BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of: **HAMILTON IRON WORKS, INC.** **1244 W. 196TH STREET** **TORRANCE, CA 90502** **Employer**	Inspection No. **1497263** **DECISION**

Statement of the Case

Hamilton Iron Works, Inc., (Employer) is a metal fabricator. Beginning July 23, 2020, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Alfred Daniel Sullivan (Sullivan), conducted an inspection of the metal fabricating site in the metal shop, located at 1244 W. 196th Street, in Torrance, California (the site).

On June 10, 2021, the Division issued two citations. Citation 1, Item 1, alleges that Employer failed to report an injury that occurred at the site. Citation 1, Item 2, alleges that Employer failed to establish and implement an effective Injury and Illness Prevention Program. Citation 1, Item 3, alleges that Employer failed to ensure head protection was worn at the site. Citation 2, Item 1, alleges that Employer failed to ensure a load was secured and balanced before lifting the load. Employer filed a timely appeal of the citations, contesting the existence of the violations, the classification of the citations, and the reasonableness of the proposed penalties. Employer also raised a series of affirmative defenses.[1]

This matter was heard by Leslie E. Murad, II, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (Appeals Board). On March 9 and 10, 2023, and May 17 and 18, 2023, ALJ Murad conducted the video hearing from Los Angeles and San Bernardino Counties with all participants appearing remotely via the Zoom video platform. Attorney Perry Poff of Donnell, Melgoza & Scates, LLP., represented Employer. Lisa Wong, Staff Counsel, represented the Division.

The matter was submitted on August 1, 2023.

[1] Except where discussed in the 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).)

Issues

1. Did Employer fail to timely report a serious occupational injury to the Division?

2. Did Employer fail to effectively implement its Injury and Illness Prevention Program?

3. Did Employer fail to ensure an employee working the overhead Gantry crane in the metal shop was wearing approved head protection?

4. Did Employer fail to ensure a load was well secured and properly balanced before it was lifted?

5. Did the Division establish a rebuttable presumption that Citation 2 was properly classified as Serious?

6. Did Employer rebut the presumption that the violation in Citation 2 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?

7. Did the Division establish that Citation 2 was properly characterized as Accident-Related?

8. Are the proposed penalties for the Citations reasonable?

9. Were the Citations issued in violation of the six-month statute of limitations found in Labor Code Section 6317?

Findings of Fact[2]

1. On June 3, 2020, the day of the accident, Employer directed its employee, Eduardo Bravo (Bravo), to use an overhead Gantry crane to move a canopy metal frame (metal frame or load) in the metal shop site.

2. Bravo attached the metal frame, with hoist chains, to the overhead Gantry crane to move the load to another position. Upon lifting the load, it tilted back toward Bravo because it was unbalanced.

[2] Finding of Fact number 11 is by stipulation of the parties at hearing.

3. Bravo was standing in an area where if the load was to tilt back toward Bravo, the load would hit him. The load tilted back toward Bravo. He put up his hand to stop the load which weighed over 800-pounds. The load struck Bravo in the left shoulder area resulting in lacerations and a broken left forearm and shoulder. Bravo was hospitalized because of his injuries.

4. Bravo's foreman Arturo Quintero (Quintero) was present in the metal shop when the accident happened but did not witness the accident.

5. Bravo yelled when he was injured, and Quintero came over to Bravo's location at the Gantry crane. Bravo told Quintero that he thought his arm was broken. Quintero told Bravo to go to the office and report the injury. Bravo reported the injury to the office.

6. Bravo knew he was supposed to wear a safety helmet when operating an overhead Gantry crane, but he was not wearing his safety helmet while using the overhead Gantry crane in the metal shop when the accident happened.

7. Bravo did not receive formal training on how to load and operate the overhead Gantry crane. Bravo learned how to operate the crane by watching other employees operate the crane.

8. Employer did not have a written procedure for the loading, use or operation of the overhead Gantry crane.

9. Employer did not report the industrial injury to the Division even though Bravo reported the injury to Employer.

10. Employer failed to establish and implement an effective Injury and Illness Prevention Program in that Bravo was operating the overhead Gantry crane in an improper manner and without using the Employer mandated protective equipment.

11. Bravo suffered a serious injury as defined under title 8 of the Regulations and the California Labor Code.

12. The penalties for all Citations were calculated in accordance with the penalty-setting regulations.

13. The Division issued the citations in a timely manner.

Analysis

1. Did Employer fail to timely report a serious occupational injury to the Division?

California Code of Regulations, title 3, Section 342, subdivision (a), states:

> (a) Every employer shall report immediately to the Division of Occupational Safety and Health any serious injury or illness, or death, of an employee occurring in a place of employment or in connection with any employment. The report shall be made by the telephone or through a specified online mechanism established by the Division for this purpose. Until the division has made such a mechanism available, the report may be made by telephone or email.
>
> Immediately means as soon as practically possible but not longer than 8 hours after the employer knows or with diligent inquiry would have known of the death or serious injury or illness. If the employer can demonstrate that exigent circumstances exist, the time frame for the report may be made no longer than 24 hours after the incident.

