Cody Simpson (Simpson), an employee of Teichert, was injured when his fingers were caught in a vise clamp on a Vermeer D10x15 horizontal directional drill (Drill).

2. The Drill had become inoperable because a vise clamp was slipping. It was determined that the vise clamp or the pin that secures the vise clamp into place needed to be replaced.

3. The Drill could not operate without the vise clamp secured into place by the pin.

4. Employer's procedure for changing vise clamps on a Vermeer D10x15 horizontal directional drill (Vermeer D10x15) was to turn the drill off.

5. The Drill was energized at the time of Simpson's injury.

6. Michael Villasenor (Villasenor), the Drill Operator, inadvertently activated the Drill when he sat on the operator seat, activating the seat sensor, and he either accidentally bumped a control switch, or the switch had been left engaged, causing the vise clamp to engage while Simpson was attempting to remove the vise clamp.

7. Simpson suffered a partial amputation of his right index finger and laceration of his right middle finger, which required surgery and a hospital stay of three days.

8. Although Simpson was experienced in operating a horizontal directional drill, he was not adequately trained to safely change vise clamps.

9. Simpson replaced vise clamps approximately 12 times without de-energizing the Vermeer D10x15.

10. Employer did not adequately supervise Simpson when replacing vise clamps.

11. The proposed penalty for Citation 1 was calculated in accordance with the Division's policies and procedures.[2]

Analysis

1. Did Employer fail to ensure that a Vermeer D10x15 horizontal directional drill was locked out or de-energized during a repair?

Employer was cited for an alleged violation of California Code of Regulations, title 8, section 3314, subdivision (d).[3] The Division has the burden of proving a violation by a preponderance of the evidence. (*Howard J. White, Inc.*, *Howard White Construction, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (Jun. 16, 1983).) "Preponderance of the evidence" is usually defined in terms of probability of truth, or of evidence that, when weighed with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence. (*Nolte Sheet Metal, Inc.*, Cal/OSHA App. 14-2777, Decision After Reconsideration (Oct. 7, 2016).)

"To establish a violation of the safety order, the Division must demonstrate the applicability of the safety order to the facts of the case." (*Coast Waste Management, Inc.*, Cal/OSHA App. 11-2385, Decision After Reconsideration (Oct. 7, 2016).)

a. Does section 3314 apply?

Section 3314, subdivision (a), sets forth the applicability of section 3314. In relevant part, section 3314, subdivision (a), provides:

> (1) This Section applies to the cleaning, repairing, servicing, setting-up and adjusting of machines and equipment in which the unexpected energization or start up of the machines or equipment, or release of stored energy could cause injury to employees.

Section 3314, subdivision (d), refers to "Repair Work and Setting-Up Operations." The

[2] Finding of fact number 11 is a stipulation by the parties.
[3] Unless otherwise specified, all references are to sections of California Code of Regulations, title 8.

Division asserted that Simpson was injured while engaged in a repair of the Drill.

The word "repair" in section 3314 includes replacement of a worn or damaged part that is not part of routine scheduled maintenance. (*Wetsel-Oviatt Lumber Company*, Cal/OSHA App. 94-1462, Decision After Reconsideration (Apr. 12, 2000).)

On the day of the accident, Teichert employees were installing water service lines in a residential community. Two-person crews were operating a Vermeer D10x15 to bore holes for and to install water lines. The two-person crews consisted of an operator and a locator. The operator was responsible for the operational controls of the drill. The locator used a device that received information from a beacon in the drill head about its pitch and depth, which was communicated to the operator, who used the information to keep the drill on the desired path. Simpson, who was a locator, went over to assist another nearby crew when that crew's drill became nonoperational.

