BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1342017**
O.C. JONES & SONS, INC. **1520 FOURTH STREET** **BERKELEY, CA 94710**	**DECISION**
Employer	

Statement of the Case

O.C. Jones & Sons, Inc. (OCJ or Employer) is a construction contractor. On August 9, 2018, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Geraldine Tolentino, commenced an inspection of a work site located at 1128 Pierce Road in Menlo Park, California (job site), after a report of an accident that occurred on August 1, 2018.

On January 30, 2019, the Division cited Employer for two alleged safety violations: failure to provide an employee with training on a new job assignment; and failure to ensure that a piece of equipment was not used or operated under conditions of stress or load that were contrary to the manufacturer's recommendations.

Employer filed timely appeals of the citations, contesting the existence of the violations, the classification of the violations, and the reasonableness of the proposed penalties. Employer also asserted numerous affirmative defenses.[1]

Pursuant to a joint motion by the parties, the second citation, which was erroneously issued as Citation 1, Item 2, was amended to Citation 2, Item 1.

This matter was heard by Kerry Lewis, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, from Sacramento County, California. The parties and witnesses appeared remotely via the Zoom video platform on August 3, 2021. Fred Walter, attorney at Conn Maciel Carey, LLP, represented Employer. Michael Duong, Staff Counsel, represented the Division. The matter was submitted on September 10, 2021.

[1]At the time of the hearing, Employer withdrew its assertion of the Independent Employee Action Defense. Additionally, 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).)

Issues

1. Did Employer fail to implement its Injury and Illness Prevention Program by failing to provide training to an employee performing a new job assignment?

2. Did the Division establish that Employer failed to ensure that a chain binder was not used under conditions of stress or load that were contrary to the manufacturer's recommendations?

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

4. Did Employer rebut the presumption that Citation 1 was properly classified as Serious by demonstrating that it did not, and could not with the exercise of reasonable diligence, know 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 reasonable?

Findings of Fact

1. On August 1, 2018, Employer's employee, Ricardo Felix (Felix), was injured as the result of his improper use of a chain binder while working for Employer.[2]

2. Felix was tasked with offloading steel plates from the back of a truck. The steel plates were secured with a chain binder, which is a tool used to tighten chains securing a load. When he was unable to release the chain binder that had overtightened during transport, Felix used a pipe as a handle extender to give him more leverage to loosen the chain binder.

3. When the binder suddenly released, the pipe struck Felix in the jaw, causing him to suffer a fractured jaw requiring surgery and three days of hospitalization.

4. Felix had never used or loosened a chain binder prior to August 1, 2018.

5. Employer did not train Felix how to use or loosen a chain binder prior to August 1, 2018.

[2] Finding of Fact No. 1 is a stipulation by the parties.

6. Liam Molloy (Molloy) was Felix's direct supervisor on August 1, 2018.

7. Molloy had never been trained by Employer, or any previous employer, how to use or loosen a chain binder.

8. Employer had multiple models of chain binders at the job site at various times during the Division's investigation.

9. The proposed penalty for Citation 1 was calculated in accordance with the Division's policies and procedures.

Analysis

1. Did Employer fail to implement its Injury and Illness Prevention Program by failing to provide training to an employee performing a new job assignment?

California Code of Regulations, title 8, section 1509, subdivision (a),[3] provides that "[e]very employer shall establish, implement and maintain an effective Injury and Illness Prevention Program in accordance with section 3203 of the General Industry Safety Orders." Section 3203 requires employers to have a written Injury and Illness Prevention Program (IIPP) that meets minimum requirements set forth in the regulation and that the IIPP must be established, implemented, and maintained effectively. In Citation 1, the Division references section 3203, subdivision (a)(7), which provides, in relevant part, that the IIPP must:

> (7) Provide training and instruction:
>
> […]
>
> (C) To all employees given new job assignments for which training has not previously been received;

In Citation 1, the Division alleges:

> Prior to and during the course of the inspection, including, but not limited to, August 1, 2018, the Employer failed to provide training to a laborer given a new assignment working with a chain binder. As a result, the employee sustained a serious injury when the pipe he placed on the handle of the chain binder for greater leverage, hit him in the jaw.