Citation 1, Item 1, alleges:

> Prior to and during the course of the Division's investigation, the employer failed to report immediately to the Division of Occupational Safety and Health the serious injury of an employee on June 3, 2020 at their worksite.

The Division has the burden of proving a violation by a preponderance of the evidence. (*Papich Construction Company, Inc.*, Cal/OSHA App. 1236440, Decision After Reconsideration (Mar. 26, 2021).) "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).)

"Section 342(a) requires employers to report to the Division any and all serious injuries occurring in the workplace, within 8 hours of the employer obtaining knowledge of the gravity of the injury using reasonable diligence." (*Allied Sales and Distribution, Inc.*, Cal/OSHA App. 11-0480, Decision After Reconsideration (Nov. 29, 2012).) "The purpose of the reporting requirement is to allow the Division to quickly respond to injuries or illnesses occurring on the job." (*Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976 et al., Decision after Reconsideration (Apr. 24, 2003).) This rapid response is "necessary to [enable the Division to] inspect potentially dangerous conditions close to the time of the accident...and to examine any

equipment that may have caused an injury.” (*Id.*, citing *Alpha Beta Company*, Cal/OSHA App. 77-853, Decision After Reconsideration (Nov. 2, 1979).)

The time period within which an employer must report is controlled by section 342, subdivision (a). (*Benicia Foundry & Iron Works, Inc.*, *supra*, Cal/OSHA App. 00-2976.) Section 330, subdivision (h), on the other hand, provides “objective guidance to what constitutes a 'serious injury' which does not preclude employer knowledge at an earlier time where, under particular circumstances, and employer knows or with diligent inquiry could know that hospitalization for more than 24 hours is either required **or substantially probable**.” (*Id.*, emphasis added.) Thus, “it is the facts giving rise to [an employer's] actual or constructive ‘knowledge’ of the serious injury which are dispositive for determining a violation of the eight hour rule in section 342(a).” (*Id.*)

The Appeals Board has addressed the constructive knowledge component of section 342, subdivision (a), in *Benicia Foundry & Iron Works, Inc.*, by stating:

> [I]n addressing the constructive knowledge requirement in section 342(a), the circumstances must be examined in order to determine whether Employer would have known in the exercise of reasonable diligence the nature of the injury as being serious. Facts which are relevant include, but are not limited to, the type and location of the injury or illness suffered by the employee, Employer's knowledge of the cause of the injury or illness, Employer's observations of the employee following the injury or illness, steps taken to obtain or provide medical treatment, Employer's efforts to determine the nature of the hospitalization (e.g. for observation, tests, treatment, duration, etc.) and the timeline and events following Employer learning of the injury or illness. Thus, the facts in a particular case must be examined to determine if an employer knew or with diligent inquiry would have known of the nature of the serious injury that requires the hospitalization described in section 330(h). (*Benicia Foundry & Iron Works, Inc.*, *supra*, Cal/OSHA App. 00-2976 et al.)

In determining whether the Division met its burden of proof by a preponderance of the evidence, “[f]ull consideration is to be given to the negative and affirmative inferences to be drawn from all the evidence, including that which has been produced by defendant.” (*Lone Pine Nurseries*, Cal/OSHA App. 00-2817, Decision After Reconsideration (Oct. 30, 2001), citing *Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 483, review denied.)

Bravo testified that he reported the accident to the office secretary. He was then driven by a co-worker to a medical clinic. At the clinic they learned that Bravo’s injury was too serious to be treated by the clinic. He was then taken to a hospital for treatment. Bravo was admitted to Harbor UCLA hospital for treatment and surgery. Bravo was in the hospital for 3 days.

Sullivan testified that he learned of the injury to Bravo at the opening conference with the Employer. Employer's Operations Manager Stella Nam (Nam) made the admission to Sullivan she was not knowledgeable about the reporting process but now understood she needed to report job injuries. Sullivan thus issued Citation 1, Item 1, to Employer. Ignorance of the law, however, is not recognized by the Appeals Board as an excuse for failing to timely report a serious injury to the Division. (*Ranch of the Golden Hawk*, Cal/OSHA App. 1224802, Decision After Reconsideration (May 23, 2022).)

Employer offered no testimony or direct evidence on the issue of the failure to report the Bravo injury to the Division. When an employer does not properly raise an issue on appeal, that issue is deemed waived. (*Western Paper Box Co.,* Cal/OSHA App. 86-812, Denial of Petition For Reconsideration (Dec. 24, 1986). *Bourgeois, Inc.,* Cal/OSHA App. 99-1705, Denial of Petition For Reconsideration (Apr. 26, 2000).

Employer argues in its closing brief that since the citation was marked as "corrected during inspection" (CDI), the penalty should be reduced. Sullivan testified that he wrote CDI on the citation because Nam stated she understood that from that point forward, Employer needed to timely report any accident to an employee that occurred at the workplace. Sullivan testified and clarified that what he meant by writing CDI on the citation was that there was as a form of abatement by Employer. The evidence is clear that Employer never reported the Bravo injury, either on time or as a late report.