Simpson testified that the crew could not continue working because a vise clamp in the Drill was slipping. Although Simpson could not remember precisely, he testified that it was determined that either the vise clamp or the pin, which holds the vise clamp in place, needed to be replaced. Villasenor, the operator of the Drill, similarly testified that the pin was either missing or damaged, and it was decided that the pin needed to be replaced in order to fix the Drill. Simpson explained that whether it was the whole vise clamp or only the pin that needed to be replaced, the process was the same, and the Drill could not operate without the pin securing the vise clamp into place. As a component of the Drill was being replaced, the task at issue was a repair. (*Wetsel-Oviatt Lumber Company, supra*, Cal/OSHA App. 94-1462.)

Employer argued that the repair had not yet begun because Simpson did not have the parts or tools necessary to complete the task. The Appeals Board has held that a preliminary task necessary to complete a repair is part of the repair process. (*Miller Brewing Company*, Cal/OSHA App. 81-1313, Decision After Reconsideration (Dec. 20, 1984).)

"The clear purpose of Section 3314(a) is to keep employees away from the danger zone created by moving machinery." (*Tri-Valley Growers*, Cal/OSHA App. 93-1971, Decision After Reconsideration (February 25, 1997).) In *Tri-Valley Growers*, the Appeals Board explained that it "has refused to get drawn into the fruitless task (akin to counting angels on pinheads) of deciding whether a particular action taken around energized machinery is a cleaning, servicing or adjusting operation." (*Id.*) The Appeals Board even noted "[i]t is well established that 3314(a) applies when an employee fails to de-energize a machine before putting a hand into a running machine to correct some malfunction, even though the employee's purpose was not directly connected with a repair or adjustment of that machine." (*Id.*) The Appeals Board "has recognized that cleaning and servicing operations subject to section 3314(a) begin when preparatory work

for cleaning and servicing begins." (*Ag Labor, Inc*., Cal/OSHA App. 96-168, Decision After Reconsideration (May 24, 2000).) While these cases relate to cleaning, servicing, or adjusting operations, they demonstrate that the Appeals Board interprets the safety order broadly and "repair" must be construed to encompass the entire repair process.

As set forth above, the Drill became nonoperational, and the decision was made to fix the Drill. Action commenced to effectuate the repair as Villasenor instructed Simpson to go get a replacement pin. The fact that Simpson did not yet have the part does not necessitate the conclusion that Simpson was not engaged in a repair. In the context of this case, once the decision was made to fix the Drill, the repair commenced. There is nothing to establish that there was any other plan of action, such as putting the Drill out of service, other than to replace the part so work could continue. Indeed, Marco "Tony" DeAnda (DeAnda), the on-site foreman, testified that he was informed by Villasenor that the pin fell out and they were going to work on the Drill until it was fixed.

While Villasenor testified that he did not ask Simpson to do the repair and did not expect Simpson to attempt to remove the vise clamp, Simpson's action to remove the vise clamp was predicated by the decision to repair the Drill. Simpson testified that the vise clamps were dislodged, needed to be replaced, and he attempted to remove the vise clamp. Even if he was mistaken that the entire vise clamp was being replaced or it was premature to remove the vise clamp, his actions were done to facilitate the repair. Therefore, Simpson was engaged in repairing the Drill at the time of the accident.

Section 3314, subdivision (a), also requires that the machine or equipment be capable of unexpected energization or start up, or release of stored energy that could cause injury to employees for the safety order to apply. Here, the Drill was capable of unexpected energization that could cause injury to an employee. Simpson was injured when his fingers were caught in the vise clamp while he was attempting to remove the vise clamp and Villasenor inadvertently activated the Drill.

Accordingly, section 3314 applies as Simpson was engaged in a repair of the Drill and an unexpected activation of the Drill caused injury to Simpson.

b. Did the Division establish a violation of section 3314, subdivision (d)?

Section 3314, subdivision (d), requires:

(d) Repair Work and Setting-Up Operations.

