BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1420923**
DRILL TECH DRILLING & SHORING, INC. **2200 WYMORE WAY** **ANTIOCH, CA 94509** **Employer**	**DECISION**

Drill Tech Drilling & Shoring, Inc., (Employer) is a drilling and shoring company in the construction industry. On August 6, 2019, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Travis Haskins, commenced an accident investigation of Employer's work site located at 500 Old Davis Road in Davis, California (work site). On December 2, 2019, the Division issued three citations to Employer.

At the hearing in this matter, the Division withdrew Citation 2. Additionally, Employer agreed to waive any rights it might have pursuant to Labor Code section 149.5 or California Code of Regulations, title 8, section 397, to petition for or recover costs or fees, if any, incurred in connection to Citation 2.

The remaining citations allege that: (1) Employer failed to maintain an effective Injury and Illness Prevention Program; and (2) Employer failed to stop and de-energize or disengage the power source, and if necessary, mechanically block or lock movable parts to prevent inadvertent movement or release of stored energy during a cleaning, servicing, or adjusting operation.

Employer filed timely appeals of the citations, contesting the existence of the violations and the reasonableness of the proposed penalties. Employer also appealed Citation 3 on the ground that the classification of the citation is incorrect. Additionally, Employer asserted numerous affirmative defenses, including the Independent Employee Action Defense.[1]

This matter was heard by Christopher Jessup, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (the Appeals Board). ALJ Jessup

[1] Except where discussed in this Decision, Employer did not present evidence in support of other affirmative defenses, and said defenses are therefore deemed waived. (*RNR Construction, Inc.,* Cal/OSHA App. 1092600, Denial of Petition For Reconsideration (May 26, 2017); see also *Western Paper Box Co.*, Cal/OSHA App. 86-812, Denial of Petition for Reconsideration (Dec. 24, 1986).)

conducted the hearing from Sacramento, California, on February 1 and 2, 2023, and March 1 and 2, 2023, with the parties and witnesses appearing remotely via the Zoom video platform. Robert Ayers, attorney with Holland & Hart, LLP, represented Employer. Lauren Ocadiz, staff counsel, represented the Division. This matter was submitted for Decision on June 28, 2023.

Issues

1. Did Employer fail to maintain an effective Injury and Illness Prevention Program?

2. Did Employer fail to stop and de-energize or disengage the power source, and if necessary, mechanically block or lock movable parts to prevent inadvertent movement or release of stored energy during a cleaning, servicing, or adjusting operation?

3. Did Employer establish the Independent Employee Act Defense?

4. Did Employer establish the Newbery Defense?

5. Did the Division establish that Citation 3 was properly classified as Serious?

6. Did Employer rebut the presumption that the violation in Citation 3 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. Are the proposed penalties reasonable?

Findings of Fact[2]

1. Nick Michalowski (Michalowski) experienced a partial amputation of two fingers on his left hand as a result of an incident on July 17, 2019.

2. Jason Askew (Askew) and Michalowski were employees of Employer on July 17, 2019.

3. On July 17, 2019, Michalowski suffered a serious injury as that term was defined under California Code of Regulations, title 8, section 330, subdivision (h), at the time.

4. On July 17, 2019, Askew was a foreman on site for Employer.

[2] Findings of fact numbers 1 to 4 are pursuant to stipulation by the parties.

5. At the time of the incident, Askew was operating the drill rig.

6. On the day of the incident, Askew was Michalowski's supervisor.

7. The Bauer drill rig (drill rig) in use by Askew and Michalowski used a stored energy system, a hydraulic system, to move its tools and equipment.

8. The Kelly bar[3] used by the drill rig weighed approximately 20,000 pounds. The auger used by the drill rig weighed approximately 2,500 pounds. The spin bottom[4] used by the drill rig weighed approximately 4,000 pounds.

9. Prior to the incident, the drill rig had been used to dig a hole with a digging bucket.

10. After the hole was dug by the drill rig, Askew and Michalowski began the process of connecting the drill rig, via the Kelly bar, to the spin bottom. During the process of connecting the drill rig to the spin bottom, both Askew and Michalowski observed that the box used to connect the spin bottom to the Kelly bar required cleaning before the tool could be secured.

11. After noticing the spin bottom required cleaning, both Askew and Michalowski took action to begin cleaning the spin bottom. At the time of the incident, Askew and Michalowski were involved in the task of cleaning the spin bottom tool.