[3] Unless otherwise specified, all references are to sections of California Code of Regulations, title 8.

The Division has the burden of proving a violation by a preponderance of the evidence. (*Howard J. White, Inc*., Cal/OSHA App. 78-741, Decision After Reconsideration (June 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).)

"The purpose of [section] 3203(a)(7) is to provide employees with the knowledge and ability to recognize and avoid the hazards they may be exposed to by a new work assignment." (*Hill Crane Service, Inc.*, Cal/OSHA App. 12-2475, Decision After Reconsideration (Dec. 23, 2013).) The threshold issue for the Division to establish was whether removing a chain binder was a new work assignment for Felix. If it was a new work assignment, the next issue was whether Employer provided him with training for that task.

Employer argued that the Division failed to establish a violation because much of its evidence was hearsay. California Evidence Code section 1200, subdivision (a), defines hearsay evidence as "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." The Appeals Board's evidence rules, found in section 376.2, provide, in part:

> Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

Associate Safety Engineer Geraldine Tolentino (Tolentino) did not have any personal knowledge of the circumstances surrounding Felix's training and her testimony was almost exclusively a recitation of the information obtained from others during her inspection.

The only other witness that testified at the hearing was Molloy. Molloy testified that he was Felix's direct supervisor, that he was the Grading Foreman with responsibility for supervising workers on a grading project at the job site, and that he instructed Felix to remove steel plates from the back of a flatbed truck.

The facts surrounding the accident were not in dispute. As described in Employer's Incident Investigation Report Form (Ex. 2), and corroborated by statements from Felix during his interview with Tolentino, the chain binders had tightened during transport and Felix was unable to release one of them by hand, so he used a pipe as a handle extender. When the handle released suddenly, Felix was struck by the pipe and suffered a fractured jaw.

Based on evidence adduced during the hearing, it is a reasonable inference that Felix was not trained to use or loosen the chain binder that caused his injury. Molloy testified that Employer's workforce does not use chain binders very often, estimating that employees were called upon to loosen a chain binder an average of less than once per month, suggesting that it was less likely that training for Felix had occurred. Molloy testified that he assumed that Felix had experience with chain binders because Felix was a journeyman laborer, suggesting that Molloy did not provide Felix with training on the use of chain binders and did not verify training for Felix on the binders.[4] Molloy did not ask Felix if he was familiar with how to release a chain binder because they are "a very simplistic tool," providing further support for the conclusion that Employer did not ensure that Felix was trained before assigning him the task of loosening the chain binder.

Molloy testified that he has used a chain binder during the 13 years that he has been employed by Employer, but that he has "never been trained [to use one] at O.C. Jones," which makes it more probable that employees supervised by Molloy had also not received such training. Molloy said that none of his employers had trained him how to use a chain binder, that he learned how to use one by observing others using them while working for other contractors, making it more likely that he did not provide any of the workers under his supervision with training on the chain binder. Additionally, Molloy testified that he had observed truck drivers (who were not employees of Employer) release chain binders with handle extenders, but he has never seen anyone employed by OCJ use an extender to help loosen a chain binder. This further supports the likelihood that Molloy did not think that Felix needed to be trained not to use a handle extender to release the chain binders.

It is a reasonable inference that Felix had not been trained how to perform the task at any point based on Molloy's testimony, set forth above. The inference that Felix had not been trained to use or loosen a chain binder is further supported by statements made by Felix during an interview with Tolentino in January 2019. Employer raised a hearsay objection to Tolentino's testimony regarding what Felix told her during his interview. Based on the Appeals Board's rules of evidence, Felix's statements are not relied upon for the finding that he was not trained. Rather, they are used to supplement Molloy's testimony.