Prime movers, equipment, or power-driven machines equipped with lockable

> controls or readily adaptable to lockable controls shall be locked out or positively sealed in the "off" position during repair work and setting-up operations. Machines, equipment, or prime movers not equipped with lockable controls or readily adaptable to lockable controls shall be considered in compliance with Section 3314 when positive means are taken, such as de-energizing or disconnecting the equipment from its source of power, or other action which will effectively prevent the equipment, prime mover or machine from inadvertent movement or release of stored energy. In all cases, accident prevention signs or tags or both shall be placed on the controls of the equipment, machines and prime movers during repair work and setting-up operations.

In Citation 1, the Division alleges:

> Prior to and during the course of the investigation, at a jobsite located at 1901 11th Ave. Sacramento, CA, the employer did not ensure the Vermeer D10x15 horizontal directional drill was locked out or use an alternative measures [*sic*] which provides effective protection, during the repair of the drill rod vice clamp. As a result, on or about August 30, 2019, an employee whose hand was in the vice clamp, suffered a serious injury when the drill clap [*sic*] inadvertently closed.

The safety order requires that an employer take positive action, "such as de-energizing or disconnecting the equipment from its source of power, or other action which will effectively prevent the equipment, prime mover or machine from inadvertent movement or release of stored energy." (§3314, subd. (d).) "Inadvertent movement" within the context of section 3314 means any movement that was not intended. (*Rialto Concrete Products, Inc*., Cal/OSHA App. 98-413, Decision After Reconsideration (Nov. 27, 2001).)

There was no dispute that the machine was energized at the time of the accident. The Drill was inadvertently activated when Villasenor sat on the operator's seat, which activated the seat sensor,[4] and he either accidentally bumped a control switch activating the Drill, or a control switch had been left engaged. Section 3314, subdivision (d), also requires that "accident prevention signs or tags or both shall be placed on the controls of the equipment, machines and prime movers during repair work…." There was no evidence that accident prevention signs or tags were employed during the repair work.

Employer argued that replacing the vise clamp was a minor servicing activity subject to an exception to the requirements of section 3314, subdivision (d). Section 3314 provides, in pertinent part:

[4] The seat sensor is a safety mechanism that requires the operator to be sitting in the operator's seat in order for the Drill to be activated.

EXCEPTIONS to subsections (c) and (d):

1. Minor tool changes and adjustments, and other minor servicing activities, which take place during normal production operations are not covered by the requirements of Section 3314 if they are routine, repetitive, and integral to the use of the equipment or machinery for production, provided that the work is performed using alternative measures which provide effective protection.

"An exception to the requirements of a safety order is in the nature of an affirmative defense, which the employer has the burden of raising and proving at hearing." (*Fed Ex Ground, Inc.*, Cal/OSHA App. 1199473, Decision After Reconsideration (Apr. 20, 2020), citing *Dade Behring, Inc.*, Cal/OSHA App. 05-2203, Decision After Reconsideration (Dec. 30, 2008).) "Exceptions are to be strictly construed in order to justify a freedom from the general rule." (*Dade Behring, Inc.*, *supra*, Cal/OSHA App. 05-2203.)

In this case, for the exception to apply, Employer must establish that replacing the vise clamp was (1) a minor servicing activity (2) taking place during normal production operations, that was (3) routine, repetitive, and integral to the use of the equipment for production, and (4) the work was performed using alternative measures which provide effective protection.

The vise clamp was described by several witnesses as a "wear part," meaning that the part periodically wears out requiring replacement. Craig Sobrero (Sobrero), an employee of RDO Equipment who provided training to Teichert employees on the Vermeer D10x15 drills, testified that replacing the vise clamp was a simple job that could be done in a few minutes on-site by the drill operator. However, the question is not only whether the task was a minor servicing activity, it must also be shown that the minor servicing activity took place during normal production operations.

Section 3314, subdivision (b), defines normal production operations as "[t]he utilization of a machine or equipment to perform its intended production function." Here, the Drill could not operate, meaning that it could not be in production, without the vise clamp properly secured in place by the pin. Both Villasenor and Sobrero testified that the Drill could not operate without the pin securing the vise clamp into place. Therefore, the Drill was not in normal production operations at the time the vise clamp needed replacement because the Drill was nonoperational.