12. When Askew noticed that the spin bottom required cleaning, he intentionally used the drill rig to lift the Kelly bar out of the spin bottom. Askew did not notify Michalowski he would be lifting the Kelly bar. At that time, Michalowski was standing directly adjacent to the spin bottom and had his fingers in the holes of the spin bottom box and Kelly bar.

13. The process of attaching the spin bottom to the Kelly bar can involve a variety of adjustments to line up the holes. However, the adjustments do not require an employee to be directly adjacent to the spin bottom while the holes are being aligned.

[3] The Kelly bar is an extension of the drill rig that is used to secure tools to the drill rig.
[4] The spin bottom is a tool used to clean out the bottom of holes dug by other drilling tools.

14. The spin bottom tool was not cleaned prior to beginning the task of securing it to the Kelly bar.

15. Tools, like the spin bottom, are typically cleaned prior to making attempts to secure a tool to the Kelly bar.

16. Cleaning the box of the spin bottom does not require that the Kelly bar be in place in the spin bottom box and it does not require the drill rig to be energized.

17. The incident occurred when Askew suddenly lifted the Kelly bar out of the spin bottom and it took place in less than five to six seconds.

18. At the time of the incident, Michalowski did not expect the Kelly bar to be moved out of the spin bottom.

19. The drill rig was capable of causing injury to employees by way of unexpected start-up or through the release of stored energy.

20. The drill rig is a machine capable of movement. At the time of the incident, the drill rig was not de-energized and did not have its power source disengaged.

21. Askew did not ensure step-by-step communication and, instead, expected communication only if something was wrong.

22. Askew was able to see Michalowski at the time of the incident while Michalowski was directly adjacent to the spin bottom. However, Askew could not see the entirety of Michalowski because a portion of his view was obstructed by the equipment.

23. At the time of the incident, Michalowski attempted to clean the box on the spin bottom by using his fingers to clear debris.

24. Prior to the incident, Michalowski attempted to verbally communicate to Askew that the spin bottom box was dirty and that he believed he could clear the obstruction.

25. Employer's safety policy requires the following: eye contact between equipment operators and employees entering the work area; communication between equipment operators and employees on the ground; and, ensuring operators

remove their hands from equipment controls at any time they are aware employees are in harm's way.

26. Employer's safety training instructed its employees to avoid pinch points.

27. Askew did not follow Employer's safety policy when he lifted the Kelly bar from the spin bottom because he did not communicate to Michalowski that he was beginning the task of cleaning the spin bottom.

28. A failure to Lockout/Tagout equipment can result in fractures, lacerations, amputations, and other injuries up to, and including, death.

29. One employee was exposed to the hazardous condition that gave rise to the citations.

Analysis

1. Did Employer fail to maintain an effective Injury and Illness Prevention Program?

In Citation 1, Employer was cited for an alleged violation of California Code of Regulations, title 8,[5] section 1509, subdivision (a). Section 1509, subdivision (a), provides that "Every 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, subdivision (a), in part, 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:
>
> […]
>
> (2) Include a system for ensuring that employees comply with safe and healthy work practices. Substantial compliance with this provision includes recognition of employees who follow safe and healthful work practices, training and retraining programs, disciplinary actions,

[5] All references are to California Code of Regulations, title 8, unless otherwise indicated.

or any other such means that ensures employee compliance with safe and healthful work practices.

[…]

(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:

[…]

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

[…]

The Alleged Violation Description (AVD) of Citation 1 provides:

Ref. Employer's Code of Safe Practices (Pg. 56)
21. Employees must observe and obey every rule, regulation and orders, which are necessary to the safe conduct of work. The foreman shall take such action as it [*sic*] necessary to obtain compliance.

Ref. Bauer Safety Information – Danger Zone (Pg. 7)
The operator must warn persons exposed to danger; in general he can do so by audible signals (sounding the horn). Where the surrounding noise level is high, established hand signals must be used instead of horn signals.

Prior to and during the course of the investigation, including but not limited to July 17, 2019[,] at a jobsite located at: 500 Old Davis Rd.[,] Davis, CA 95616; the employer's IIPP was ineffective in that they did not ensure the operator of the Bauer Drill rig warned person(s) exposed to danger(s) of the moving part(s); as required by this section.

Pursuant to section 3203, subdivision (a), employers are required to establish, implement, and maintain an effective Injury and Illness Prevention Program (IIPP). To establish an IIPP violation, the flaws in a program must amount to a failure to "establish," "implement" or "maintain" an "effective" program.

Additionally, a supervisor's violation of a safety rule is attributed to an employer and such a violation supports the conclusion that an employer has failed to enforce its safety program. (*PDM Steel Service Centers, Inc.,* Cal/OSHA App. 13-2446, Denial of Petition for Reconsideration (June 10, 2015).)

