BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	**Inspection No. 1332867**
GUY F. ATKINSON CONSTRUCTION, LLC **18201 Von Karman, Ave., #800** **Irvine, CA 92612** **Employer**	**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.

JURISDICTION

Guy F. Atkinson Construction, LLC dba Atkinson Construction (Employer) is a construction company. On January 19, 2019, the Division cited Employer for two violations, only one of which remains at issue: an alleged Serious, Accident-Related violation of California Code of Regulations, title 8, section 3328, subdivision (a)(2)[1] [operating a forklift under environmental conditions contrary to the manufacturer's recommendations].

This matter was heard by Jacqueline Jones, Administrative Law Judge (ALJ) for the Board, via Zoom, on February 23, 2021 and June 15, 2021. Kevin Bland, Attorney, of Ogletree, Deakins, Nash, Smoak & Stewart P.C., represented Employer. Clara Hill-Williams, Staff Counsel, represented the Division. The ALJ subsequently issued a Decision on October 20, 2021, which vacated the citation and the proposed penalty.

The Division timely filed a Petition for Reconsideration contending that the ALJ erred when it vacated the citation. Employer filed a timely Answer. The Board took the petition under submission.

ISSUES

1. Did the Division demonstrate a violation of section 3328, subdivision (a)(2)?

2. Did the Division establish a rebuttable presumption that a Serious violation exists?

3. Did the Employer rebut the presumption that a Serious violation exists?

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

4. Was there a "causal nexus" between the violation of the cited safety order and the accident?

5. Did Employer establish the accident was unforeseeable?

6. Were the penalties appropriately calculated?

FINDINGS OF FACT

1. On July 20, 2018, Jordan Hoyt (Hoyt), an employee of Employer, was fatally injured while operating a forklift eastbound on an unpaved access road at Employer's job site.

2. During that operation, the forklift departed the access road, flipped, and was found at the bottom of the adjacent ravine.

3. The access road had a wall on one side and a ravine on the other side.

4. The forklift was found in the ravine below the narrowest point of the road.

5. At the narrowest point, the width of the access road, from the wall to where the ravine slope starts, was 129 inches.

6. The forklift measured 99 inches across, meaning it only had 30 inches of free navigable space on its sides, or 15 inches per side, at the narrowest point of the access road.

7. The edge of the access road had soft edges that could collapse, near where the slope of the ravine starts.

8. The Operator's Manual states, "Stay away from soft edges that could collapse under the forklift."

9. Mr. Hoyt did not, and could not, stay away from soft edges that could collapse.

DISCUSSION

1. Did the Division demonstrate a violation of section 3328, subdivision (a)(2)?

Citation 2, Item 1, asserts a Serious, Accident-Related violation of section 3328, subdivision (a)(2), which states,

> (a) All machinery and equipment:
> […]
> (2) shall not be used or operated under conditions of speeds, stresses, loads, or environmental conditions that are contrary to the manufacturer's recommendations or, where such recommendations are not available, the engineered design.

The alleged violation description states,

> Prior to and during the course of the investigation, the Employer failed to operate the 1245 Xtream Forklift according to the manufacturers recommendations by operating the forklift on soft edges of roads that could collapse under the forklift. As a result, on or about July 20, 2018, an employee operating the forklift on the soft edge of the access road near wall 2181 suffered a fatal injury when the access road collapsed and the forklift tipped over into a ravine.

The Division holds the burden of proving a violation by a preponderance of the evidence. (*United Parcel Service*, Cal/OSHA App. 1158285, Decision After Reconsideration (November 15, 2018).) The Division also bears the burden of proving employee exposure to a violative condition addressed by a safety order. (*Dynamic Construction Services, Inc*., Cal/OSHA App. 1005890, Decision After Reconsideration (December 1, 2016).) To establish a violation of the cited regulation, the Division must demonstrate (1) the citation concerns a piece of machinery or equipment; (2) the machinery was used or operated; and (3) the use or operation of the machinery was under conditions of speeds stresses, loads, or environmental conditions contrary to the manufacturer's recommendations or, where such recommendations are not available, the engineered design. (§ 3328, subd. (a)(2).)