Tolentino obtained a written statement from Felix and took notes of questions and answers from the interview. (Ex. 8.) Felix's statement provides, in relevant part, "Although I had never worked with chain binders before, I didn't think i'd [*sic*] be that difficult to have to ask someone to teach me how to undo the binder." When Tolentino asked Felix who trained him how to use the chain binder, Felix responded, "No one." Tolentino's notes reflect that Felix said

[4] It was unreasonable for Molloy to assume that Felix's status as a journeyman laborer meant that he had been trained elsewhere. Such an assumption improperly delegates Employer's responsibility to train its employees simply because the employee had a job in the industry previously.

that he had worked for OCJ for over one year and had never performed the task of removing a chain binder prior to the accident.

As set forth above, Molloy's testimony during the hearing, supplemented by Felix's interview statements, supports a finding that Felix had not been trained to use the chain binder. The Division established by a preponderance of the evidence that Felix was not provided training and instruction for a new job assignment for which he had not previously been trained. Accordingly, Citation 1 is affirmed.

a. Post-Hearing Submission of Exhibit 23

At the close of the hearing, the ALJ gave the parties clear instructions regarding the evidentiary record:

> The evidentiary record is closed to further evidence. If you wish to present further evidence after today, you shall file a motion requesting leave to submit that additional evidence, specify what you wish to submit and the reason why, with the exercise of reasonable diligence, you were unable to submit that proposed evidence at the time of the hearing.

(Hearing Record, 3:32:36.)

In its post-hearing brief, the Division made two references to an "Exhibit 23" as a document supporting the argument that Molloy was a member of management for purposes of making January 2019 interview statements to Tolentino admissible over hearsay objection. However, there was no Exhibit 23 introduced during the hearing. In fact, the Division did not even upload Exhibit 23 to the Appeals Board's electronic filing system until five weeks after the hearing, on September 10, 2021. The Division provided no explanation for its attempt to submit an exhibit after the filing of its post-hearing brief and did not even acknowledge that the exhibit had been untimely submitted. Rather, the Division's post-hearing brief just made the two references to the document in its argument, as though the previously-unmentioned exhibit was presumed admitted.

The Division did not file a motion requesting leave to submit additional evidence. Accordingly, Exhibit 23 is not admitted, references to it in the Division's brief are stricken, and the Division is hereby admonished for its actions and reminded that any evidence submitted after the close of the evidentiary record requires a motion requesting leave to file such evidence. A late submission without an appropriate motion deprives the opposing party an opportunity to respond.

Although the Division's actions were improper with respect to the proffered "Exhibit 23," the document did not influence any of the findings herein. As such, admonishment is sufficient and no further sanctions are warranted.

2. Did the Division establish that Employer failed to ensure that a chain binder was not used under conditions of stress or load that were contrary to the manufacturer's recommendations?

Section 3328, subdivision (a), provides, in relevant part:

(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.

In Citation 2, the Division's Alleged Violation Description (AVD) states:

Prior to and during the course of the inspection, including, but not limited to, August 1, 2018, the Employer failed to ensure a chain binder (Durabilt by Durbin, Duralloy DF 7-1) was not used or operated under conditions of stress or load that were contrary to the manufacturer's recommendations. As a result, the employee sustained a serious injury when the pipe he placed on the handle of the chain binder for greater leverage, hit him in the jaw.

As set forth above, the Division has the burden of proving a violation by a preponderance of the evidence. (*Howard J. White, Inc*., *supra*, Cal/OSHA App. 78-741.) In order to establish a violation of section 3328, subdivision (a), the Division has the burden to prove that a chain binder was used under a specified condition that was contrary to manufacturer recommendations or the engineered design. The Division asserted that a warning embossed on the handle of various chain binders supports its claim that Felix used the chain binder under a condition that was contrary to the manufacturer's recommendations.

However, there is a dispute about what type of chain binder Felix was using at the time of the accident and whether the Division established what, if any, manufacturer recommendations were provided for the particular chain binder at issue. The Appeals Board has held it does "not assume facts that are not in evidence, or take official notice of an element of a violation on which

the Division bears the burden of proof." (*California Family Fitness*, Cal/OSHA App. 03-0096, Decision After Reconsideration (Mar. 20, 2009).)