The Division has the burden of proving a violation by a preponderance of the evidence. (*Wal-Mart Stores, Inc. Store # 1692,* Cal/OSHA App. 1195264, Decision After Reconsideration (Nov. 4, 2019).) "'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." (*Sacramento County Water Agency Department of Water Resources,* Cal/OSHA App. 1237932, Decision After Reconsideration (May 21, 2020).) Full consideration is to be given to the negative and affirmative inferences to be drawn from all the evidence. (*Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 483.)

The Division alleges that Employer's IIPP was ineffective because Employer failed to follow its safety rules to ensure that employees complied with the manufacturer's instructions associated with equipment in use at the work site. As noted above, the AVD asserts that Employer "did not ensure the operator of the Bauer Drill rig warned person(s) exposed to danger(s) of the moving part(s); as required by this section." As discussed in greater detail below, the equipment in use at the time of the incident, the drill rig, had moving parts capable of causing injury to employees.

Employer's safety policies recognize the hazards associated with employees near the operations of heavy equipment as is demonstrated by Employer's response to the Division's Notice of Intent to Classify Citation 3 as Serious (1BY).

Employer's response to the Division's 1BY states that "(1) Drill Tech trains all employees to make eye contact with the operator before entering the work area or putting themselves in harm's way" and "(2) Drill tech also trains operators the [*sic*] hand off controls any time they are aware of any employee putting themselves in harm's way." (Ex. 16.) Included within Exhibit 16 is a document titled "DRILL TECH SAFETY STAND DOWN," which provides the following:

> Drill Tech Drilling and Shoring Inc. is committed to the safety of all its employees. As a commitment to all of its employees, management will continue to look at new ways to improve safety. It has come to our attention that our field crews are using the term "getting or making eye contact with the operator" as a

safe way to perform our work. *While getting eye contact with the operator is always a good idea, it is not enough. Eye contact cannot be considered de-energized or disengaged. The operator and any workers on the ground must have clear communication, not just eye contact. Before any persons puts* [*sic*] *any part of their body in a position that could become injured the equipment must be de-energized or disengaged from the power source. This is not merely eye contact. This is making sure the proper procedures are followed.*

In equipment that has a hydraulic safety control lever, it must be in the locked-out position before any part of any affected employee's body is put in any pinch point area. *This must be confirmed by the operator and all affected employees*. This lever must remain in this position until it is *confirmed by both the operator and all affected employees that all affected employees are completely clear of all pinch points*.

If equipment that does not have a hydraulic safety control lever, the machine's engine must be shut off, if the hydraulics cannot be locked-out without the machine being shut off at any time any employee's body part is to be put in any pinch point area. *This must be confirmed by the operator and all affected employees.* The machine must remain shut down until it *is confirmed by both the operator and all affected employees that all affected employees are completely clear of all pinch points*.

These procedures do not supersede Drill Tech's lock out procedures while maintaining or servicing equipment but are intended to supplement the procedures for daily tasks of changing tooling and minor adjustments that need to be made without completely shutting down the engine and computers.
(Emphasis added.)

The moving parts of the drill rig were dangerous because they were capable of causing injury to employees and Employer's safety policy recognizes the danger to employees in the operation area of the equipment. As such, it is next necessary to examine whether Michalowski, who was in the operational area of the drill rig, was effectively protected by Employer's safety policy from the dangers of the drill rig.

Askew testified regarding the series of events both immediately prior to, and at the time of, the incident. Askew testified that he was operating the drill rig at the time of the incident and that he was also the foreman and supervisor of the injured employee, Michalowski. Askew testified that, moments before the incident, Michalowski and Askew were involved in the task of connecting the Kelly bar to the spin bottom. Askew testified that he lowered the Kelly bar into

the spin bottom, saw that he could not align the equipment properly because the box used to connect the spin bottom to the Kelly bar required cleaning, and then he lifted the Kelly bar out of the spin bottom. Askew testified that he did not notify Michalowski before moving the Kelly bar. Askew explained that he did not notify Michalowski for the following reason:

> It's just our, you know, our -- we don't have a, you know, swing here, do this, do that. It's not like something that is in our -- the way we operate. It's just, you know, you would -- I would come out because I knowingly that the box needs to be cleaned, him knowingly that the box needs to be cleaned. It's no different than when I come up with the auger, and I swing over, I'm looking at him. You know, he's standing next to the hole, I look at him. I swing over. He never gives me any indication that I need to swing over or anything. But if he waved his hands, hey, you know, then I would stop. That would be the kind of communication we have. We don't really have like a step-to-step communication that, you know, it's a routine until there's a point or something that needs to be addressed. You know, there's, you know, if -- we're trained that if the homeless guy walking down is waving his hands up and down you're to stop. Because that's an indication something's going wrong.