Even if it could be found that replacing the vise clamp or pin was a minor servicing activity that took place during normal production operations, Employer failed to show that the task was performed using alternative measures that provide effective protection. Employer asserted that its alternative measure taken to provide effective protection while changing a vise clamp was to turn the Drill off. Sobrero testified that, in his trainings, he instructed workers to power off the Vermeer D10x15 drills and remove the key prior to changing a vise clamp.

While turning the Drill off and removing the key during a repair may provide some protection, it was not established that Employer's practice was to take both steps. Villasenor testified that when he replaced a vise clamp, he put the drill in the necessary position, then turned the drill off, and then replaced the vise clamp. However, Villasenor did not elaborate as to whether turning the Drill off included removing the key from the ignition or that he would have taken that step during the repair at issue. Furthermore, there was no testimony to establish that, once the key was removed, the person doing the repair retained control of the key and this prevented another employee from starting the Drill. Accordingly, Employer did not establish that shutting off the Drill would have provided effective protection.

Finally, neither Simpson nor Villasenor used the purported alternative measure to replace the vise clamp or pin. As such, even if it could be found that Employer established all the criteria of the exception, the alternative measure was not utilized, and a violation would be established because the Drill was not de-energized during the repair as required by the safety order.

Based on the foregoing, the Division established a violation of section 3314, subdivision (d), because Employer failed to de-energize the Drill during a repair and did not establish that Exception 1 applied to the repair. Therefore, Citation 1 is affirmed.

2. Did Employer establish that the Independent Employee Action Defense relieved it of liability for the violation?

In order to assert the affirmative defense of Independent Employee Action Defense (IEAD) successfully, an employer must establish each of the following elements:

(1) The employee was experienced in the job being performed;
(2) The employer has a well-devised safety program which includes training employees in matters of safety respective to their particular job assignments;
(3) The employer effectively enforces the safety program;
(4) The employer has a policy of sanctions against employees who violate the safety program; and
(5) The employee caused a safety infraction which he or she knew was contra to the employer's safety requirements.

(*Fedex Freight, Inc*., Cal/OSHA App. 14-0144, Decision After Reconsideration (Dec. 14, 2016); *Mercury Service, Inc*., Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980).)

Where there are two actors who are involved in the violation of a safety order, an

employer must prove all elements as to both employees. (*Paramount Farms, King Facility*, Cal/OSHA App. 09-864, Decision After Reconsideration (Mar. 27, 2014).) Here, Simpson and Villasenor were both involved in the events that led to the injury and both employees failed to de-energize the drill prior to starting the repair process. As set forth below, Employer failed to establish all elements of IEAD for Simpson. As such, it is unnecessary to evaluate IEAD as applied to Villasenor.

a. Was Simpson experienced in the job being performed?

This requirement is satisfied when an employer shows that the employee had sufficient experience performing the work that resulted in the alleged violation. (*West Coast Communication*, Cal/OSHA App. 05-2801, Decision After Reconsideration (Feb. 4, 2011).) Replacing vise clamps is the work that resulted in the alleged violation. Thus, Employer must establish that Simpson had sufficient experience replacing vise clamps.

Prior to becoming employed by Teichert, Simpson was employed by Arrow Construction for almost three years, during which time he operated a horizontal directional drill. However, while at Arrow Construction, Simpson was not trained to replace vise clamps and was not required to perform that task.

Simpson was employed by Teichert for about a year prior to the accident, during which time he operated a Vermeer D10x15 as the locator. Simpson received new employee orientation training. The new employee orientation generally covers lockout/tagout requirements, but does not cover the specifics of de-energizing a Vermeer D10x15 when replacing the vise clamps. (Ex. E and F.)

