BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1409863**
A-C ELECTRIC COMPANY **P.O. BOX 81977** **BAKERSFIELD, CA 93380** **Employer**	**DECISION**

Statement of the Case

A-C Electric Company (Employer), is an electrical contractor. Beginning June 18, 2019, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer Larry Johnson (Johnson), conducted an accident investigation at Employer's worksite, a high school football field located at 501 Park Drive in Bakersfield, California (the site).

On December 3, 2019, the Division issued three citations to Employer, alleging violations of the California Code of Regulations, title 8.[1] Citation 1, classified as General, alleges that Employer failed to give new employees instructions regarding the hazards and safety precautions applicable to the work they were assigned to perform. Citation 2, classified as Serious, alleges that Employer failed to ensure that a load was rigged either by a qualified person or by a trainee under the direct visual supervision of a qualified person. Citation 3, classified as Serious Accident-Related, alleges that Employer failed to ensure that employees kept their hands and fingers clear of the space between a sling and a load while the sling was being tightened around the load.

Employer filed a timely appeal contesting the existence of each alleged violation, the classifications, the reasonableness of abatement, and the proposed penalties. In addition, Employer raised numerous affirmative defenses, including, but not limited to, the Independent Employee Action Defense (IEAD).[2]

This matter was heard by Howard Isaac Chernin, Administrative Law Judge (ALJ), for the California Occupational Safety and Health Appeals Board (Appeals Board) in Los Angeles, California, on October 29, 2021, and December 15, 2022. ALJ Chernin conducted the video hearing with all participants appearing remotely via the Zoom video platform. Senior Safety

[1] Unless otherwise specified, all references are to California Code of Regulations, title 8.
[2] 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).)

Engineer Gregory Clark, represented the Division, and attorney Thomas Feher of Lebeau Thelen, LLP, represented Employer.[3]

During the hearing, the parties stipulated to a protective order concerning Exhibit 17, which contains a graphic photograph of an amputation injury. Good cause appearing, Exhibit 17 is placed under seal by the undersigned pursuant to section 376.6. The parties also stipulated that an employee suffered a serious injury.

This matter was submitted on August 21, 2023.

Issues

1. Did Employer fail to give new employees instructions regarding the hazards and safety precautions applicable to the work they were assigned to perform?

2. Did Employer fail to ensure that a load was rigged either by a qualified rigger or by a trainee under the direct visual supervision of a qualified rigger?

3. Did Employer fail to ensure that employees kept their hands and fingers clear of the space between a sling and a load while the sling was being tightened around the load?

4. Did Employer establish any of its affirmative defenses?

5. Did the Division correctly classify the citations?

6. Did Employer rebut the presumption that the violations alleged in Citations 2 and 3 are Serious?

7. Did Employer's violation of section 5042, subdivision (a)(10), cause a serious injury to its employee?

8. Is abatement of the violations unreasonable?

9. Did the Division propose reasonable penalties?

[3] During the hearing, the parties stipulated to have a court reporter transcribe the hearing and prepare a transcript of the hearing, which would serve as the official recording of the proceeding. Pursuant to section 376.7, subdivision (b), it is so ordered.

Findings of Fact

1. On June 4, 2019, Employer was pulling electrical wires (wires) from underground electrical conduits beneath a high school football field as part of a construction project at the site.

2. Journeyman Electrician Nick Totzke (Totzke) and Apprentice Electrician Brian Damon (Damon) were assigned as a two-man crew to perform the work.

3. Totzke and Damon used a forklift (alternatively called a lift truck) equipped with a sling hanging from one of the forks to hoist the wires out of the conduits.

4. Damon placed the sling around the wires to hoist them.

5. Damon had his hand on the wires to hold them in place in the sling.

6. Totzke began tightening the sling by raising the boom of the forklift. As Totzke tightened the sling around the wires, Damon's left index finger became caught between the sling and the wires.

7. Damon suffered a serious amputation injury when his left index finger was caught between the sling and the wires.[4]

8. Employer did not have a written Code of Safe Practices at the time of the accident.

9. Employer did not provide instruction to employees Totzke and Damon regarding the hazards and safety precautions applicable to removing electrical wires by hoisting them with a sling attached to a forklift.

10. Damon was not a qualified rigger.

11. Totzke could not see where Damon's hands were while he was raising the forks of the forklift to tighten the sling around the wires because the forklift obscured his line of sight.

[4] The finding of a serious injury results from a stipulation by the parties.

12. Not having a Code of Safe Practices, as well as failing to provide adequate instructions to employees about the hazards of new tasks they are to perform, both bear a relationship to occupational safety and health.

13. A serious injury can result from an unqualified person performing rigging while not under the direct visual supervision of someone who a qualified rigger.

14. A serious injury can result from placing one's hand and fingers between a load and a sling while the sling is being tightened around the load in preparation for hoisting the load.

15. Damon suffered a serious amputation injury because he placed his left hand and fingers between the wires and the sling while Totzke was raising the sling to tighten it around the wires.

16. The accident occurred out in the open in plain view.

17. At the time of the accident, Damon was an apprentice electrician and required supervision and instruction to perform work safely.

18. Employer did not provide training and instruction to employees specific to the hazard of placing one's hands on wires while a sling is being tightened around them in preparation for mechanically pulling the wires out of an underground conduit.

19. It is feasible to provide instruction to employees on new job assignments.

20. It is feasible to ensure that rigging is either performed by a qualified person, or by someone under the direct visual observation of a qualified person.

21. It is feasible to ensure that employees keep their hands and fingers away from the space between a load and a sling while the sling is being tightened around the load.