For all of the foregoing reasons, therefore, the Division established a violation of section 342, subdivision (a), and Citation 1, Item 1, is affirmed.

2. Did Employer fail to effectively implement its Injury and Illness Prevention Program?

Section 3203, subdivision (a), provides:

(a) Effective July 1,1991, every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program (Program). The Program shall be in writing and, shall, at a minimum:
(1) Identify the person or persons with authority and responsibility for implementing the Program.
(2) Include a system for ensuring that employees comply with safe and healthy work practices.
(3) Include a system for communicating with employees in a form readily understandable by all affected employees on matters relating to occupational safety and health, including provisions designed to encourage employees to inform the employer of hazards at the worksite without fear of reprisal.

(4) Include procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices. Inspections shall be made to identify and evaluate hazards: […]

(5) Include a procedure to investigate occupational injury or occupational illness.

(6) Include methods and/or procedures for correcting unsafe or unhealthy conditions, work practices and work procedures in a manner based on the severity of the hazard: […]

(7) Provide training and instruction: […]

(8) Allow employee access to the Program. […]

Citation 1, Item 2, the Division alleges:

Prior to and during the course of the Division's investigation, including but not limited to June 3, 2020, the employer failed to establish and implement an effective injury and illness Prevention Program, in that:

Instance 1: The employer failed to implement an effective system for ensuring that employees comply with safe and healthy work practices. An employee was operating an overhead gantry crane, in an improper manner, without utilizing protective equipment that was designated by the employer. T8CCR section 3203 (a)(2).

Instance 2: The employer failed to include procedures for identifying and evaluating workplace hazards to identify unsafe conditions and work practices within their written program T8CCR Section (a)(4).

Instance 3: The employer failed to implement effective procedures for identifying and evaluating work place hazards to identify unsafe conditions and work practices, such as an employee operating an overhead gantry crane, in an improper manner, without utilizing appropriate protective equipment. T8CCR Section 3203(a)(6).

Instance 4: The employer failed to include methods and/or procedures for correcting unsafe or unhealthy conditions, work practices and work procedures in a timely manner within their written program. T8CCR Section 3203(a)(6),

"In order to have an effective written IIPP, an employer must, at a minimum, provide an IIPP which contains the seven elements enumerated in section 3203(a)." (*Mountain Cascade, Inc.*, Cal/OSHA App. 01-3561, Decision After Reconsideration (Oct. 17, 2003).)

In order to prove a violation, the Division need only demonstrate that one of the instances charged by the citation is violative of the safety order. (*Petersen Builders Inc.*, Cal/OSHA App. 91-057, Decision After Reconsideration, (Jan. 24, 1992), fn. 4.)

Section 3203, subdivision (a)(6), is a performance standard and creates a goal or requirement, leaving it to employers to design appropriate means of compliance under various working conditions. (*Davey Tree Service*, Cal/OSHA App. 08-2708, Decision After Reconsideration (Nov. 15, 2012).) In a citation alleging a violation of section 3203, subdivision (a)(6), the issue is often that the employer has neglected to implement its otherwise compliant IIPP, as it has failed to correct a hazard at the workplace. (*Contra Costa Electric, Inc.*, Cal/OSHA App. 09-3271, Decision After Reconsideration (May 13, 2014).) Employers are given wide latitude in how they choose to correct hazards, and presumably, creation of a new written procedure may not always be necessary.

At the time of the inspection, Employer provided a copy of its Injury and Illness Prevention Program (IIPP), to Sullivan (Ex.7-A,7-B and 7-C.) Sullivan testified that he was familiar with the IIPP regulation, and based upon review of Employer's IIPP, he credible testified Employer failed to ensure compliance with safe and healthy work practices, procedures for identifying and evaluating work place hazards, methods and/or procedures for correcting unsafe or unhealthy conditions, and training. Employer did not offer any testimonial evidence in defense of its appeal of the IIPP citation and instances.

Sullivan testified Employer failed to implement an effective IIPP system ensuring employees comply with safe and healthy work practices, in that Bravo operated an overhead Gantry crane without wearing a helmet. Sullivan further testified that there was a failure to implement any system for compliance with safety by Employer when, in viewing the video (Exhibit J-1), Bravo’s foreman Quintero was 12 to 15 feet away from Bravo when the accident took place. Quintero could see Bravo without a helmet going to operate an overhead Gantry crane. Quintero on behalf of Employer, failed to evaluate, identify, and correct the hazard of Bravo not wearing a helmet. Bravo was also not formally trained on how to use and operate the Gantry crane.