Simpson attended a March 2019 training provided by RDO Equipment to Teichert employees on the Vermeer D10x15. Simpson testified that he only received basic training on operating the Vermeer D10x15 and did not recall receiving specific training on replacing vise clamps. Villasenor, who was at the training, testified that replacing vise clamps was a covered topic. Sobrero, who conducted this training, initially testified that he could not recall if replacing vise clamps was covered. Sobrero later testified he was certain the topic had been covered, but he could not say how in-depth. Whatever training was presented, Employer failed to demonstrate that the vise clamp replacement training was sufficient.

As set forth above, Employer argued that its procedure for safely changing vise clamps on a Vermeer D10x15, was to turn the drill off. However, replacing the vise clamp was not established as a minor servicing activity falling under Exception 1 found in section 3314. Particular to the issue of training, it was not established that turning the drill off alone to make the repair provided effective protection, so training to that effect would not be sufficient.

Furthermore, Simpson testified that he replaced the vise clamp about a dozen times during his employment with Teichert and that each time he did so with the drill energized, which indicates he was not effectively trained to even turn the drill off.

Accordingly, there is insufficient evidence to establish that Simpson was adequately trained to safely change the vise clamp.

b. Did Employer 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. (See *Mercury Service, Inc., supra,* Cal/OSHA App. 77-1133.)

Employer presented evidence of its safety program, including its Injury and Illness Prevention Program (IIPP), weekly tail gate meetings, and employee training on safety topics. However, as established, Employer's procedure for replacing vise clamps was to turn the Vermeer D10x15 off during replacement, but there was no evidence that accident prevention signs or tags were utilized as required by section 3314, subdivision (d). Again, Employer failed to establish that Exception 1 found in section 3314 applied to replacing vise clamps. It cannot be said that Employer's safety program was well-devised when Employer's procedure for replacing vise clamps did not comport with the safety order.

Accordingly, Employer failed to establish that it had a well-devised safety program that included training to safely replace vise clamps.

c. Did Employer effectively enforce its safety program?

"Proof that Employer's safety program is effectively enforced requires evidence of meaningful, consistent enforcement." (*FedEx Freight, Inc., supra,* Cal/OSHA App. 317247211.) "[A]n essential ingredient of effective enforcement is provision of that level of supervision reasonably necessary to detect and correct hazardous conditions and practices." (*Ibid.*, citing *City of Los Angeles Water and Power*, Cal/OSHA App. 86-349, Decision After Reconsideration (Apr. 4, 1988).)

Simpson testified that each time he replaced a vise clamp, which was about 12 times during his employment, he did so with the Vermeer D10x15 still energized. There is insufficient evidence that Employer supervised Simpson's prior work to ensure he was complying with Employer's procedures or disciplined Simpson for his failure to follow those procedures. Employer's failure to identify and correct this behavior tends to show that it did not effectively enforce its safety program.

Accordingly, Employer failed to establish that it met the third element of the IEAD.

d. Did Employer have a policy of sanctions against employees who violate the safety program?

Employer's disciplinary policy regarding employee safety violations is contained in its IIPP. (Ex. N.) The policy makes clear that employees are responsible for following safety rules, provides the criteria for evaluating potential violations, and outlines the progressive discipline options, which include counseling and/or coaching, first notice, written warning, suspension, and termination of employment. (*Id*.) Villasenor testified that employees were disciplined for safety violations.

Overall, Employer's safety program contained sufficient sanctions for a failure to comply with safety procedures even though Simpson's violations were not discovered or corrected. Employer established the fourth element of IEAD.

e. Did Simpson commit a safety infraction which he knew was contra to Employer's safety requirements?

"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." (*Synergy Tree Trimming, Inc*., Cal/OSHA App. 317253953, Decision After Reconsideration (May 15, 2017).) When the record lacks evidence that the employee actually knew of the safety requirement that was violated, the fifth element fails. (*Paso Robles Tank, Inc*., Cal/OSHA App. 08-4711, Denial of Petition for Reconsideration (Nov. 2, 2009). In *Paso Robles Tank, Inc*., the Appeals Board found that the injured employee did not know he was taking an action in violation of the safety program, given his testimony that he had taken that same action on numerous occasions.