22. The proposed penalties are calculated in accordance with the Division's penalty-setting regulations.

Analysis

1. Did Employer fail to give new employees instructions regarding the hazards and safety precautions applicable to the work they were assigned to perform?

Section 1510, subdivision (a), provides:

> When workers are first employed they shall be given instructions regarding the hazards and safety precautions applicable to the type of work in question and directed to read the Code of Safe Practices.

Citation 1 alleges:

> Prior to and during the course of the investigation, including, but not limited to, on June 18, 2019, the employer failed to provide instructions to employees regarding the hazards and safety precautions applicable to rigging of slings for hoisting loads.

The Division has the burden of proving a violation, including the applicability of the safety order, by a preponderance of the evidence. (*Coast Waste Management, Inc.*, Cal/OSHA App. 11-2385, Decision After Reconsideration (Oct. 7, 2016).) "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. (*United Parcel Service*, Cal/OSHA App. 1158285, Decision After Reconsideration (Nov. 15, 2018); *Leslie G. v. Perry & Associates* (1996) 43 Cal.App. 4th 472, 483.)

Applicability

Section 1510 is found within the Construction Safety Orders (CSOs), which apply "whenever employment exists in connection with the construction […] alteration […] renovation, [or] removal of any fixed structure or its parts." (§ 1502, subd. (a).) Here, the site was a high school football field undergoing renovation. As part of the renovation, Employer was removing wiring from conduits in connection with the demolition of a field house. Employer had employees working at the site, and the work posed hazards to employees necessitating safety precautions. The safety order therefore applies.

Violation

The Division must demonstrate that Employer either failed to give instructions on the hazards likely present at the site at the time of hire or failed to direct the employees to read the

Code of Safe Practices. (See *Burtech Pipeline, Inc.*, Cal/OSHA App. 13-0830, Decision After Reconsideration (Mar. 28, 2016).)

a. Employer did not direct employees to read its Code of Safe Practices

On November 8, 2019, Associate Safety Engineer Johnson issued a document request to Employer. (Exhibit 2.) Johnson requested Employer's Code of Safe Practices, among other documents. Employer responded to the Division on November 13, 2019. (Exhibit 9.) Employer did not include a Code of Safe Practices or offer any explanation in its response to the document request, or at any time thereafter. Employer's expert witness, consultant Ben William Laverty III (Laverty) testified that Employer informed him employees "were actually given a written Code of Safe Practices."

Laverty's testimony is at odds with Employer's failure to respond to the Division's document request response, and with the overall record which is devoid of any further evidence that Employer complied with this mandate. Employer had the opportunity to introduce better evidence, including its Code of Safe Practices, to show that it complied with the safety order.

Employer's failure to offer better evidence, when viewed against the evidence that the Division provided showing that it requested but did not receive a Code of Safe Practices from Employer, supports a negative inference that Employer did not have a Code of Safe Practices at the time of the accident. (See California Evidence Code §§ 412 and 413.) Because Employer did not have a Code of Safe Practices at the time, it logically follows that Employer did not direct its employees to read the nonexistent document. Therefore, a violation is established.

b. Employer did not instruct employees on the hazards and safety precautions applicable to their work[5]

To comply with section 1510, subdivision (a), an employer must provide instruction to employees on the hazards and the safety precautions applicable to the work they are to perform. It logically follows that such instruction must be effective to satisfy the regulation, analogous to the requirement found under section 3203, subdivision (a)(7). (See, *c.f. Timberworks Construction*, Inc., Cal/OSHA App. 1097751, Decision After Reconsideration (Mar. 12, 2019) [holding that the purpose of section 3203, subdivision (a)(7), "is to provide employees with the knowledge and ability to recognize, understand and avoid the hazards they may be exposed to by a new work assignment through "training and instruction'"]; *Bellingham Marine Industries, Inc.*, Cal/OSHA App. 12-3144, Decision After Reconsideration (Oct. 16, 2014); *National Distribution Center, LP*, Cal/OSHA App. 12-0391, Decision After Reconsideration (Oct. 5, 2015) [holding

[5] Although the failure to have or require employees to review a Code of Safe Practices is enough to support a violation, the remaining element is discussed as it is relevant to other citations discussed later.

that, in order to be adequate, training provided pursuant to section 3203, subdivision (a)(7), must make the employee "proficient and qualified"].)

The instructions provided by an employer under section 1510, subdivision (a), are critical to providing a safe work environment and cannot be delegated to a third party over which the employer exercises no oversight. (See, *e.g., Guardsmark,* Cal/OSHA App. 10-2675, Denial of Petition for Reconsideration (Sept. 22, 2011); *Labor Ready, Inc*., Cal/OSHA App. 99-3350, Decision After Reconsideration (May 11, 2001) [holding that an employer's statutory duty to furnish a safe and healthful place of employment is non-delegable].)

Christopher Kui (Kui) testified that he was the foreman for Damon's crew. Kui testified that he provided hands-on training at the site on both days of the project, demonstrating two methods for hoisting and removing wires from conduit using a forklift and sling.[6] Both methods involved the use of a forklift. (Exhibits 11, 14, and 15.) The method that the crew was using on the second day required Damon to place his hands on the wires while the forklift slowly raised a sling wrapped around the wires to make the sling taut against them, before continuing to hoist them out of the conduit. Kui testified that he and his crew members had all gone through rigging training through their union, and that the rigging course covers hoisting. The course covers safety, including pinch point hazards when hoisting with a sling, but Kui did not recall whether it included training on how to pull wires using a sling and a forklift.