First and Second Elements

The first and second elements require that the Division demonstrate, respectively, that the citation concerns a piece of machinery or equipment, and that it was used or operated. Both of these elements were established. The citation concerns a forklift, which constitutes machinery or equipment. Further, the forklift had been operated by employee Hoyt. Hoyt was fatally injured while operating the forklift eastbound on an unpaved access road at Employer's job site. During that operation, the forklift departed the access road, flipped, and was found at the bottom of an adjacent ravine.

Third Element

The primary dispute in this matter concerns the third element, whether the use or operation of the machinery was under conditions of speeds, stresses, loads, or environmental conditions contrary to the manufacturer's recommendations.

As a threshold inquiry, the Board must first determine whether there is any competent evidence as to the contents of the manufacturer's recommendations. Absent competent evidence of the manufacturer's recommendation, the Division cannot establish the third element, particularly since it asserts no allegations concerning the forklift's engineered design.

No exhibit was introduced into evidence containing the manufacturer's recommendations. During the hearing, Steve Honjio (Honjio), Senior Safety Engineer, read from a document

described in the record as the Operator's Manual, but the Division never offered the document into evidence. The relevant testimony was as follows:

> **MS. HILL-WILLIAMS**: … I would like for Your Honor to show Mr. Honjio Exhibit C, Page 411, and that's the employer's exhibit. (Employer's Exhibit C was identified.)
> **ADMINISTRATIVE LAW JUDGE JONES**: Exhibit C. Okay. I'll share the screen. Okay. It appears this exhibit is 19 pages long.
> **MR. BLAND**: And -- and, Your Honor, just so -- just from an administrative standpoint for our -- since it's our exhibits, I want to just explain what we did. Because of the -- the limitation on the 25 pages, we segmented the Operator's Manual into several exhibits trying to segregate it in logical separations like the Beginning and Intro and then Labels is D. E is Operator Cab and so on and so forth just for ease of meeting the 25 but having a logical denoca -- denotation as to separation of the Operator's Manual in a logical choice.
> [. . .]
> **MS. HILL-WILLIAMS**: Mr. Honjio, are you familiar with this -- this document?
> **MR. HONJIO**: Yes, I am.
> **MS. HILL-WILLIAMS**: . . . What is this a part of?
> **MR. HONJIO**: This is the forklift manual by the -- given by the manufacturer –
> […]
> **MR. HONJIO**: -- for the -- for the forklift that was in the accident.
> **MS. HILL-WILLIAMS**: Okay. And why is this particular page important to your -- this -- this -- this accident that occurred on July 20th?
> **MR. HONJIO**: Because we look for the manufacturer's recommendations, and this is under the "Safety" section under the -- the Forklift Manual under the section where it says to, "Operate the forklift for maximized stability. Unstable forklifts can tip over resulting in death, serious injury, or property damage. Keep the forklifts stable by following these and other appropriate guidelines." And then we were looking at the two bottom bullet points underneath this category of "Safety."
> [. . .]
> **MS. HILL-WILLIAMS**: All right. And, Mr. Honjio, in your previous answer, you said -- you referred to the . . . the very bottom bullet -- which bullet points did -- were you referring to that are related -- that you deemed related to this accident?
> **MR. HONJIO**: Well, we -- we look at both bottom two bullet points underneath this section.
> **MS. HILL-WILLIAMS**: Can you read those two bullet points?

MR. HONJIO: The first bullet point from the last is: "Use caution around steep slopes, creeks, gullies, ridges, ditches, and ravines."
MS. HILL-WILLIAMS: And the last bullet point?
MR. HONJIO: The last bullet point is: "Stay away from soft edges that could collapse under the forklift."

(Transcript, pp. 151- 155 [Feb 23, 2021].)

We must decide whether Mr. Honjio's aforementioned testimony, reciting the alleged contents of the manufacturer's recommendations is sufficient to establish the contents of the document where the Division fails to move the actual document into evidence.[2] Notably, the ALJ's Decision concluded that Mr. Honjio's testimony regarding the manufacturer's recommendations could not be fully credited due to the Division's failure to move the document into evidence. (Decision, pp. 5-6.)