Simpson testified that he was not aware of Employer's requirement to de-energize the Drill when replacing the vise clamp and did not think he was acting contra to Employer's safety policies. Simpson further testified that he had changed the vise clamp on several occasions with the Vermeer D10x15 still energized. While Simpson received general training on lockout/tagout procedures and was present for general safety discussions at tailgate meetings, this is insufficient to show a specific employee was actually aware of a specific safety rule in order to satisfy element five of the IEAD. (See *UPS (United Parcel Service)*, Cal/OSHA App. 07-3322, Decision After Reconsideration (Mar. 27, 2012); *Pacific Coast Roofing Corp*., Cal/OSHA App. 95-2996, Decision After Reconsideration (Oct. 14, 1999).)

Employer asserted that Simpson was not asked to do the repair and repairing the drill was

not part of his job duties. The Appeals Board has held that inadvertence or an error in judgment is insufficient to demonstrate a knowing violation of an employer's safety program. (*Synergy Tree Trimming, Inc., supra*, Cal/OSHA App. 317253953.) Simpson conceded that no one specifically requested that he do the repair. However, Simpson explained that it was a group effort to get the repair done, and there was an understanding of what was going on and needed to be done in order to fix the Drill. Simpson's testimony establishes that he believed that he was acting to get the repair done. Even if it was not Simpson who should have been doing the repair or he removed the vise clamp prematurely, the evidence is not sufficient to conclude that his actions were more than inadvertence or an error in judgment. As such, Employer failed to establish that Simpson knew he was acting against Employer's safety policy at the time of the accident.

A single missing element defeats the IEAD. (*RNR Construction, Inc., supra*, Cal/OSHA App. 1092600.) Accordingly, because elements one, two, three and five were not established, Employer has not met its burden of proof with regard to the affirmative defense of IEAD for Citation 1.

3. Did the Division establish a rebuttable presumption that Citation 1 was properly classified 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 Appeals Board has defined the term "realistic possibility" to mean a prediction that is within the bounds of human reason, not pure speculation. (*A. Teichert & Son, Inc. dba Teichert Aggregates*, Cal/OSHA App. 11-1895, Decision After Reconsideration (Aug. 21, 2015), citing *Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (Sep. 27, 2001).) "Serious physical harm" is defined as an injury or illness occurring in the place of employment that results in, among other possible factors, "inpatient hospitalization for purposes other than

medical observation" or "the loss of any member of the body." (Lab. Code §6432, subd. (e).)

"The accident that has occurred as a result of the violation of the safety order is evidence that may be weighed by the Board in considering the appropriate classification." (*Langer Farms, LLC*, Cal/OSHA App. 13-0231, Decision After Reconsideration (Apr. 24, 2015).) In addition, "circumstantial and direct evidence, as well as common knowledge and human experience, may also support the serious classification." (*Shimmick Construction Company, Inc.*, Cal/OSHA App. 1192534, Decision After Reconsideration (Aug. 26, 2022).)

Ultimately, Simpson's injuries demonstrate not only a realistic possibility that the hazard could result in serious physical harm, but that it was an actuality in this case. Simpson's fingers were injured in the vise clamp when the Drill became inadvertently energized while he was attempting to remove the vise clamp. As a result, Simpson suffered partial amputation of his right index finger and laceration of his right middle finger. Simpson's injuries required surgery and a three-day hospitalization, which meets the definition of serious physical harm set forth in Labor Code section 6432. Accordingly, the Division established a rebuttable presumption that the violation cited in Citation 1 was properly classified as Serious.