Employer did not provide documentary evidence of the contents of the union training at any time. Thus, it is inferred that the training was not thorough enough to cover the hazards and safety precautions applicable to removing electrical wires from conduit by hoisting them with a sling attached to a forklift. Moreover, nothing in the record suggests that Employer exercised influence or control over the union that provided the training, or the contents of the training, and therefore, even if such training were sufficient to meet the regulatory standard, Employer could not legally delegate its duty to the union.

Kui also testified that he provided his crew with hands-on training at the site regarding rigging with a sling and a forklift on the first day of the job. Kui demonstrated how to set up the sling, and watched his crew do multiple pulls to ensure that they could do it safely and correctly. Kui further testified that Employer "encouraged" employees to keep their hands clear of hazards while an object was being pulled. Kui was not present, however, at the time of the accident. He testified that Totzke, who was a journeyman electrician, was in charge when Kui was absent.

[6] Employer contends that it utilized a strap, not a sling, to perform the work. That matter is addressed more thoroughly below.

Damon testified that Employer trained employees to keep their hands away from pinch points when using a sling to pull wires with a forklift, and specifically instructed Damon to not hold the wires while they were being hoisted. Nonetheless, Damon placed his hands between the wires and the knot of the sling and was holding the wires in place while the sling was being lifted by Totzke's forklift when the accident occurred. Furthermore, Damon testified that Employer provided him with written instructions on how to perform the work safely, but no such document was provided during the hearing to corroborate his testimony, which permits an inference that no such document existed or was provided to Damon. Moreover, Totzke credibly testified that he and Damon were taught to hold the wires while the forklift raised the sling. He further testified that 90 percent of the pulls required keeping hands on the wires while slowly raising the sling with the forks of the forklift to pull the sling taut. Totzke's testimony is more consistent than Damon's and is credited.

Kui and Totzke provided testimony consistent with their written statements that Employer provided to the Division. For instance, Kui wrote that Damon informed him after the accident that he had been "holding the sling on a set of conductors and the sling slipped and took off the end of his finger." (Exhibit 7.) Totzke wrote in his statement that "once we tied off [Damon] held the conductors til the straps got taught [*sic*] below the knot/tie off point…." (Exhibit 6.) Damon wrote in Employer's incident report that "on this particular pull I hooked the wires around the strap, and the strap was cinched down on the wire. I held the wire ends in place 1-2 feet down, so they would not slip. The strap/wire did slip and my left index finger tip got caught between the strap and the wire cinch point, degloving/amputating it." (Exhibit 5.)

Taken together, the evidence supports a conclusion that Employer did not provide the required instruction to its employees, because Damon and Totzke consistently did not perform the work in a safe manner. Alternatively, it supports a conclusion that the instruction that Employer did provide was ineffective, because it was not followed when the accident occurred. Thus, it is found that Employer did not provide adequate training and instruction to Damon on the hazards associated with placing one's hands on the wires while the wires were being suspended from a forklift with a sling and the sling and wires were being lifted by the forklift, tightening the sling.

Employer did not effectively instruct its employees on the hazards and safety precautions applicable to hoisting electrical wires with a forklift and sling to remove them from a conduit. Employer also lacked a written Code of Safe Practices, and therefore did not direct employees to read it at any time during their employment. For all the foregoing reasons, a violation is established. Therefore, Citation 1 is affirmed.

2. Did Employer fail to ensure that a load was rigged either by a qualified rigger or by a trainee under the direct visual supervision of a qualified rigger?

Section 4999, subdivision (a), provided at the time of the inspection:

> The qualified person (rigger) shall be trained and capable of safely performing the rigging operation. All loads shall be rigged by a qualified person (rigger) or by a trainee under the direct visual supervision of a qualified person (rigger).

Citation 2 alleges:

> Prior to and during the course of the investigation, including, but not limited to, on June 18, 2019, the employer failed to ensure that an employee rigging a synthetic web sling around electrical wires to be pulled from underground using a telescoping industrial truck was a qualified person (rigger) and capable of safely performing the rigging operation. The employee was also not performing the rigging under the direct visual supervision of a qualified person (rigger).

Applicability

Section 4999 is found within the General Industry Safety Orders (GISOs), which "apply to all employments and places of employment in California". (§ 3202, subd. (a).) The GISOs apply unless the Standards Board "adopts safety orders applying to certain industries, occupations or employments exclusively, in which like conditions and hazards exist", in which case, if the more specific safety order is inconsistent with the GISOs, the more specific safety orders will prevail. (*Id.*)

Additionally, section 4999 belongs to Group 13, which section 4880 defines as applied to "derricks, cranes, and boom-type excavators," Section 4880, subdivision (a)(1), specifies that "this standard applies to power operated equipment that can hoist, lower and horizontally move a suspended load with or without attachments." Section 4880, subdivision (c)(8), further provides that Group 13 excludes "Powered industrial trucks (forklifts), except when configured to raise or lower by means of a hoist and horizontally move a suspended load."

Section 4885 defines a hoist as "an apparatus for raising or lowering a load by the application of a pulling force, but does not include a car or platform riding in guides," and it defines hoisting as "the act of raising, or lowering a load with equipment covered by this standard," and notes that hoisting "can be done by means other than wire rope/hoist drum equipment." This section also defines a load as "[t]he object(s) being hoisted and/or the weight of the object(s). Both uses refer to the object(s) and the load-attaching equipment, such as ropes,

slings, shackles, and any other ancillary attachment as defined by the crane/derrick manufacturer."

Here, evidence admitted during the hearing establishes that, on the date of the accident, Employer configured a forklift with a sling to hoist wires upward and out of an underground conduit in connection with construction activities at the site. There is no dispute that the wires constituted a load within the meaning of section 4885. Kui, Employer's foreman, credibly testified that Damon and Totzke were removing wires from conduits by mechanical means when the accident occurred.