Askew's testimony established that he and Michalowski would have only communicated in this situation if they noticed something was wrong.

Michalowski testified that he attempted to communicate with Askew, verbally, that the box of the spin bottom was dirty and that he believed he could take care of it. It is inferred that Askew did not hear Michalowski's communication. This attempt at communication demonstrates the first issue with Employer's enforcement of its IIPP. Because Askew only expected communication if something was "wrong" and it is apparent that Askew did not perceive the dirty box as something "wrong" that required communication, he, as a supervisor, did not ensure communication with Michalowski. As such, Employer did not ensure clear communication between the operator and groundman where Askew hear Michalowski's attempt to communicate with him and did not take efforts to communicate with Michalowski before moving the drill rig while Michalowski was in its area of operation.

At the time of the hearing, Askew was still acting as a foreman for Employer and, despite Michalowski's amputation, he did not indicate that his procedure for communication had changed. To the contrary, it appeared that Askew believed that his communication style was a standard industry practice. As such, it is found that Employer did not effectively enforce its safety policy regarding ensuring clear communication.

Additionally, Askew testified that, although he could see Michalowski at the time of the incident, he could not see the side of the equipment where Michalowski was standing. Further, based on Askew's testimony, Askew could not see all of Michalowski while Michalowski was working to place the pin used to secure the Kelly bar to the spin bottom. Despite the foregoing, Askew moved the drill rig while Michalowski was directly adjacent to the spin bottom and without confirming that Michalowski was out of harm's way. Therefore, it is found that Employer did not effectively enforce its safety policy to ensure that an operator confirmed that an employee was out of harm's way before engaging the controls for the equipment.[6]

Pursuant to the foregoing, Employer failed to effectively enforce its IIPP to the extent that its supervisor, Askew, failed to adhere to its own safety policies. Accordingly, the Division has met its burden of proof to establish a violation of section 1509, subdivision (a), and Citation 1 is affirmed.

2. Did Employer fail to stop and de-energize or disengage the power source, and if necessary, mechanically block or lock movable parts to prevent inadvertent movement or release of stored energy during a cleaning, servicing, or adjusting operation?

In Citation 3, Employer was cited for an alleged violation of section 3314, subdivision (c). Section 3314, subdivision (c), provides in relevant part:

> (c) Cleaning, Servicing and Adjusting Operations.
>
> Machinery or equipment capable of movement shall be stopped and the power source de-energized or disengaged, and, if necessary, the moveable parts shall be mechanically blocked or locked out to prevent inadvertent movement, or release of stored energy during cleaning, servicing and adjusting operations. Accident prevention signs or tags or both shall be placed on the controls of the power source of the machinery or equipment.

The AVD for Citation 3 provides:

> Ref. Employer's Code of Safe Practices (Pg. 62)
> 4. Do not service, repair or adjust machinery or equipment while it is moving or operating.

[6] It is noted that Employer argues that Askew did not know that Michalowski was in harm's way when he raised the Kelly bar. Employer's argument is unpersuasive, however, because Exhibit 16 shows that Employer's safety policy required that Askew confirm that Michalowski was out of harm's way prior to moving the drill rig.

6. Use lockout procedures whenever the possibility exists that the equipment, machine or vehicle may be started/engaged by someone other than the person working on it.

Prior to and during the course of the investigation, including but not limited to July 17, 2019[,] at a jobsite located at: 500 Old Davis Rd. Davis, CA 95616; the employer did not ensure that the Bauer drill rig was stopped and the power source de-energized, during cleaning/servicing/adjusting operations, as required by this section.

Employer asserts that section 3314 is inapplicable to the equipment involved in the incident.

a. Applicability of section 3314

Section 3314, subdivision (a), provides, in relevant part:

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

(2) For the purposes of this Section, cleaning, repairing, servicing and adjusting activities shall include unjamming prime movers, machinery and equipment.

Notably, section 3314, subdivision (a), does not require an unexpected energization or start-up in order for the safety order to apply. Rather, section 3314, subdivision (a), provides that section 3314 shall apply to machines and equipment which could cause employee injury if the machine were to have an unexpected energization or start-up or a release of stored energy. Therefore, a threshold question for application of section 3314 is whether employees were involved in a cleaning, repairing, servicing, setting-up or adjusting operation of a machine. Thereafter, it is necessary to determine whether the machine involved could cause injury to employees by way of unexpected energization or start-up or through the release of stored energy.