4. Did Employer rebut the presumption that the violation cited 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.

Labor Code section 6432, subdivision (b), provides that the following factors may be taken into account: (A) Training for employees and supervisors relevant to preventing employee

exposure to the hazard or to similar hazards; (B) Procedures for discovering, controlling access to, and correcting the hazard or similar hazards; (C) Supervision of employees exposed or potentially exposed to the hazard; and (D) Procedures for communicating to employees about the employer's health and safety rules and programs.

Employer argued that the Serious classification of the violation is not proper because it had no knowledge of the violation. DeAnda was at the adjacent property mapping utilities when the accident occurred. DeAnda testified that Villasenor informed him that the pin had fallen out, they were going to fix the issue, and had the issue under control, so he went back to his task. DeAnda further testified that he did not see Simpson's actions at the time of the accident, and had he seen Simpson attempting to remove the vise clamp with the Drill still energized, he would have stopped Simpson. DeAnda asserted that he had never observed any employee reach their hand into the vise clamp area of a drill with it still energized. However, DeAnda also testified that he did not typically oversee his crew when they are engaged in repairs.

Employer argued that it took all reasonable steps to anticipate and prevent the violation by extensively training employees on the hazard, providing close supervision, and disciplining employees for failure to adhere to safety rules. While Employer presented evidence of general lock out/tag out procedures, there were no such procedures for the Drill. Employer's procedure was to de-energize the Drill when replacing the vise clamp. However, Employer had no requirement that accident prevention signs or tags be placed on the controls as required by section 3314, subdivision (d). As set forth above, Employer did not establish that replacing the vise clamp was a minor servicing activity qualifying for Exception 1 found in section 3314, or that it could be said that simply turning the Drill off while doing the repair was an alternative measure that provided effective protection. Accordingly, Employer did not demonstrate that it did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation because it did not take reasonable steps to avoid the violation.

Therefore, Employer failed to rebut the presumption that Citation 1 was properly classified as Serious. Accordingly, the Serious classification is sustained.

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

In order for a citation to be classified as accident-related, there must be a showing by the Division of a "causal nexus between the violation and the serious injury." (*Webcor Construction, LP dba Webcor Builders*, Cal/OSHA App. 317176766, Denial of Petition for Reconsideration (Jan. 20, 2017).) The violation need not be the only cause of the accident, but the Division must make a "showing [that] the violation more likely than not was a cause of the injury." (*Id.*, citing *MCM Construction, Inc.*, Cal/OSHA App. 13-3851, Decision After Reconsideration (Feb. 22, 2016).)

At the time of the accident in 2019, Labor Code section 6302, subdivision (h), provided that a "serious injury" included, among other things, any injury or illness occurring in a place of employment or in connection with any employment which required inpatient hospitalization for a period in excess of 24 hours for other than medical observation.

As established, Simpson's injuries required an inpatient hospitalization of three days during which time he underwent surgery. Accordingly, Simpson's injuries meet the definition of serious injury. Simpson's fingers were injured when the Drill became inadvertently energized. If the Drill had been properly de-energized, the vise clamps would not have engaged, and the injury would not have occurred. As such, there is a direct nexus between the violation and the injury. Therefore, Citation 1 was properly characterized as Accident-Related.

6. Is the proposed penalty for Citation 1 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).)

The parties stipulated that the penalty was calculated in accordance with the Division's policies and procedures. Accordingly, the proposed penalty is found to be reasonable.

Conclusion

For Citation 1, the Division established that Employer violated section 3314, subdivision (d). Employer failed to ensure that a Vermeer D10x15 horizontal directional drill was de-energized to prevent inadvertent movement during a repair. The violation was properly classified as Serious and Accident-Related. The proposed penalty is found to be reasonable.

Order

It is hereby ordered that Citation 1, Item 1, is affirmed and the penalty of $18,000 is sustained.

It is further ordered that the penalty indicated above and set forth in the attached Summary Table be assessed.

Dated: 12/14/2022

_____
Jennie Culjat
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.**