In its closing brief, Employer argues that it is in compliance with the regulation with its Injury and Illness Prevention Program (IIPP), in that they issued a warning (number one) on March 30, 2020, to Bravo reminding him to wear a helmet and gloves. (Exhibit H). Bravo testified that since none of his co-workers wore their helmets, neither did he. One warning is not sufficient. While an employer may have a comprehensive IIPP, the Division may still demonstrate an IIPP violation by showing that the employer failed to implement one or more elements. (*HHS Construction*, Cal/OSHA App. 12-0492, Decision After Reconsideration (Feb. 26, 2015); *BHC Fremont Hospital, Inc.*, Cal/OSHA App. 13-0204, Denial of Petition for Reconsideration (May 30, 2014).)

The Division presented evidence sufficient to establish that Employer was in violation of Instance 1 in the citation. Bravo testified, and it is undisputed, that he was not wearing his safety helmet, even though he knew he was supposed to wear it. One warning three months before the accident was not sufficient to ensure compliance as demonstrated by Bravo's failure to wear his safety equipment at the time of the accident. As can be seen in the video in Exhibit J-1, Employer's foreman was present with Bravo in the metal shop on the day of the accident and did not enforce the requirement that Bravo wear his helmet. Accordingly, Employer failed to implement its IIPP, and a violation of section 3203, subdivision (a)(2), is established.

3. Did Employer fail to ensure an employee working the overhead Gantry crane in the metal shop was wearing approved head protection?

Section 3381, subdivision (a), provides:

> (a) Employees working in locations where there is a risk of receiving head injuries from flying or falling objects and/or electric shock and burns shall wear approved head protection in accordance with this section.

Citation 1, Item 3, the Division alleges:

> Prior to and during the course of the Division's investigation, including but not limited to June 3, 2020, the employer failed to ensure that an employee working their overhead gantry crane while exposed to the risk of head injury from falling objects, was wearing approved head protection in accordance with this section.

The Appeals Board explained the requirements of section 3381, subdivision (a), as follows:

> The head protection requirement of Section 3381(a) is precautionary, designed to prevent injuries. The fact that the precaution may not be adequate in every instance cannot establish a defense if the safety order is to be liberally interpreted. The cited authorities require that Section 3381(a) be read to require head protection whenever there is danger from any falling object. No exception having been created by the Occupational Safety and Health Standards Board (Standards Board), the Appeals Board cannot create one for loads of 500 pounds or more. The Appeals Board cannot substitute its judgment for that of the Standards Board. (Howe Industries, Inc., OSHAB APP. 76-1168, Decision After Reconsideration (Oct. 17, 1980).)

(*Revere Extruders, Inc.,* OSHAB APP 84-R5D2-1191 Decision After Reconsideration (April 30, 1986).)

The evidence presented, particularly by way of the surveillance video (Exhibit J-1) (the video), shows that the metal shop area that Bravo was working in contained hazards that posed a risk of head injury due to use of an overhead crane and the hazard of object falling or flying into an employee's head. the danger of working in the metal shop especially with an overhead gantry crane above the working employee's head.

Sullivan testified that he was told by Employer's operations manager Nam, that all employees working in the metal shop were required to wear approved helmets. Indeed, in observing Exhibit J-1 we can see even the shop foreman, Quintero, is shown in the video of the accident wearing his helmet. Sullivan further testified that the crane with hoisting chains is above the employee's head. Objects can fall onto an employee's head while working under the Gantry crane. Objects can be thrown or fall off the crane hook or off a load while using the overhead crane resulting in head injuries. Sullivan testified that there was a hazard of injury from falling objects in the work area involved in this accident. Sullivan further testified that the use of a helmet would help prevent injuries.

The video clearly shows Bravo not wearing a helmet. Bravo testified that he did not wear his helmet on the day of the accident and that he knew he was supposed to wear his helmet. Bravo also testified that he observed that other employees did not wear their helmets and Bravo noted that he did not like wearing his helmet.

Employer argued in its closing brief that it did discipline Bravo for not wearing his helmet and Employer did have posters in English and Spanish about safety posted in the metal shop. That was insufficient to prevent this accident. Employer also argued in its closing brief that there was no evidence presented by the Division of the danger of overhead injuries. Sullivan did testified there was a danger of injury from flying and falling objects to employees when using an overhead Gantry crane. Employer did not provide any direct evidence or testimony in defense of its appeal on this or any of the citations. The evidence presented does not support Employer's arguments. Pursuant to the foregoing, Employer failed to ensure that an employee was wearing approved head protection, in accordance with section 3381, subdivision (a), while operating Employer's overhead Gantry crane and being exposed to the risk of head injury from flying and falling objects. Accordingly, a violation of section 3381, subdivision (a), is established.

4. **Did Employer fail to ensure a load was well secured and properly balanced before it was lifted?**

Section 4999, subdivision (d)(2), provides:

> (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 2, Item 1, the Division alleges:

> Prior to and during the course of the Division's investigation, the employer failed to ensure that a load was well secured and properly balanced in a sling or lifting device before it was lifted more than a few inches. As a result, on or about June 3, 2020, an employee sustained a serious injury while repositioning a steel frame.