There is no dispute that the incident involved a machine, the drill rig. However, it appears that employees were engaged in two distinct tasks during the series of events leading to the injury of Michalowski.

(1) Setting-up or Adjusting Operations

As set forth above, Askew and Michalowski were changing the tool that was being used on the drill rig. The plain language of section 3314, subdivision (a), contemplates a tool change related to performing a new task as setting-up or adjusting[7] the machine. "We interpret 'setting-up' to refer to the process of preparing a machine or equipment for operation, and not something done routinely while the machine or equipment is in operation which is a necessary part of that operation." (*Newman Flange & Fitting Company*, Cal/OSHA App. 07-2581, Decision After Reconsideration (Oct. 5, 2011); See also §4188 which defines the term "Setting Up Operations" to mean "[o]perations in which fixtures or tooling which support, secure, or act upon the workpiece are mounted on the machine surfaces or in machine components designed to accept such tooling.") Additionally, Exception 1 to section 3314, subdivisions (c) and (d), refers to "[m]inor tool changes and adjustments, and other minor servicing activities," which shows that a tool change operation is contemplated by section 3314, subdivision (a).

Askew testified that, just prior to the incident, the drill rig had dug a hole with a digging bucket and the employees then began the process of attaching the spin bottom to the drill rig so that they could clean the bottom of the hole. Askew further testified that, during the process of securing the Kelly bar to the spin bottom, multiple adjustments may be needed to properly align the holes used to secure the tool. Because the employees began the process of attaching the spin bottom and attempting to align it, the evidence shows that the employees were engaged in setting-up or adjusting the drill rig for the new task of cleaning the bottom of a hole with the spin bottom.

Employer argues that the employees were not engaged in an adjusting operation at the time of the incident. Employer avers that "[c]hanging a tool does not 'adjust' the drill." (Employer's Post-Hearing Brief.) However, Askew's testimony regarding adjustments is sufficient to establish that attaching a tool to the drill rig involves adjusting the tool to allow for its operation.

(2) Cleaning Operations

During the process of setting-up or adjusting the drill rig, both Michalowski and Askew recognized that the box used to connect the spin bottom to the Kelly bar required cleaning. Michalowski testified that he attempted to communicate with Askew verbally that the box was dirty. Askew testified that he could see the box was dirty while operating the drill rig. In response to observing that the box was dirty, both employees took action. Michalowski put his

[7] See *Golden State Boring & Pipe Jacking, Inc.*, Cal/OSHA App. 1308948, Decision After Reconsideration (July 24, 2020) where the Appeals Board found the process of installing auger casing to be a setting-up or adjusting operation.

fingers in one of the box's holes[8] in an attempt to clear away the debris. Askew testified that, because he could see the box was dirty, he lifted the Kelly bar out of the box. Therefore, it is found that both employees began a cleaning operation at the time of the incident, as both described the box as dirty and took action to remedy that situation.

Employer also argues that the employees were not involved in a cleaning operation. Employer asserts that Michalowski's attempt to clean debris with his fingers was not cleaning. Employer asserts:

> Second, it is impossible to remove debris or otherwise "clean" the Kelly box with the Kelly bar inserted. Tr. At 3/2/23 59:1-60:4, 64:1-5. The only way to "clean" the Kelly box, and thus allow the pinholes to align, is for the Kelly bar to be out of the box, which removes all energized equipment. *Id.* Thus, Mr. Michalowski's placement of his fingers in the pinhole cannot be a "cleaning" operation because it was impossible to clean the debris with the energized Kelly bar in the Kelly box. If Mr. Michalowski wanted to clean the Kelly box to allow the pinholes to align, the only way to do so would have been to first remove the energized equipment.

(Employer's Post-Hearing Brief.)

Employer's argument takes Askew's testimony, that you cannot clean the box of the spin bottom with the Kelly bar in place, to an illogical extreme. Employer asserts that Michalowski could not have *attempted* to clean the box while the Kelly bar was still in place. This assertion is directly refuted by the fact that Michalowski attempted to clean the box with his fingers. Indeed, not only did the evidence establish that Michalowski attempted to clean the box with his fingers, but he also testified that he attempted to verbally notify Askew that he believed he could do so. Additionally, Employer's argument does not include an assessment of Askew's actions to remove the Kelly bar from the box in response to observing that the box was dirty. Askew's recognition that the box was dirty and deliberate action to lift the Kelly bar from the box, so that the box could be cleaned, signaled that he had begun the operation of cleaning the tool rather than securing it to the drill rig. Therefore, in this instance, the cleaning operation had begun with the combined efforts of Michalowski and Askew at the time of the incident. As such, Employer's argument that the employees were not involved in a cleaning operation is unpersuasive.