There is no doubt that the Division erred when it failed to seek admission of the Operator's Manual. Further, the rules of evidence might well prevent reliance on Mr. Honjio's testimony to establish the contents of the document. For example, Evidence Code section 1523, subdivision (a), states, "Except as otherwise provided by statute, oral testimony is not admissible to prove the content of a writing." (See also, Evid. Code, §§ 412, 413.) However, the Division's error is not necessarily fatal in this particular matter.

Although the Board looks to the Evidence Code for guidance, the Board, as an administrative adjudicative entity, need not always follow such rules. [3] Section 376.2 states, "The hearing need not be conducted according to technical rules relating to evidence and witnesses." Further, Labor Code section 6612, states, "No order, decision, or finding shall be invalidated because of the admission into the record, and use as proof of any fact in dispute of any evidence not admissible under the common law or statutory rules of evidence and procedure."

After careful deliberation, we conclude that Mr. Honjio's testimony regarding the contents of the Operator's Manual should be credited in this specific case, notwithstanding the Division's failure to move the actual document into evidence. The Board's rules state, "Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions." (§ 376.2; See also Lab. Code, § 6612.) Adequate indicia of reliability existed in the instant matter. The document that Mr. Honjio read from had been specifically identified by Employer's Counsel

[2] The record indicates that Mr. Honjio read from a document referred to as Employer's Exhibit C. It appears that the document was lodged by Employer in OASIS as a proposed exhibit. However, the Board has not considered, referred to, or relied on this lodged document as it was neither offered nor admitted in evidence. (*Webcor Builders, Inc.,* Cal/OSHA App. 1416143, Decision After Reconsideration and Remand (May 23, 2022).) We consider only the testimony of Mr. Honjio as to the contents of the document.

[3] "Generally, the rules of evidence do not apply in these or any administrative hearings . . . Board rules accordingly allow the admission of evidence that would not be allowed in civil proceedings." (*Duininck Bros., Inc.,* Cal/OSHA App. 06-2870, Decision After Reconsideration (April 13, 2012), citing Lab. Code, § 6612 and § 376.2.)

as the "Operator's Manual." (Transcript, pp. 151-152 [Feb 23, 2021].)[4] The ALJ shared the document on the screen and thereafter Mr. Honjio read its contents, without any contemporaneous objection or correction from Employer. In sum, the overall circumstances demonstrated the reliability of Mr. Honjio's testimony on the subject. Since the document was identified by Employer's Counsel, and read without contemporaneous objection, we conclude that it was the type of evidence on which responsible persons are accustomed to rely. Mr. Honjio's testimony regarding the contents of the manual is credited to prove the contents of the manual.

Having concluded that reliable evidence exists concerning the manufacturer's recommendations, we now address the Division's contention that the machinery was operated under conditions of speeds, stresses, loads, or environmental conditions contrary to the manufacturer's recommendations. Notably, the Division's petition for reconsideration specifically focuses on environmental conditions, not speeds, stresses, or loads. Issues not raised in a petition for reconsideration are deemed waived. (Lab. Code, § 6618; see also § 391.) Therefore, the Board need only determine whether the forklift was operated under environmental conditions contrary to the manufacturer's recommendations.

In determining the meaning of the term "environmental conditions," the Board first looks to plain language of the regulations, which is generally the most reliable indicator of intent. (*Department of Industrial Relations v. Occupational Safety & Health Appeals Bd.* (2018) 26 Cal.App.5th 93, 101; *Katz v. Los Gatos-Saratoga Joint Union High School Dist.* (2004) 117 Cal.App.4th 47, 54-55.) The words should be given their ordinary and usual meaning and should be construed in context. (*Borikas v. Alameda Unified School Dist.* (2013) 214 Cal.App.4th 135, 146; *Heritage Residential Care, Inc. v. Division of Labor Standards Enforcement,* (2011) 192 Cal.App.4th 75, 82-83 (*Heritage Residential Care*).) To obtain the ordinary meaning of a word the Board may appropriately refer to its dictionary definition. (*Heritage Residential Care*, *supra*, 192 Cal.App.4th at 83.) Dictionaries define the word "environmental," in the use relevant here, to mean "the circumstances, objects, or conditions by which one is surrounded" and" "relating to or arising from a person's surroundings."[6] The word "condition" is defined as, relevant here, a "state of being" or "attendant circumstances."[7] Based on the plain meaning of the words within the regulation, it is clear that environmental conditions concerns one's surroundings or surrounding circumstances.