In order to establish a violation of section 4999, subdivision (d)(2), and pursuant to the regulation, the Division must show that a load was (1) not well secured, (2) not properly balanced, (3) in a sling or lifting devise, (4) before it was lifted more than a few inches.

Bravo testified that he was told by Quintero to move the steel frame to another location. Bravo determined that it would be best to move the frame from the current resting point on the resting mounts or sawhorses, as shown in the video, to the opposite side of the sawhorses. He was intending to move the frame over the sawhorses to the other side he was facing in the video. He attached the hoist chains where he thought he should attach them and based on how he had seen it done before, he then began to lift the steel frame. The steel frame immediately began to swing out of balance with the very minimal lifting movement. Instead of immediately stopping and putting the frame down, Bravo attempted to move the frame more resulting in this injury.

The video of the accident shows Bravo placing the hoist chains, attaching the load, and then connecting the hoist chains to the overhead Gantry crane hook. The video then shows that the Gantry crane is used to lift the load approximately an inch or two and, at that time, the load starts rocking toward Bravo. (*Id.*) It is readily apparent in Exhibit J-1 video that the load was not well balanced when it was lifted.

The video clearly shows Bravo, while operating the Gantry crane, standing in a position so that if the load does swing back at him, he will be struck. An area such as Bravo's position as seen on the video before the injury is defined as the "danger zone."

Section 4188 defines Danger Zone as:

> Any place in or about a machine or piece of equipment where an employee may be struck by or caught between moving parts, caught moving and stationary objects or parts of the machine, caught between the material and a moving part of the machine, burned by hot surfaces or exposed to electric shock.

The Division may establish exposure by showing that an employee was actually exposed to the zone of danger created by the violative condition. (*Dynamic Construction Services, Inc.*, Cal/OSHA App. 14-1471, Decision After Reconsideration (Dec. 1, 2016) [other citations

omitted]; *Home Depot USA, Inc.*, Cal/OSHA App. 1011071, Decision After Reconsideration (May 16, 2017). (See *USA Waste of California, Inc. dba Blue Barrel Disposal Services,* App. 1384029 Decision After Reconsideration (Feb. 10, 2022).)

Sullivan testified that based on his observation of the video (Exhibit J-1), where Bravo was standing when he lifted the load, was in an area where he would be struck if the load was to tilt toward him if it was unbalanced. The unbalanced load was the violative condition. Since Bravo was not trained as to where to position himself when lifting a load, he was in the zone of danger. Thus, further exacerbating the situation of the unbalanced load is the fact that Bravo was standing in the zone of danger when the movement of the metal frame was attempted. The lack of balance of the metal frame caused it to swing toward Bravo, resulting in him being struck by this load which he estimated to weigh some 800 pounds. Sullivan estimated the metal frame was 20 feet in length and weighed much more than 800 pounds. Sullivan estimated that the steel frame weighed closer to 2 tons or the low side of 4,000 pounds. Sullivan further confirmed in his testimony that such weight striking a person could cause injuries such as what Bravo suffered. The lack of securing and balancing the load, in combination with Bravo standing in the zone of danger if the load swung toward him, which it did, resulted in his injury. Employer failed to present any testimony or direct evidence in support of its appeal of this citation.

Employer argues in its closing brief that the load was only tilted and not lifted. The video (Exhibit J-1) shows a lifting of the load, even if it is a slight lifting. Employer's argument that there was no lifting is not supported by the evidence. The failure to secure and balance the load, in combination with lack of training and lack of supervision resulted in the injury Bravo suffered. Employer is responsible for the violation of the regulation.

Sullivan testified that upon observing the video, and observing Bravo testify, he determined that the load was not (1) properly secured and not (2) balanced in the (3) hoist chain when connected to the overhead gantry crane, and (4) before it was lifted, even if just slightly by a few inches, causing the center of gravity to change, resulting in the load swinging and toppling into Bravo. The evidence presented at hearing supports this conclusion.

Based on the evidence presented, the Division has met its burden by showing that Employer failed to ensure that the load was well secured and properly balanced before it was lifted. For these reasons, Citation 2 is affirmed.

5. Did the Division establish a rebuttable presumption that Citation 2 was properly classified as Serious?

Labor Code section 6432, subdivisions (a) and (b), provide, 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 actual hazard may consist of, among other things:
[...]
(b)The existence in the place of employment of one or more unsafe or unhealthful practices that have been adopted or are in use.

Further, 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.

"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.

(Labor Code section 6432, subdivision (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).) '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).)

Section 330, subdivision (h), defines serious injury as:

"Serious injury or illness" means any injury or illness occurring in a place of employment or in connection with any employment that requires inpatient

> hospitalization for other than medical observation or diagnostic testing, or in which an employee suffers an amputation, the loss of an eye, or any serious degree of permanent disfigurement, but does not include any injury or illness or death caused by an accident on a public street or highway, unless the accident occurred in a construction zone.

Sullivan testified he was current with his Division-mandated training. As such, Labor Code section 6432, subdivision (g), is applied to deem Sullivan presumptively competent to testify regarding the serious classification of Citation 2.