Pursuant to the foregoing, the first element of the applicability analysis is established because employees were involved in cleaning, setting-up, or adjusting a machine.

[8] The box had several holes arranged on each side of the box so that a large pin could be used to secure the Kelly bar to the tool when the pin was placed through the box.

(3) Unexpected Energization, Startup, or Release of Stored Energy

As to the next element of the applicability analysis, the focus is on whether the machine is capable of injuring employees through unexpected energization or startup or through the release of stored energy. In the instant matter, Michalowski's fingers were amputated when the Kelly bar was suddenly lifted from the spin bottom. The incident itself supports several factual findings.

The first finding supported by the incident is that the drill rig is capable of injuring employees because Michalowski's fingers were amputated by the drill rig.

The second finding supported by the incident is that unexpected start-up of the machinery was capable of causing the injury. As noted directly above, Michalowski was injured by the equipment being moved. The plain meaning of the term start-up refers to situations where the machinery starts to perform an action. Therefore, this scenario of machinery in action necessarily contemplates machinery in motion. This interpretation is further supported by the language of section 3314, subdivision (c), which requires that moving parts "be mechanically blocked or locked out to prevent inadvertent movement." The section 3314, subdivision (c), requirement to prevent movement shows the regulation's intent to apply to situations where machinery or equipment are capable of motion.

In the instant matter, the drill rig was capable of movement and did move, thereby injuring Michalowski, and so it is established that the start-up of the machinery caused the injury. Further, it is found that, where the start-up of the drill rig was unexpected, it was capable of injuring employees. This finding is supported because the movement during the incident at issue here was unexpected by the exposed employee, Michalowski. It is inferred that Michalowski did not expect the movement of the Kelly bar because Askew did not notify Michalowski that he was going to move it. Clearly, had Michalowski expected the Kelly bar to move, he would have removed his fingers from the box. Accordingly, the drill rig is machinery capable of causing injury to employees through an unexpected start-up.

Additionally, the evidence supports a finding that the drill rig employs a stored energy system, through its hydraulic system, that is capable of injuring employees and did injure Michalowski. Askew testified that the drill rig used a hydraulic system to move the Kelly bar and the spin bottom. Askew testified that the auger, also used by the drill rig, weighed approximately 2,500 pounds, that the spin bottom weighed approximately 4,000 pounds, that the pin used to secure the tools to the Kelly bar weighed 15 pounds, and that the Kelly bar itself weighed approximately 20,000 pounds. As such, it is found that the hydraulic system used by the drill rig had sufficient energy to move its heavy tools and equipment and, in the instant matter, amputate Michalowski's fingers.

Pursuant to the foregoing, the drill rig was capable of causing injury to employees by way of unexpected start-up or through the release of stored energy. Therefore, the second element of the applicability analysis is established.

Section 3314 applies to the drill rig in question as the evidence adduced at hearing shows that the employees were involved in cleaning, setting-up, or adjusting a machine and that the machine was capable of causing injury to employees through either unexpected energization or start-up or through the release of stored energy.

Despite the foregoing, Employer argues that, because the drill rig was not de-energized, there was no unexpected energization and no potential for unexpected energization. However, as discussed above, section 3314, subdivision (a), does not require an *actual* unexpected energization or start-up in order for section 3314 to apply. Instead, it is sufficient that the drill rig *could* cause injury to employees from an unexpected start-up or release of stored energy.

Having found that section 3314 is applicable, it is next necessary to examine whether the Division established a violation of the cited regulation, section 3314, subdivision (c).