Kui further testified that the process involved using a six-foot lifting sling-type strap (the sling). The sling was hitched to the wires to be removed by tying it around the wires in a half hitch or choke knot, then the sling was to be attached to the fork of the forklift, and finally the wiring was to be lifted out. Kui confirmed that the sling being used by Damon and Totzke was similar to the one shown in Exhibits 12 and 13, which depict a yellow sling labeled as a "synthetic web sling." Kui's testimony is corroborated by both Damon and Totzke, who testified that they were using a sling wrapped around the wiring and suspended from the fork of Totzke's forklift to remove wire wiring from conduits. Because these conduits were underground, Totzke testified that he had to raise the forks on the boom of the forklift that he was operating in order to remove the wires. Thus, the evidence demonstrates that the forklift and sling were used to raise the wires vertically. Furthermore, nothing in the record suggests that the forklift was incapable of horizontally moving the wires once suspended. In fact, Johnson credibly testified that the equipment in use was best described as an articulating boom-type forklift capable of hoisting and moving loads both vertically and horizontally.

Because it is established that Employer was using a forklift configured with a sling to hoist electrical wires out of underground conduits, the safety order applies to the work that was being performed on the date of the accident.

Violation

To establish a violation of section 4999, subdivision (a), the Division must prove by a preponderance of the evidence that Employer failed to ensure that a load was rigged by a qualified person (rigger) or by a trainee under the direct visual supervision of a qualified person (rigger). The safety order explains that a qualified person (rigger) is someone who is trained and capable of safely performing the rigging operation.

a. Was Damon trained and capable of safely performing the rigging operation?

As discussed regarding Citation 1, it is found that Damon was not adequately trained to safely perform the rigging on the date of the incident. Despite Employer's argument that Damon had gone through rigging training provided by the union, Employer at no time offered corroborating evidence of what that training included. Nothing in the record suggests that the union training covered the hazards associated with the scenario discussed here, utilizing a forklift configured with a sling to hoist electrical wires out of underground conduits.

Moreover, Damon was an apprentice at the time of the accident, and Totzke was a journeyman electrician, and both were members of the International Brotherhood of Electrical Workers (IBEW) Local 428. Totzke testified that, in general, a journeyman's duty is to "teach and help [apprentices] along to become a journeyman," and that apprentices typically cannot work independently of the journeyman because "they're not properly trained enough to work alone yet." Damon provided corroborating testimony that an apprentice electrician "is an electrician in training…in the process of learning, both in school and on the job."

Furthermore, Totzke credibly testified that 90 percent of the pulls required keeping hands on the wires while slowly raising the sling with the forks of the forklift to pull the sling taut. Damon testified that he consciously disregarded Kui's instructions when he placed his hand on the wires while they were being hoisted via a forklift and attached sling. However, the consistency with which Damon disregarded his alleged training, as demonstrated by Totzke's testimony, strongly supports a conclusion that Damon was not adequately instructed by Employer on the hazards associated with the work he was performing to be considered a qualified rigger.

b. Did Employer fail to ensure that a load was rigged by a qualified rigger or by a trainee under the direct visual supervision of a qualified rigger?

Employer argues that it did not violate the safety order because Damon was being overseen by Totzke while they were pulling the wires, and Employer argued that Totzke was a qualified person (rigger). Even assuming that Totzke was a qualified person (rigger), the evidence supports a conclusion that he did not maintain direct supervision over Damon as he was rigging the wires. Totzke credibly testified that from his position in the cab of the forklift, he could not see Damon's hands, and there was "too much visual impairment" to see where Damon was holding the wires. As discussed, Damon lacked adequate training and experience to be considered a qualified person (rigger). Damon was therefore a trainee, who was required to be under the direct supervision of a qualified person (rigger) while rigging the wires that were to be hoisted out of the underground conduits via Totzke's forklift. Totzke could not see what Damon was doing at the time of the accident. Therefore, it is found that Damon was not under the direct visual supervision of Totzke when the accident occurred.

For all the foregoing reasons, it is found that Employer violated section 4999, subdivision (a). Accordingly, Citation 2 is affirmed.

3. Did Employer fail to ensure that employees kept their hands and fingers clear of the space between a sling and a load while the sling was being tightened around the load?

Section 5042, subdivision (a)(10), provided at the time of the inspection:

> (a) Whenever any sling is used, the following practices shall be enforced:
> [. . .]
> (10) Hands or fingers shall not be placed between the sling and its load while the sling is being tightened around the load.

Citation 3 alleges:

> Prior to and during the course of the investigation, including, but not limited to, on June 18, 2019, the employer failed to ensure that an employee rigging a synthetic web sling around electrical wire to be pulled from underground using telescoping industrial truck kept his hands and fingers from between the sling and the load while the sling was being tightened around the load. As a result, on or about June 4, 2019, an employee suffered a serious injury when he placed his hand between the electrical wire load and sling as the sling was tightening on the electrical wire being pulled up.

Applicability

Section 5042 also falls within Group 13 of the GISOs, which includes cranes and other hoisting equipment. Section 5040 defines the scope of section 5042, which "applies to slings used in conjunction with material handling equipment for the movement of material by hoisting. The types of slings covered are those made from alloy chain steel, wire rope, metal mesh, natural or synthetic fiber rope (conventional three strand construction), and synthetic web (nylon, polyester, and polypropylene)."[7]

Employer advances several arguments that the safety order is inapplicable. Employer argues that forklifts such as the one that Totzke was using to raise the wires out of the underground conduits is covered by other safety orders. Employer also asserts that the safety order does not apply to a forklift equipped with a sling. Employer's arguments are viewed by the undersigned as affirmative defenses and will be discussed *infra*.