Sullivan interviewed the injured employee, Bravo, and after that interview and review of documents provided by Employer, confirmed Bravo suffered fractures of his left forearm and shoulder. Bravo also told Sullivan that he was injured and was hospitalized. Bravo further told Sullivan that as a result of the accident he had surgery with the placement of screws and a plate in his arm. Bravo also testified at hearing that he was injured and hospitalized with subsequent surgery to his arm as a result of the accident, just as he had told Sullivan. Bravo suffered a serious injury.

The fractures and surgery demonstrate that there was not only a realistic possibility of serious physical harm, but the violation resulted in actual serious physical harm.

The parties further stipulated at hearing that Bravo suffered a serious injury as defined under title 8 of the Regulations and the California Labor Code.

Accordingly, the Division has met its burden to establish a rebuttable presumption that the violation cited in Citation 2 was properly classified as Serious.

6. Did Employer rebut the presumption that the violation in Citation 2 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 that:

> (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.

The burden is on Employer to rebut the presumption that the citation was properly classified as Serious. (*Bigge Crane & Rigging, Co.,* Cal/OSHA App. 1380273, Decision After Reconsideration (Apr. 7, 2023).) Further, the Board has held that a failure to exercise supervision adequate to ensure employee safety is equivalent to failing to exercise reasonable diligence and will not excuse a violation on a claim of lack of employer knowledge. (*Stone Container Corporation*, Cal/OSHA App. 89-042, Decision After Reconsideration (Mar. 9, 1990). *See also Gateway Pacific Contractors*, Cal/OSHA App. 10-R2D3-1502-1508, Decision After Reconsideration (Oct. 4, 2016).)

The evidence presented supports the contention that Employer did not formally train Bravo as to how to secure and balance a load before moving the load. The evidence that was presented (Exbibit 12), produced by Employer to the Division and identified as a training record for Bravo, showed that Bravo did not receive formal training. An added handwritten note to Exhibit 12, the form, indicates that Quintero trained Bravo on how to use an overhead crane on material handling. Quintero did not testify to authenticate this document. Employer presented no evidence at hearing on any allegation of Employer training of Bravo. When shown Exhibit 12, Bravo testified he did not remember this document. Also, Bravo did not sign this document. Bravo was unaware of a formal procedure to secure and balance a load. Bravo testified that he watched his coworkers use the crane as his guide as to how to secure and balance a load to be lifted by the overhead Gantry crane. Employer did not present any testimony in its defense on this or any of the citations.

Therefore, Employer did not meet its burden to establish that it did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation. Employer has not rebutted the presumption that the citation was properly classified as Serious. Accordingly, Citation 2 was properly classified as Serious and is affirmed.

7. Did the Division establish that Citation 2 was properly characterized as Accident-Related?

The Appeals Board has commonly stated that in order for a citation to be properly characterized as Accident-Related "there must be a showing by the Division of a 'causal nexus between the violation and the serious injury.'" (*Sacramento County Water Agency Department of Water Resources, supra*, Cal/OSHA App. 1237932, citing *RNR Construction, Inc., supra*, Cal/OSHA App. 1092600.) As such, the Division must establish that there is a causal nexus between the violation and the serious injury or death. The Appeals Board has explained that the Division may do this by showing that the violation is more likely than not the cause of the accident, resulting in the injury or death, but that the violation need not be the only cause of the accident. (*Id.*, and *Sacramento County Water Agency Department of Water Resources, supra*, Cal/OSHA App. 1237932.) (See also (*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).)

Employer argues in its closing brief that it took all steps a reasonable and responsible employer could be expected to take to protect its employees. The evidence presented contradicts Employer's assertion, particularly in light of the fact Employer elected to not present any testimony or evidence to support this assertion.

The Exhibit J-1 video clearly shows Bravo working in the metal shop without wearing his helmet as required by Section 3381, subdivision (a), with his foreman Quintero in the same proximity of the metal shop where Bravo was injured. Quintero had the opportunity to supervise Bravo but failed to do so. Quintero, if he was supervising Bravo, would have seen where Bravo was positioned in the zone of danger when the load was lifted and should have corrected that. Quintero also could have helped position the load so it was balanced so that the load would not tip when lifted. Quintero would have also required Bravo to wear his protective equipment including his helmet. Employer did not take all steps a reasonable and responsible employer could be expected to take to protect its employees.

The violation was more likely than not the cause of the injury because had Employer ensured that the load was well secured and balanced when lifted, the injury would not have taken place. Employer failed to ensure that the load was well secured and properly balanced when it

was lifted. If Employer had done so, then the load would not have tilted or shifted in the manner that it did resulting in Bravo's injuries.

Here there is a clear causal nexus between the violation and Bravo's injury. The load was not properly secured and balanced. The lack of balance resulted in the load swinging. The unbalanced load struck Bravo. Bravo suffered injuries including broken bones as result of being struck by the unbalanced load, in violation of the regulation. The failure to properly secure and balance the load resulted in Bravo's injury. As such, Bravo's injury was a result of the violation.