Tolentino's Narrative Investigation Summary (Ex. 10) and the AVD in Citation 2 indicate that Felix was using a Durabilt Duralloy DF 7-1 (Durabilt) chain binder. However, the Division did not provide evidence in support of this allegation. Employer objected to the admission of Tolentino's Narrative Investigation Summary on the basis of hearsay.

Evidence Code section 1280 provides an exception to the hearsay rule for official records:

> Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the act, condition, or event if all of the following applies:
>
> (a) The writing was made by and within the scope of duty of a public employee.
>
> (b) The writing was made at or near the time of the act, condition, or event.
>
> (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

The Narrative Investigation Summary was prepared by Tolentino, a public employee, as part of her duties. However, it was not made at the time of the event, as required by Evidence Code section 1280, subdivision (b). Additionally, "a public employee's writing, which is based upon information obtained from persons who are not public employees, is generally excluded because the 'sources of information' are not 'such as to indicate its trustworthiness'… ." (*Alvarez v. Jacmar Pacific Pizza Corp*. (2002) 100 Cal.App.4th 1190, 1205-1206 [Internal citations omitted].) Tolentino's notes are almost entirely based on information obtained from other sources rather than her own observations. The "Site Evaluation" section indicates that the chain binder used by Felix was the Durabilt. However, there is no source referenced for that information and Tolentino did not have any personal knowledge during questioning at the hearing.

At hearing, multiple photographs depicting various chain binders were offered into evidence. There were three models of chain binders depicted, including the Durabilt. Some of the photographs evidence an embossed warning on the handle saying not to use a handle extender. Some of the photographs of different models do not show such a warning. Tolentino was unable to provide foundation for each of the photographs, giving uncertain and confused testimony as to

the origin of the photographs.[5] There were no other manufacturer recommendations or warnings submitted into evidence. Without evidence that Felix was using the Durabilt, there is nothing definitive to identify which of the chain binders was used. As set forth above, the Appeals Board cannot assume facts not in evidence.

Tolentino prepared 24 questions to ask Felix during her interview with him on January 7, 2019. (Ex. 8.) Those questions create additional reason for uncertainty about the manufacturer recommendations for different types of chain binders. The questions raise a query of whether there exists a situation where a particular chain binder has a manufacturer-approved extender. Specifically, Tolentino's questions that raise the issue are:

- Have you ever seen the extender specifically made for the chain binder?
- Have you ever used the extender specifically made for the chain binder?
- Have you ever seen your supervisor use an extender (not made by the manufacturer) on a chain binder?
- Have you ever seen your supervisor observe one of your coworkers use an extender (not made by the manufacturer) on a chain binder and not say anything?

(Ex. 8.)

Given the multiple types of chain binders depicted in the Division's exhibits, there is an unanswered question of whether there may be a type of binder that is designed to have an extender and, therefore, does not contain a restriction on use of an extender. The questions prepared by Tolentino are not viewed as an admission or concession by the Division that a manufacturer-made extender exists for a chain binder, or for the specific chain binder in use at the time of the accident. However, the questions do support the conclusion that it cannot definitively be determined that such an extender does not exist. Indeed, the Division's questions reflect at least the contemplation by the Division that such a device *might* exist.

The evidence adduced at hearing did not establish which particular chain binder was in use at the time of the accident. Tolentino did not indicate the source of her claim that the Durabilt chain binder was used by Felix at the time of the accident. As such, the Division failed to meet its burden of proof to establish the manufacturer's recommendations for the particular chain binder in use by Felix at the time of the accident.

Accordingly, Citation 2 is dismissed.

[5] Tolentino claimed that a photograph of the Durabilt (Ex. 21) was provided by Employer, but it has a date stamp that identifies it as having been taken on the date that Tolentino returned to Employer's offices during her investigation. The format of the time/date stamp is consistent with photographs normally taken during the Division's investigations.