[7] There is an exception to section 5040, but neither party argued that it applies to the work that was being performed, and the evidence, as discussed *infra*, demonstrates that it does not.

Here, the evidence demonstrates that Damon and Totzke were utilizing a forklift, which is a type of powered industrial equipment. (See § 4880, subds. (a)(1) and (c)(8).) Furthermore, the evidence demonstrates that they were using the forklift to hoist wires. Neither party offered evidence disputing that the wires are material falling within the scope of section 5042, and the plain meaning of material supports a conclusion that the wires are material.[8] Accordingly, the safety order applies to the work that was being performed.

Violation

To establish a violation, the Division must show that: 1) an employee was using a sling; 2) the sling was being tightened around a load; and 3) while the sling was being tightened, an employee placed their hands or fingers between the sling and the load.

a. Damon was using a sling

Although the safety order does not define what a sling is, slings are generally defined as "a usually looped line (as of strap, chain, or rope) used to hoist, lower, or carry something." (Merriam-Webster.com Dict. (2023).) Here, evidence provided during the hearing establishes that employee Damon was using a sling at the time of the accident. Employer's expert Laverty testified he did not believe the item was a sling, and offered his opinion that it was a tow strap or pull strap.

Laverty's testimony is at odds with the evidence, as well as the generally accepted dictionary definition of "sling." The testimony of Kui, Totzke, and Damon are consistent in describing the manner of the work that was being performed. To remove the wires from the underground conduits, the strap was attached to the fork of Totzke's forklift and had to be looped around the conduits and tightened to provide enough resistance to prevent them from slipping out of the sling while Totzke raised the boom of his forklift. Thus, the evidence supports a finding that Damon was using a sling at the time of the accident.

b. The sling was being tightened around a load

Although the safety order does not define what a load is, it is generally understood to mean "a mass or weight supported by something." (Merriam-Webster.com Dict. (2023).) Here, testimony from Kui, Totzke, and Damon establishes that Totzke was raising the boom of his forklift to tighten the sling around the wires that he and Damon were removing from underground conduits. The evidence in the record supports a finding that the sling was supporting the wires; otherwise, it would not have been possible to remove the wires by hoisting

[8] See, e.g., this definition of "material" from the Merriam Webster dictionary: "matter that has the qualities which give it individuality and by which it may be categorized." (Merriam-Webster.com Dict. (2023).) Here, the cables could be described and categorized as conductive material, because they are meant to conduct electricity.

them via the sling attached to Totzke's forklift. Thus, the evidence supports a finding that Damon and Totzke were tightening the sling around a load.

c. Damon placed his hands and fingers between the sling and the load while the sling was being tightened

Damon admitted during the hearing that he placed his hand on the wires, between the wires and the sling, while Totzke was hoisting the sling and wires upward with his forklift. Damon's admission is consistent with the incident reports and witness statements provided by Employer. (Exhibits 4, 5, 6 and 7.) Moreover, as discussed *infra*, Damon's testimony is consistent with the injuries that he sustained in the accident. Thus, the evidence supports a finding that Damon placed his hands and fingers between the sling and the load while the sling was being tightened.

For all of the foregoing reasons, therefore, the Division established a violation of section 5042, subdivision (a)(10). Citation 3 is therefore affirmed.

4. Did Employer establish any of its affirmative defenses?

Employers bear the burden of proving their pleaded affirmative defenses by a preponderance of the evidence, and any such defenses that are not presented during the hearing are deemed waived. (*RNR Construction, Inc*., *supra*, Cal/OSHA App. 1092600.) Here, Employer was given the opportunity to present evidence in support of its affirmative defenses during the hearing. Employer presented evidence which, viewed in the light most favorable to Employer, is relevant to Employer's asserted IEAD, as well as the defense that another more specific safety order applies.

a. Does a different, more specific safety order apply to the work that was being performed?

Employer presented evidence during the hearing, and argued in its post-hearing brief, that a different safety order applies to the work that was being performed by Damon and Totzke than section 4999, subdivision (a), or 5042, subdivision (a)(10). Employer argues that section 3203, subdivision (a), is the applicable safety order. As a threshold matter, the defense raised by Employer requires a showing that a different, more specific safety order applies. As the Appeals Board stated in *Coast Waste Management, Inc*., Cal/OSHA App. 11-2385, Decision After Reconsideration (Oct. 7, 2016):

> The Board will find a specific safety order is controlling where there is an actual conflict between the two safety orders. (*Devcon Construction, Inc*., Cal/OSHA App. 09-3398, Denial of Petition for Reconsideration (February 16, 2012), *Cabrillo Economic Development Corp*., Cal/OSHA App. 11-3185, Decision After

> Reconsideration and Remand (October 16, 2014).) If the two safety orders can be harmonized with one another, the Board will reject the defense and read the standards in this way. (*Pacific Gas and Electric Company*, Cal/OSHA App. 82-1102 through 1104, Decision After Reconsideration (December 24, 1983).)

Here, Employer does not argue that a more specific safety order applies; rather, Employer asserts that a more general safety order, section 3203, subdivision (a), is the applicable safety order. Sections 4999, subdivision (a), and 5042, subdivision (a)(10), specifically apply to and regulate the operation of "power operated equipment that can hoist, lower and horizontally move a suspended load with or without attachments." (§ 4880, subd. (a)(1).) Section 3203, subdivision (a), however, requires applies to every employer in California, with limited exceptions which are not relevant here. Furthermore, section 3203, subdivision (a), can be harmonized easily with the more specific safety orders that the Division cited. Finally, even if section 3202, subdivision (a) can be considered the applicable safety order, Employer did not produce evidence that it was in compliance with its training requirements, because as discussed above, Employer did not provide Damon with training specific to the hazards of placing his hands on wires while a sling was being mechanically raised and tightened around the wires. Therefore, Employer did not meet its burden of establishing the defense that a more specific safety order applies.

b. Did Employer establish the IEAD as to any of the citations?