Within the immediate matter, the Division argues that the forklift was operated under environmental conditions contrary to the manufacturer's recommendation when it operated near soft edges that could collapse. Again, according to Mr. Honjio, the operator's manual states, "Stay away from soft edges that could collapse under the forklift." (Transcript, pp. 151- 155 [Feb 23, 2021].) In other words, the alleged soft edges that could collapse would be the relevant environmental condition (i.e. the circumstances or conditions by which one is surrounded), and

[4] Statements made by counsel may be considered a judicial admission. (See, e.g., *Fassberg Construction Co. v. Housing Authority of City of Los Angeles* (2007) 152 Cal.App.4th 720, 752; see also, e.g., Evid. Code, § 1222.)

[5] Merriam-Webster Dictionary (Online) <https://www.merriam-webster.com/dictionary/environment> [accessed on April 22, 2022].

[6] Lexico English Dictionary (Online) < https://www.lexico.com/en/definition/environmental> [accessed on April 22, 2022].

[7] Merriam-Webster Dictionary (Online) <https://www.merriam-webster.com/dictionary/conditions> [accessed on April 22, 2022].

the alleged failure to stay away from those soft edges when operating the forklift was contrary to the manufacturer's recommendation. The Division's argument has merit.

The testimony and photographic exhibits within the record demonstrate that the road was bordered, at least on one side, by soft edges that could collapse. Although much of the road had been compacted, the edge of the road near the ravine was not all compacted. (See, e.g., Exhibits 7-12, 7-22, 7-24, 7-27.) Mr. Honjio described the soil at the edge of the road, just above where the forklift came to rest after the accident, as loose and dry, noting the soil was like a spoils pile. (Transcript, pp. 113-115, 120-123 [Feb 23, 2021]; Exhibit 7-22.[8]) He said it appeared that portions of the road, closest to the ravine, had previously collapsed or sloughed off and the road was not symmetrical. (*Ibid*.) Relevant photographs supported his testimony. Mr. Honjio offered similar testimony as to Exhibit 7-24, again indicating that the road was subject to collapse. (Transcript, p. 127 [Feb 23, 2021].) Mr. Honjio also climbed down the ravine's slope to examine the forklift after the accident. When asked to describe the soil condition of the slope, he said the soil was loose, dry, and steep. (Transcript, p. 99 [Feb 23, 2021].) Employer's own witness, Benjamin Turnham (Turnham), testified that the soil next to the road may be described as "soft soil." (Transcript, p. 368 [June 15, 2021].) Again, on balance, the record evidence, and in particular the testimony of Mr. Honjio, indicates that the access road was bordered on one side by soft edges that could collapse in the area above where the forklift came to rest in the ravine.

Having ascertained the existence of soft edges that could collapse, which constitutes the relevant environmental condition, we must next determine whether the forklift was operated too near to those soft edges, which would be against the manufacturer's recommendations. The parties spend considerable time and effort advancing contradictory theories as to how the accident occurred. The Division's Petition, and Mr. Honjio, contend that the fatal accident occurred because the road had actually collapsed under the weight of the forklift. (Transcript, pp. 121-122, 155-156 [Feb 23, 2021].) Employer, on the other hand, contends there is no evidence that the road collapsed under the forklift. Mr. Turnham speculated the forklift was somehow driven off the road. (Transcript, pp. 350-351 [June 15, 2021].) We need not, however, resolve the issue. Actual collapse of the edge is not a prerequisite to affirmation of a violation.