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

Labor Code section 6432, subdivision (a) states:

(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:
[…]

(2) The existence in the place of employment of one or more unsafe or unhealthful practices 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:

(1) Inpatient hospitalization for purposes other than medical observation.

(2) The loss of any member of the body.

(3) Any serious degree of permanent disfigurement.

(4) Impairment sufficient to cause a part of the body or the function of an organ to become permanently and significantly reduced in efficiency on or off the job, including, but not limited to, depending on the severity, second-degree or worse burns, crushing injuries including internal injuries even though skin surface may be intact, respiratory illnesses, or broken bones.

(Lab. Code §6432, subd. (e).)

The violation established in Citation 1 is the failure to train an employee how to properly use a chain binder. The actual hazard created by the violation is that, as a result of using a chain

binder incorrectly, an employee could become injured. The parties stipulated that Felix was injured as the result of his improper use of the chain binder.

Medical records reflect that Felix was admitted to the hospital on August 1, 2018, and was discharged on August 4, 2018, after undergoing surgery for a fractured jaw. As such, there was an actuality, in addition to a realistic possibility, of serious physical harm resulting from the violation.

Accordingly, the Division met its burden of establishing that there was a realistic possibility of serious physical harm as a result of the violation and there is a rebuttable presumption that Citation 1 was properly classified as Serious.

4. Did Employer rebut the presumption that Citation 1 was properly classified as Serious by demonstrating that it did not, and could not with the exercise of reasonable diligence, know 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 did not present any evidence to rebut the presumption that the failure to train an employee how to perform a new job assignment was properly classified as Serious. Indeed, Molloy's testimony that he was not trained in the use of chain binders indicates that training was not provided to prevent exposure to the hazard or similar hazards. Further, there is evidence that inadequate supervision was provided to employees exposed to the hazard due to the fact that Molloy was Felix's direct supervisor and assigned him the task involved in the accident without inquiring whether Felix had experience loosening a chain binder. As such, Citation 1 was properly classified as Serious. Serious.

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*, 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 2018, 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 set forth above, medical records established that Felix was hospitalized for three days and underwent surgery for a fractured jaw during the hospitalization. Accordingly, his injury meets the definition of "serious injury."

The violation found in Citation 1 was a failure to train Felix how to properly use a chain binder, a task that he had not previously performed. The parties stipulated that his injury was caused by the improper use of the chain binder. As such, there is a direct nexus that the violation caused the injury. Accordingly, Citation 1 was properly characterized as Accident-Related.

6. Is the proposed penalty reasonable?

Penalties calculated in accordance with the penalty-setting regulations set forth in sections 333 through 336 are presumptively reasonable and will not be reduced absent evidence that the amount of the proposed civil penalty was miscalculated, the regulations were improperly applied, or that the totality of the circumstances warrant a reduction. (*RNR Construction, Inc.*, *supra*, Cal/OSHA App. 1092600, citing *Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).)

The Division submitted into evidence the Proposed Penalty Worksheet and Tolentino testified about the calculations used to establish the proposed penalty for the citation. Employer did not present any evidence or argument to rebut the presumption that the penalty was reasonable and calculated in accordance with the Division's policies and procedures.

Accordingly, the penalty of $12,600 for Citation 1 is reasonable.

Conclusions

The Division established that Employer violated section 1509, subdivision (a). The citation was properly classified as Serious and characterized as Accident-Related. The proposed penalty was reasonable.

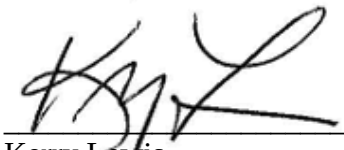
The Division failed to establish a violation of section 3328, subdivision (a), because there was no evidence of which chain binder was used at the time of the accident and what the manufacturer's recommendations were for that chain binder.

ORDER

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

It is hereby ordered that Citation 2 is dismissed and the penalty is vacated.

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



Dated: 10/05/2021

Kerry Lewis
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.**