In order to successfully assert the affirmative defense of IEAD, an employer must establish the following elements:

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

(*Fedex Freight, Inc*., Cal/OSHA App. 12-0144, Decision After Reconsideration (Dec. 14, 2016); *Mercury Service, Inc*., Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980).)

Citation 1

Citation 1 alleges that Employer failed to provide training to employees on how to safely perform their work. Providing training is an employer's non-delegable duty. Therefore, IEAD does not apply.

Citations 2 and 3

Element 1: Were Damon and Totzke experienced employees?

Damon was an apprentice at the time of the accident, and although he had received some union training and on the job training prior to the accident, the evidence at hearing did not establish that Damon was sufficiently experienced at rigging for this particular type of hoisting operation. Damon testified that he had been employed by Employer for "a couple of months" prior to the accident and had worked with Totzke for "a month or so," but had not been involved in removing wires from conduits with Totzke previously. He also testified that, prior to the accident, he had not used slings and motorized equipment to remove wiring from conduits. Totzke credibly testified that Employer showed Totzke and Damon how to perform this type of rigging "like two times." Damon's overall lack of experience completing the specific work that he was engaged in at the time of the accident is demonstrated by the evidence received during the hearing. In summary, it is determined that Employer failed to establish that Damon was experienced in the job being performed.

Element 2: Does Employer have a well-devised safety plan?

As discussed by the Appeals Board in *Synergy Tree Trimming, Inc.*, Cal/OSHA App. 317253953, Decision After Reconsideration (May 15, 2017):

> The second element of the IEA defense requires the employer to demonstrate that it has a well-devised safety program that includes training employees in matters of safety respective to their particular job assignments. (*Chevron U.S.A., Inc*. Cal/OSHA App. 89-283, Decision After Reconsideration (Feb. 8, 1991).) The Board has analyzed this element by looking at the written policies and procedures of the employer, as well as taking testimony as to what constitutes the day-to-day safety practices of the employer. (See, *Glass Pak*, Cal/OSHA App. 03-750, Decision After Reconsideration (Nov. 4, 2010).) Indeed, demonstration of an extant and effective Illness and Injury Prevention Program, as well as relevant training records and information regarding what constitutes Employer's training program for impacted employees, are typically the showings an employer must make to meet this element.

The Division did not cite Employer for its written safety program but, as noted previously, the record demonstrates Employer did not provide sufficient training to Damon and did not have a Code of Safe Practices at the time of the inspection. There is no dispute that Employer was conducting construction-related work at the time of the accident, so Employer was subject to the CSOs. (See §1502, subd. (a).) Section 1509 specifically requires that, as part of its overall Injury and Illness Prevention Program, an employer subject to the CSOs must "adopt a written Code of Safe Practices." (§ 1509, subd. (b).) Employer did not provide any training

records relating to Damon and did not adopt a written Code of Safe Practices. Therefore, Employer did not establish that it had a well-devised, much less effective, safety program.

Element 3: Did Employer enforce its safety program?

Similarly, Employer failed to establish that it enforces its safety program. Employer lacked a compliant safety program, in that it did not provide required training to employees and did not have a Code of Safe Practices, a document which is integral to its obligation to provide a safe workplace to employees. It is axiomatic that an employer that lacks a Code of Safe Practices does not enforce it. Because it lacked a complete safety program, Employer could not enforce portions of the program that it did not have. Therefore, it is concluded that Employer did not enforce its safety program because its safety program was incomplete.

Elements 4 and 5

Employer offered testimonial evidence to establish that it has a policy of sanctions against employees who violate its safety program but offered no corroborating documentary evidence to show that it disciplined employees, including Damon, who violated its safety program. Employer also offered evidence that Damon may have known that placing his hand and fingers between the load and the sling while the load was being hoisted by Totzke was contra to Employer's safety policies.

As the IEAD is an affirmative defense, Employer bears the burden of proof and must establish that all five elements of the IEAD are present by a preponderance of the evidence. (*Sacramento County Water Agency Department of Water Resources*, Cal/OSHA App. 1237932, Decision After Reconsideration (May 21, 2020).) Employer failed to establish the first, second and third elements of its affirmative defense. Even assuming for sake of argument that Employer established the fourth and fifth elements, a failure to prove a single element of the IEAD defeats the defense, thus Employer's IEAD fails.

c. Did Employer establish the Newbery defense as to any of the citations?

Employer asserts that the cited violations were unforeseeable, and therefore Employer should be relieved of liability under the defense recognized by the Court of Appeal in *Newbery Electric Corp. v. Occupational Safety and Health Appeals Board*, (1981) 123 Cal.App.3d 641. The elements of the defense require proof of the nonexistence of four criteria:

1) that the employer knew or should have known of the potential danger to employees;
2) that the employer failed to exercise supervision adequate to assure safety;
3) that the employer failed to ensure employee compliance with its safety rules; and

4) that the violation was foreseeable.

(*Gaewiler v. Occupational Safety and Health Appeals Board* (1983) 141 Cal.App.3d 1041.)

Furthermore, "the key factor in *Newbery* is unforeseeability, based upon independent action by an employee or employees in contravention of an employer's well-designed safety program." (*Bellingham Marine Industries, Inc., supra*, Cal/OSHA App. 12-3144, Decision After Reconsideration (Oct. 16, 2014).)