Therefore, Citation 2 is properly characterized as Accident-Related.

8. Are the proposed penalties for the Citations 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).)

Generally, the Division, by introducing its Proposed Penalty Worksheet and testifying to the calculation being completed in accordance with the appropriate policies and procedures, will be found to have met its burden of showing the penalties were calculated correctly. (*Ontario Refrigeration Service, Inc,* Cal/OSHA App 1327187, Decision After Reconsideration (Mar. 22, 2022), citing *MI Construction, Inc.,* Cal/OSHA App. 12-0222, Decision After Reconsideration (Jul. 31, 2014).)

Sullivan testified that the penalties proposed in all the citations were calculated in accordance with the Division's policies and procedures based on the penalty-setting regulations. The Division offered its Proposed Penalty Worksheet, the C-10, into evidence at hearing (Exhibit 17.)

Employer did not present evidence at hearing that the calculations were incorrect. Employer did, however, argue in its closing brief that Citation 1, Item 1, should be reduced due to the "corrected during inspection" notation on the citation. That argument was countered by the testimony and evidence presented at the hearing, and as discussed above.

Employer also argued in its closing brief that the penalty for Citation 2 was incorrect. Sullivan testified that the penalty for Citation 2 was calculated in accordance with the Division policies. The Base Penalty of $18,000 for a Serious violation characterized as an Accident-Related violation has only one permissible reduction available, which is for Size, (section 336, subd. (d)(7).) Sullivan testified that he determined that after review of Employer's

documentation, the OSHA 300A form, (Exhibit 19,) that Employer had less than 30 employees. The form actually indicates Employer had 17 employees. (*Id*.) Even though Sullivan was right that a reduction was in order, Exhibit 19 gave the correct number of employees. Employer was entitled to a size reduction credit because of the small number of employees (section 336, subd. (d)(1).) Section 336, subdivision (d)(1) provides when an employer has 11 to 25 employees, Employer is entitled to a 30 percent Size reduction credit to the penalty. Sullivan applied the correct reduction of a 30 percent Size reduction credit and thereafter reduced the $18,000 gravity-base penalty by subtracting $5,400, with a final total penalty of $12,600. Employer did not provide any evidence at hearing or information which would support a finding that the penalty was miscalculated, the regulations were improperly applied, or that any other reduction should have been made to this penalty. The penalty of $12,600 is found to be reasonable.

Accordingly, the penalties for each of the citations are reasonable and affirmed.

9. Were the Citations issued in violation of the six-month statute of limitations found in Labor Code section 6317?

Employer did not present any testimony or evidence in its appeal at the hearing that the Division was in violation of the six-month statute of limitations found in Labor Code section 6317. It is noted that at number 5 of the list of affirmative defenses attached to Employer's appeal, Employer does allege but did not argue until the closing brief that, "The citation was not issued timely."

Employer now argues for the first time in its closing brief that the citations issued in this case by the Division are untimely because it was issued more than six months after the occurrence of a violation. The ALJ, upon receipt of this new defense being raised for the first time in Employer's closing brief, then directed the Division to file a supplement responsive brief addressing this six-month statute of limitations issue by August 1, 2023. The Division filed and served a brief addressing the statute of limitations issue on August 1, 2023.

Labor Code section 6317, subdivision (e)(1), provides, in relevant part:

> A citation or notice shall not be issued by the division more than six months after the occurrence of the violation. For purposes of issuing a citation or notice for a violation of subdivision (b) or (c) of Section 6410, including any implementing related regulations, an "occurrence" continues until it is corrected, or the division discovers the violation, or the duty to comply with the violated requirement ceases to exist. Nothing in this paragraph is intended to alter the meaning of the term "occurrence" for violations of health and safety standards other than the recordkeeping requirements set forth in subdivision (b) or (c) of Section 6410, including any implementing related regulations.

Where, as here, statutory language is clear, its meaning must be construed from the words of the statute itself, so as to effectuate the purpose the Legislature intended. (See *Department of Personnel Administration v. Superior Court* (1992) 5 Cal.App.4th 155, 173-174; *Moyer v. Workmen's Compensation Appeals Board* (1973) 10 Cal.3d. 222.) The Appeals Board has held that the time to issue a citation begins to run when the violation occurs. (*Shimmick Construction Company*, Cal/OSHA App. 09-0399, Denial of Petition for Reconsideration (Jul. 19, 2012).) The Appeals Board has held that "the Division has six months from the time it learns of an accident to investigate and issue citations." (*Bimbo Bakeries USA*, Cal/OSHA App. 03-5216, Decision After Reconsideration (Jun. 9, 2010).) The six-month statute of limitations is not necessarily triggered by the date the Division opens its inspection. (*The Environmental Group*, Cal/OSHA App. 94-1838, Decision After Reconsideration (Aug. 25, 1998).)