The manufacturer's recommendations merely state, "Stay away from soft edges that could collapse under the forklift." The evidence demonstrates that the forklift failed to stay away from soft edges that could collapse for two reasons, either of which would be sufficient to affirm the violation. First, the location of the forklift at the bottom of the ravine, below the soft edges, demonstrates that, at some point, the forklift came too near to a soft edge, which had the possibility of collapse. Even assuming the accident was not directly caused by a collapse of soil, the forklift could not have been found at the bottom of the ravine unless it either came too near or had contact with a soft edge that had the possibility of collapse (i.e. against the manufacturer's recommendations). To put it another way, regardless of whether the edge actually collapsed under the forklift, it is clear that the accident would not have occurred had adequate distance been maintained between the forklift and the edge.

[8] Throughout this decision, we include some citations to the record. These citations illustrate some of the evidence supporting the stated propositions, but they are not necessarily exhaustive of evidence relied upon by the Board. The Board issues this decision based on a review of the entire record.

Second, the violation would still have been established even if no accident had occurred. It was virtually impossible for Mr. Hoyt to stay away from the soft edges that could collapse at the narrowest point of the road. Mr. Honjio testified that the width of the access road from the wall to where the ravine slope starts, at the narrowest point, was approximately 129 inches. (Transcript, pp. 72, 132-134, 175, 195 [Feb 23, 2021]. [9]) The forklift itself measured 99 inches across, meaning it only had 30 inches of free space on its sides to navigate the roadway, or 15 inches per side. (Transcript pp. 79-81, 134-136 [Feb 23, 2021].) It also weighed in excess of 30,000 pounds, weighing as much as multiple pickup trucks. (Transcript, p. 160-162 [Feb 23, 2021].) Given these measurements, the forklift operator could not reasonably stay away from the edge.[10] Notably, the forklift was found at the bottom of the ravine below the narrowest point of the road. (Transcript, pp. 75-76, 134 [Feb 23, 2021].)

Ultimately, the evidence demonstrates that the use of the forklift was under environmental conditions contrary to the manufacturer's recommendations in that the forklift failed to stay away from soft edges that could collapse.

Further, the record demonstrates exposure. Mr. Hoyt was operating a forklift and suffered a fatal injury, demonstrating exposure under both the actual and reasonably predicable access standards. (*Dynamic Construction Services, Inc*., *supra*, Cal/OSHA App. 1005890.)

All elements of the violation having been established, the citation is affirmed.

2. Did the Division establish a rebuttable presumption that a Serious violation exists?

The Division classified the citation as Serious. Labor Code section 6432 sets forth the evaluative framework for determining whether a citation has been properly classified as Serious. Labor Code section 6432, subdivision (a), provides, "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." As used therein, the term "realistic possibility" means that it is within the bounds of reason, and not purely speculative. (*Langer Farms*, *LLC*, Cal/OSHA App. 13-0231, Decision After Reconsideration (April 24, 2015).)

To meet its initial burden, the Division offered the testimony of Mr. Honjio. Mr. Honjio is current on all Division-mandated training, therefore, he is deemed competent by operation of law to establish each element of a serious violation. (Lab. Code, § 6432, subd. (g).)

Mr. Honjio read the Operator's Manual into evidence, which itself, constituted evidence demonstrating a realistic possibility of serious physical harm or death should Employer depart from its requirements. As noted above, Mr. Honjio credibly testified that the manual stated,

[9] Mr. Honjio said that the forklift was found below the narrowest point of the road. (Transcript, pp. 75-76, 132-134 [Feb 23, 2021]—[" The -- the -- the width of the road is basically at the narrowest part where -- and this is where the -- the forklift was at the bottom of the ravine."].) He indicated that the forklift was observed at the narrow point of the road, where the road was about "10-and-a-half foot" wide. (*Ibid.*)

[10] Our conclusion that the road was too narrow is case-specific. It relates to the specific facts and circumstances of this matter. Parties should be cautious not to cite this decision for overbroad propositions.

"Operate the forklift for maximized stability. Unstable forklifts can tip over resulting in death, serious injury, or property damage." Mr. Honjio also noted, and the parties stipulated, that Mr. Hoyt died as a result of the accident. (Transcript p. 15 [Feb 23, 2021].) Here, Mr. Honjio's testimony, the contents of the manual, and the accident itself were sufficient to establish a rebuttable presumption that a Serious violation exists.