Here, Employer did not have a well-designed safety program, in that it provided inadequate training for the work being performed and lacked a written Code of Safe Practices. With regard to Citation 1, providing training is a non-delegable duty, and therefore, the *Newbury* defense is unavailable to Employer because the failure to provide training was not the result of anything Damon or Totzke did. With regard to Citations 2 and 3, it is further found that the violations were both foreseeable. It was foreseeable that an inexperienced employee lacking sufficient training might place his hands and fingers between a sling and its load while performing rigging. Moreover, credible testimony from Totzke established that 90 percent of the pulls required Damon to place his hands on wires while Totzke raised the boom of his forklift to tighten the sling around the wires. It was thus foreseeable that Damon would place his hands on the wires for this particular pull. It was further foreseeable that Totzke, from the vantage point of the cab of the forklift that he was operating, would not be able to directly observe where Damon's hands were while he was rigging the wires to be pulled out by Totzke's forklift.

Thus, for the foregoing reasons, Employer did not establish the *Newbery* defense as to any of the citations.

5. Did the Division correctly classify the citations?

Citation 1

A General violation is defined by section 334, subdivision (b), as "a violation which is specifically determined not to be of a serious nature but has a relationship to occupational safety and health of employees."

Johnson testified that he classified Citation 1, Item 1, as General because it pertained to occupational safety and health. Johnson's testimony is credited. Indeed, it is reasonable to infer employees who are not trained in how to perform their jobs, and specifically on the hazards associated with the performance of their jobs, are more likely to experience an occupational injury or illness than employees who do receive such training. Thus, it is found that this violation bears a relationship to employee occupational safety and health.

Employer offered no evidence to controvert the classification. Therefore, it is determined, for all of the foregoing reasons, that the Division correctly classified Citation 1, Item 1, as General.

Citation 2

Labor Code section 6432, subdivision (a), in relevant part, states:

> There shall be a rebuttable presumption that a "serious violation" exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation. The demonstration of a violation by the division is not sufficient by itself to establish that the violation is serious. The actual hazard may consist of, among other things:
>
> […]
> (2) The existence in the place of employment of one or more unsafe or unhealthful practices that have been adopted or are in use.

Labor Code section 6432, subdivision (e), provides:

> "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.

The Appeals Board has defined the term "realistic possibility" to mean a prediction that is within the bounds of human reason, not pure speculation. (*Sacramento County Water Agency Department of Water Resources, supra*, Cal/OSHA App. 1237932.)

The evidence produced during the hearing demonstrates that the Division complied with Labor Code section 6432, subdivision (b)(1), by sending Employer a Notice of Intent to Classify Citation as Serious (1BY). (Exhibit 18.)

At the time of the hearing, Johnson had been employed by the Division for about three years, during which time he had conducted numerous investigations, including investigations

involving equipment such as forklifts and cranes. Prior to working for the Division, Johnson gained experience working for approximately 10 years in the oil and gas industry.

Johnson testified that he classified Citation 2 as Serious because he determined as part of his investigation that there was a realistic possibility of serious physical harm that could result from the violations if someone who was unqualified or unsupervised by a qualified person was performing rigging. As is discussed more fully *infra*, not only was there a realistic possibility that the hazard created by the violation could result in a serious injury, the parties stipulated that an employee (Damon) did suffer a serious injury. Accordingly, the Division established a rebuttable presumption that Citation 2 was properly classified as Serious.

Citation 3

Johnson credibly testified that a serious injury could result from an employee placing their hand or fingers between the sling and the load being hoisted. Moreover, as discussed more fully *infra*, Damon suffered a serious injury because of the violation. Accordingly, the Division established a rebuttable presumption that Citation 3 was properly classified as Serious.

For the foregoing reasons, the Division correctly classified each citation.

6. Did Employer rebut the presumption that the violations alleged in Citations 2 and 3 are Serious?

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 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.

The Appeals Board has held that a hazard in plain view can constitute a Serious violation, and that an Employer's failure to detect such a hazard negates the argument that the employer acted reasonably and responsibly. (See e.g., *RNR Construction, Inc.*, *supra*, Cal/OSHA

App.1092600, Denial of Petition for Reconsideration (May 26, 2017); *National Steel and Shipbuilding Company*, Cal/OSHA App. 10-3791, Decision After Reconsideration (Nov. 17, 2014) ["hazardous conditions, plainly visible to the naked eye, constitute serious violations since the employer could have discovered them through reasonable diligence."].) Johnson credibly testified that Damon and Totzke were working outside in plain view at the time of the accident, and nothing in the record disputes Johnson's account. Both violations, therefore, were readily visible and could have been prevented by reasonable and appropriate supervision.

Citation 2

Employer argues in its post-hearing brief that it reasonably relied on Totzke's training and experience, that there was nothing wrong with the rigging, and that the violation resulted from Damon's "unilateral and unannounced decision to keep his hand on/just above the knot." (Employer's Post-Hearing Brief, p. 20.) Employer's arguments fail. Citation 2 was issued because the Division determined that Damon was not under direct supervision of a qualified person (rigger) when the violation occurred. This was born out by the evidence at hearing. Employer's reliance on Totzke's training and experience to supervise Damon was ill-placed, as Employer reasonably could have predicted that Totzke, while operating the forklift, would have an obstructed view of Damon and therefore may not be able to see where Damon's hands and fingers were during the rigging and hoisting.

Citation 3

Employer also argues that it lacked knowledge of the violation because Kui "was aware that Totzke and Damon had prior experience with wire jobs, previous training in avoiding pinch points, and previous training in rigging, hoisting, and signaling through a number of different sources, including" Employer. Nonetheless, as noted previously, Employer had the opportunity to provide evidence as to the specific training provided to Totzke and Damon, but largely failed to provide more than unsupported hearsay regarding training received from the union. Moreover, the accident occurred out in the open, in plain view. This strongly implies that Employer did not provide reasonable supervision of Damon.