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

In order to establish a violation of section 3314, subdivision (c), the Division must establish that (1) during a cleaning, servicing, or adjusting operation (2) on a machine capable of movement, an employer (3) failed to stop the machinery or de-energize or disengage the power source of the machinery, or (4) failed to mechanically block or lock the equipment or machinery, where necessary, (5) to prevent the inadvertent movement or release of stored energy. Additionally, the Division may establish a violation of section 3314, subdivision (c), by demonstrating Employer failed to place accident prevention signs or tags or both on the controls of the power source of the machinery or equipment.[9]

As discussed above, employees were engaged in an adjusting or cleaning operation. There is no dispute that the drill rig was capable of movement, and Employer's Post-Hearing Brief asserts specifically that the drill rig remained energized at the time of the incident. Further, Askew's testimony establishes, and Employer's Post-Hearing Brief avers, that Askew intentionally lifted the Kelly bar out of the spin bottom tool at the time of the incident. Therefore, in examining the elements above: (1) during a cleaning or adjusting operation (2) the drill rig, that was capable of movement, (3) was not stopped or de-energized and did not have its power source disengaged (4) and it was not mechanically blocked or locked (5) in a manner that could prevent inadvertent movement or release of stored energy while Michalowski was exposed to the

[9] The parties did not provide any evidence regarding that accident prevention signs or tags required by section 3314, subdivision (c), so it is not discussed further herein.

hazard created by that condition. As such, the Division has met its burden of proof to establish a violation of section 3314, subdivision (c).

c. Did Employer rebut the conclusion that section 3314, subdivision (c), was violated?

1. Applicability of section 3314, subdivision (c)(1).

Employer argues that section 3314, subdivision (c)(1), precludes the application of section 3314, subdivision (c).

Section 3314, subdivision (c)(1), provides:

> If the machinery or equipment must be capable of movement during this period in order to perform the specific task, the employer shall minimize the hazard by providing and requiring the use of extension tools (eg., extended swabs, brushes, scrapers) or other methods or means to protect employees from injury due to such movement. Employees shall be made familiar with the safe use and maintenance of such tools, methods or means, by thorough training.

Employer asserts that the drill rig must be capable of movement to change a tool and that Employer provided a method and means to protect employees from injury. However, as discussed above, two distinct tasks are in question in this matter, with regard to section 3314, subdivision (c): the task of setting-up and adjusting the spin bottom and the task of cleaning the spin bottom. Employer's own brief indicates that cleaning the spin bottom should not take place with the Kelly bar in place and Askew's testimony supports Employer's assertion. As such, it is found that cleaning the spin bottom does not require that the machinery be capable of movement in order to perform the task. Because the cleaning task does not require that the machinery is capable of movement, the fact that the employees were engaged in a cleaning operation alone is sufficient to find that section 3314, subdivision (c)(1), does not provide an exception to the application of section 3314, subdivision (c).

However, given the parties' focus on the argument regarding the task of setting-up or adjusting the tool, that argument is considered herein as well. As a threshold matter, the evidence supports that the setting-up and adjusting of the tool requires the ability to move the Kelly bar. Thus, the question becomes whether Employer minimized the hazards by "providing … other methods or means to protect employees from injury due to such movement." (§3314, subd. (c)(1).) Employer argues that its procedures protect employees by making it unlikely for employees to be harmed if its procedures are followed. Employer identifies its alternative measures as including: training employees to avoid placing body parts in pinch points; requiring

employees to avoid placing body parts in pinch points; training employees on how to avoid hazards associated with moving equipment; ensuring employees knew how to use appropriate industry-standard hand signals; and ensuring that operators and groundmen are in contact and able to communicate. (Employer's Post-Hearing Brief.)

However, the facts in the instant matter do not support Employer's assertions that its procedures were sufficiently enforced to protect employees from injury. Notably, Askew, a supervisor and the drill rig operator, moved the Kelly bar while Michalowski was directly adjacent to the moving equipment and with his fingers in a pinch point. Further, the Kelly bar was moved without communication from Askew to Michalowski and where Askew did not ensure that Michalowski was out of harm's way. This instance demonstrates that Employer, through its supervisor, Askew, failed to ensure that several of the alternative safety measures were followed.

As an initial consideration, the incident occurred while Michalowski was in plain view, putting his fingers in a pinch point, and where Michalowski had verbally attempted to communicate to Askew about what he was doing. These facts do not reflect that Employer ensured that employees avoided pinch points or the hazards of moving equipment. Additionally, the evidence establishes that Employer did not ensure that Askew and Michalowski were communicating at the time of the incident, as Askew moved the Kelly bar without notifying Michalowski and while believing such communication was unnecessary. Although Michalowski attempted to communicate with Askew about his efforts to clean the box of the spin bottom, it appears those efforts were ineffective. Therefore, it cannot be said that Employer effectively minimized the hazard, as the facts do not support that the safety measures were enforced at the time of the incident.

Pursuant to the foregoing, Employer did not establish that section 3314, subdivision (c)(1), applies either to the task of cleaning the spin bottom or to the task of adjusting the spin bottom.