Employer asserted that the accident occurred on June 3, 2020. The Division conducted the opening conference with Employer on July 23, 2020. Sullivan testified that it was at the opening conference when the Division discovered there had been an accident. Employer further argues that the six-month statute of limitations required the Division to issue a citation on or before January 23, 2021. The Division issued the citations on June 10, 2021, nearly six months after the statute of limitations had expired.

The Division contends in its supplemental brief addressing the statute of limitation issue, that the statute of limitations was extended by executive orders (EO) issued on May 7, 2020, (Executive Order N-63-20), June 30, 2020, (Executive Order N-71-20), and June 11, 2021, (Executive Order N-08-21).

The Division further asserts that the deadline set forth in Labor Code section 6317 was extended, pursuant to the Governor's legislative power as delegated under the Emergency Services Act. (*640 Tenth LP v. Newsom* (2022) 79 Cal.App.5th 667a; *Newsom v. Superior Court* (2021) 63 Cal.App.5th 1099; Cal. Exec. Order No. N-63-20 (May 7, 2020).)

It appears that the Division timely issued citations on June 10, 2021, as the deadline to issue citations in the instant case was extended and suspended pursuant to the Governor's Executive Orders. Ultimately, EO N-08-21 extended the deadline to issue citations in this matter to September 30, 2021.

Pursuant to all of the relevant Executive Orders, given the relevant dates at issue based on the timeframes of the violations and investigation, it appears that the deadline to issue citations appears to have fallen between May 7, 2020, and September 29, 2021. The citations were issued on June 10, 2021. The Division had until September 30, 2021, to timely issue citations in this case. The ALJ accepts the Division's position. On the merits, the citations appear to be issued timely.

Further, the Board has recently ruled in *United Pumping Service Inc.,* under the facts of that case, that the six-month statute of limitations issue is not jurisdictional and can be waived when an employer fails to plead or present the defense in a timely fashion. (*United Pumping Service, Inc.,* Cal/OSHA App. 1509967, Decision After Reconsideration (Mar 23, 2022).)

In our case, Employer did plead as an affirmative defense number 5 that, "the citation was not issued timely." However, Employer never presented any evidence on this defense at the hearing, did not raise the issue in any testimony at hearing and only raised this defense after the hearing had concluded and in its closing brief. As was announced on the record at the conclusion of the hearing, the post hearing briefs were limited to those issues identified in the record at the hearing. The issue of when the citations were issued and whether the Division violated the six-month statute of limitations was not raised by Employer at the hearing.

Employer was relying on old legal authority for their position that Employer could raise this six-month statute of limitations defense at any time. That reliance was misplaced. Employer failed to present evidence at the hearing in support of its affirmative defense that the citations were not issued timely. As a result, said defense can be waived. Since Employer did not present any evidence to support this defense at the hearing and in a timely fashion, and this defense is beyond what was on the record at the hearing and cannot be raised in the closing brief, it appears that said defense is therefore deemed waived. (*RNR Construction, Inc., supra,* Cal/OSHA App. 1092600.) Even though it appears a waiver has occurred, Employer's defense on the statute of limitations is reviewed on the merits, and, in any event, denied on the merits.

Conclusion

The evidence supports a finding that Employer violated section 342 subdivision (a), in that Employer did not timely report a serious occupational injury. The proposed penalty is found to be reasonable.

The evidence supports a finding that Employer violated section 3203, subdivision (a)(2) by failing to ensure employees were utilizing protective equipment including protective headwear while operating an overhead gantry crane. The proposed penalty is found to be reasonable.

The evidence supports a finding that Employer violated section 3381 subdivision (a), in that Employer failed to ensure that an employee working the overhead gantry crane was wearing approved head protection. The proposed penalty is found to be reasonable.

The evidence supports a finding that Employer violated section 4999, subdivision (d)(2) by failing to ensure a load was well secured and properly balanced before lifting it more than a

few inches. The violation was properly classified as Serious 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 $5,000 is sustained.

It is hereby ordered that Citation 1, Item 2, is affirmed, and the penalty of $335.00 is sustained.

It is hereby ordered that Citation 1, Item 3, is affirmed, and the penalty of $450.00 is sustained.

It is hereby ordered that Citation 2, Item 1, is affirmed, and the penalty of $12,600 is sustained.

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

Dated: 09/08/2023

Leslie E. Murad, II
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.**

APPENDIX A
CERTIFICATION OF HEARING RECORD

Inspection No.: **1497263**
Employer: **HAMILTON IRON WORKS, INC.**

I, Leslie E. Murad, II, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hear the above-entitled matter, hereby certify the proceedings therein were electronically recorded or recorded by a certified court reporter. If the proceedings were recorded electronically, the recording was periodically monitored during the hearing. Either the electronic recording or the recording made by a certified court reporter constitutes the official record of the proceedings, along with the documentary and other evidence presented and received into evidence during or after the hearing. To the best of my knowledge the recording equipment, if utilized, was functioning normally and exhibits listed in this Appendix are true and correct, and accurately represent the evidence received during or after the hearing.

Leslie E. Murad, II

09/08/2023
Date