The Appeals Board has previously held that the failure to adequately supervise an employee supports a finding that the employer did not rebut the Serious classification. (*Timberworks Construction, Inc., supra*, Cal/OSHA App. 1097751, Decision After Reconsideration (Mar. 12, 2019) ["The lack of training on proper use of fall protection equipment, as well as the failure of supervision, support the ALJ's conclusion that the presumption of a serious violation was not rebutted by the employer."].)

Accordingly, Employer failed to rebut the presumption that the Division correctly classified Citations 2 and 3 as Serious.

7. Did Employer's violation of section 5042, subdivision (a)(10), cause a serious injury to its employee?

For a citation to be characterized as Accident-Related, there must be a showing by the Division of a "causal nexus between the violation and the serious injury." (*RNR Construction, Inc.*, *supra*, Cal/OSHA Insp. No. 1092600.)

Here, the evidence establishes that Damon suffered a serious amputation injury when his hand and fingers got caught between the wires (the load) and the sling while Totzke was raising the sling to tighten it around the wires. Had his hand and fingers not been where they were, the accident would not have occurred. Thus, for the foregoing reasons, Citation 2 is properly characterized as Accident-Related.

8. Is abatement of the violations unreasonable?

The Division does not mandate specific means of abatement; rather, the employer is free to choose the least burdensome means of abatement. (*Starcrest Products of California, Inc*., Cal/OSHA App. 02-1385, Decision After Reconsideration (Nov. 17, 2004), citing *The Daily Californian/Caligraphics*, Cal/OSHA App. 90-929, Decision After Reconsideration (Aug. 28, 1991).) To establish that abatement requirements are unreasonable an employer must show that abatement is not feasible, impractical, or unreasonably expensive. (See *The Daily Californian/Caligraphics*, Cal OSHA/App. 90-929, *supra*.)

An employer may seek a variance from the Standards Board if it can show that "an alternate program, method, practice, means, device, or process which will provide equal or superior safety for employees." (See Labor Code § 143; *United States Cold Storage of California*, Cal/OSHA App. 11-1342, Denial of Petition for Reconsideration (Dec. 21, 2012); *Gates & Sons, Inc*., Cal/OSHA App. 79-1365, Decision After Reconsideration (Dec. 15, 1980).)

Employer did not present evidence that abatement is unfeasible, impractical, or would be unreasonably expensive. To the contrary, ample evidence was presented at hearing that Employer has abated the violations or could do so without suffering unreasonable expense. Regarding Citation 1, Employer could have taken steps to better train and instruct Damon and Totzke and could have developed a Code of Safe Practices and instructed Damon and Totzke to read it before performing their job assignments.

Regarding Citation 2, assuming for sake of argument that Totzke was a qualified person (rigger), Employer could have either ensured that Totzke alone performed the work, if feasible, or could have had someone else operate the forklift while Damon was doing rigging work, so that Totzke could directly observe him and be able to see where Damon's hands were while Damon was rigging the wires.

Regarding Citation 3, Employer could have provided better training and supervision to ensure that employees did not place their hands and fingers between the load and the sling while tightening the rigging around a load to be lifted out of the ground through mechanical means.

For the foregoing reasons, Employer did not establish that abatement of any of the violations would have been unfeasible or impractical.

9. Did the Division propose reasonable penalties?

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).)

Generally, the Division, by introducing its proposed penalty worksheet and testifying to the calculations being completed in accordance with the appropriate penalties and procedures, will be found to have met its burden of showing the penalties were calculated correctly. (*M1 Construction, Inc*., Cal/OSHA App. 12-0222, Decision After Reconsideration (Jul. 31, 2014).) The Appeals Board has held that maximum credits and the minimum penalty allowed under the regulations are to be assessed when the Division fails to indicate the basis of its adjustments and credits. (*Armour Steel Co*., Cal/OSHA App. 08-2649, Decision After Reconsideration (Feb. 7, 2014).)

Here, the Division introduced its proposed penalty worksheet (Exhibit 20), and Johnson credibly testified that he applied the penalty setting regulations when he calculated the penalties for Citations 1, 2 and 3. The evidence at hearing supported Johnson's calculations, and Employer offered no compelling evidence warranting a different calculation.

In summary, the record supports a finding that the Division proposed reasonable penalties for Citations 1, 2 and 3.

Conclusion

The evidence supports a conclusion that Employer violated section 1510, subdivision (a), by failing to instruct employees on the hazards of their job assignments and failing to require them to review a Code of Safe Practices prior to removing wires by means of powered mechanical hoisting. The citation was properly classified as General, and the abatement requirements and the proposed penalty are reasonable.

The evidence supports a conclusion that Employer violated section 4999, subdivision (a), by failing to ensure that a load comprised of electrical wires in a sling was rigged either by a qualified person or by a trainee under the direct visual supervision of a qualified person. The citation was properly classified as Serious, and the abatement requirements and the proposed penalty are reasonable.

The evidence supports a conclusion that Employer violated section 5042, subdivision (a)(10), by failing to ensure that employees kept their hands and fingers clear of the space between a sling and a load while the sling was being tightened around the load. The citation was properly classified as Serious, properly characterized as Accident-Related, and the abatement requirements and the proposed penalty are reasonable.

Order

Citations 1, 2, and 3 and their associated penalties are affirmed and assessed as set forth in the attached Summary Table.

Howard I. Chernin

Dated: 09/19/2023

Howard I. Chernin
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.**