3. Did the Employer rebut the presumption that a Serious violation exists?

Labor Code section 6432, subdivision (c), provides a mechanism for Employer to rebut the presumption of a Serious violation. It states:

> 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.

Employer cannot reasonably contend that it did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation. The width of the access road, at 129 inches, and the width of the vehicle, at 99 inches, were both in plain view. Further, the soft edges that could collapse were perceivable. Given the dimensions of the road and the forklift, it should have been clear to the Employer that the forklift could not stay away from soft edges that could collapse. The Appeals Board has long held that hazardous conditions in plain view constitute serious violations since the employer could detect them by exercising reasonable diligence. (*Home Depot USA, Inc.,* Cal/OSHA App. 15-2298, Decision After Reconsideration (May 16, 2017); *Fibreboard Box & Millwork Corp.*, Cal/OSHA App. 90-492, Decision After Reconsideration (June 21, 1991).)

The Serious classification is therefore affirmed.

4. Was there a "causal nexus" between the violation of the cited safety order and the accident?

The Division classified the citation as Accident-Related. The Board requires a showing of a "causal nexus between the violation and the serious injury" to sustain an Accident-Related characterization. (*HHS Construction*, Cal/OSHA App. 12-0492, Decision After Reconsideration (Feb. 26, 2015) [other citations omitted].) 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. (*MCM Construction, Inc.*, Cal/OSHA App. 13-3851, Decision After Reconsideration (Feb. 22, 2016).)

It is not in dispute that the forklift fell down the slope and into the ravine. These facts alone are sufficient to demonstrate that the forklift failed to stay away from soft edges that could collapse. The forklift could not have been found at the bottom of the ravine without being operated extremely close to a soft edge that could collapse. Again, regardless of whether the edge actually collapsed, it is clear that the accident would not have occurred had adequate distance been maintained between the forklift and the edge. As such, the violation is found to have been a cause of the injury. The Accident-Related classification is sustained.

5. Did Employer establish the accident was unforeseeable?

Employer raised an affirmative defense. Employer had argued that even if the Board finds a violation, the citation should still be dismissed under the unforeseeable employee act defense set forth in *Newbery Elec. Corp. v. Occupational Safety and Health Appeals Board* (1981) 123 Cal.App.3d 641, 649-651. (Employer's Closing Brief, pp. 6-7: Answer to Petition, pp. 7-8.) To establish this defense, the employer must show: (1) the employer did not and could not have known of the potential danger to employees; (2) the employer exercised adequate supervision to ensure safety; (3) the employer ensured employee compliance with its safety rules; and, (4) the violation was unforeseeable. (*Gaehwiler v. Occupational Safety and Health Appeals Board* (1983) 141 Cal.App.3d 1041, 1045; *Newbery Elec. Corp. v. Occupational Safety and Health Appeals Board, supra,* 123 Cal.App.3d at 650.)

We conclude that Employer failed to establish that it could not have known of the potential danger to employees, nor that the violation was unforeseeable. As already discussed above, the width of the access road, at 129 inches, and the width of the vehicle, at 99 inches, were both in plain view, as was the condition of the road. Employer could have known of the hazard with the exercise of reasonable diligence; it was in plain view. Further, given the road conditions and various measurements, the violation was foreseeable. The defense is not established.

6. Were the penalties appropriately calculated?

The initial base penalty for Serious violation is $18,000, which was assessed by the Division. (§ 336, subds. (c)(1).)

The Board affirmed the Serious, Accident-Related classification. Due to the Accident-Related classification, Employer is entitled to no reductions except for size. (§ 336, subds. (c)(2) and (d)(7).) Mr. Honjio testified that Employer had over a hundred employees, and therefore is entitled to no further reductions. (Transcript p. 168 [Feb 23, 2021].)

The penalty of $18,000 was appropriately calculated by the Division and it is assessed against Employer.

CONCLUSION

The Decision of the ALJ is reversed as it relates to Citation 2, Item 1. The Division established that Employer violated section 3328, subdivision (a)(2) and the citation is affirmed. The violation was properly classified as Serious, Accident-Related and the penalty of $18,000 is found reasonable.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

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

FILED ON: 07/13/2022