2. Applicability of Exception 1 to section 3314, subdivision (c).

Employer argues that Exception 1 to section 3314, subdivision (c), should be applied in the instant matter. Exception 1 to section 3314, subdivision (c), provides:

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

The Appeals Board has explained that "an exception is in the nature of an affirmative defense, and Employer bears the burden of proving the exception by a preponderance of the evidence." (*Walsh/Shea Corridor Constructors*, Cal/OSHA App. 1093606, Decision After Reconsideration (Feb. 9, 2018); see also *Dade Behring, Inc.,* Cal/OSHA App. 05-2203, Decision After Reconsideration (Dec. 30, 2008).)

In *Dade Behring, Inc., supra,* Cal/OSHA App. 05-2203 (*Dade Behring*) the Appeals Board noted that conclusory statements regarding elements of a safety order or an exception to a safety order do not sufficiently demonstrate that the proposed alternative measures are effective without further specific evidence demonstrating that such measures "rise to a level which justifies freedom from the general protective provisions in §3314(c)." (*Id.*) Adding, "[e]xceptions are to be strictly construed in order to justify a freedom from the general rule." (*Id.*) Ultimately, in *Dade Behring*, the Appeals Board concluded that the employer failed to demonstrate specific evidence showing how its measures constituted effective protection in performing the assigned tasks and, therefore, the measures taken by the employer could not be deemed to have been effective alternative measures. (*Id.*)

In the instant matter, Employer argues that the task at issue in Citation 3 is the task of changing a tool on the drill. Employer further argues that the task falls within Exception 1 to section 3314, subdivision (c), because it was a minor servicing activity that took place during normal production operations that was routine, repetitive, and integral to the use of the equipment for production and that alternative measures provided effective protection.

As a threshold matter, as noted above, two tasks took place prior to the incident: the task of setting-up and adjusting the spin bottom and the task of cleaning the spin bottom. Employer does not address the task of cleaning the spin bottom in its argument regarding the exception. However, Askew testified that tools are typically cleaned prior to attempting to secure them to the Kelly bar, and Employer's Post-Hearing Brief concedes "[i]f Mr. Michalowski wanted to clean the Kelly box to allow the pinholes to align, the only way to do so would have been to first remove the energized equipment." Pursuant to the foregoing, cleaning the spin bottom is not a minor tool change, adjustment, or other minor servicing activity that took place during normal production operations. Therefore, as to that task, the exception cannot apply.

Even when contemplating the task of attaching the spin bottom tool to the drill rig, a setting-up or adjusting task as discussed above, the exception does not apply. As an initial matter, a preponderance of the evidence does not support that attaching the spin bottom to the drill rig was a minor tool change, adjustment, or other minor servicing activity. This is because the task of changing the tool involved multiple employees, while production operations ceased, and where the scale and substantiality of the equipment involved preponderate against the

conclusion that it was minor. Further, the reason for the tool change does not support that it was minor in nature, as it was taking place because the drill rig had stopped using its digging bucket to dig a hole and was preparing to use the spin bottom to clean out the hole.

Additionally, as discussed above, it does not appear that Employer used effective alternative measures to protect employees. The evidence adduced shows that Employer moved heavy machinery with an employee directly adjacent to the equipment and where the operator could not fully observe the employee near the equipment. Further, Employer did not ensure notification of the employee on the ground before the equipment was moved and did not ensure that the employee left the area before the movement of the heavy machinery. Finally, as with the other aforementioned facts, Michalowski's injury itself does not support Employer's position that it employed alternative measures which provided effective protection. Accordingly, Employer failed to meet its burden of proof to establish Exception 1 to section 3314, subdivision (c).

3. Did Employer establish the Independent Employee Act Defense?

Employer asserted the Independent Employee Act Defense (IEAD) should apply in the instant matter. In *Sacramento County Water Agency Department of Water Resources*, *supra*, Cal/OSHA App. 1237932, citing *Fedex Freight Inc.*, Cal/OSHA App. 1099855, Decision After Reconsideration (Sept. 24, 2018), the Appeals Board explained:

> There are five elements to the IEAD, all of which must be shown by an employer in order for the defense to succeed: (1) the employee was experienced in the job being performed; (2) the employer has a well-devised safety program; (3) the employer effectively enforces the safety program; (4) the employer has a policy of sanctions which it enforces against employees who violate the safety program; and (5) the employee caused the safety violation which he knew was contrary to employer's safety rules. (*Synergy Tree Trimming, Inc.,* [Cal/OSHA App.] 317253953, Decision After Reconsideration (May 15, 2017) [other citations omitted].)

As the IEAD is an affirmative defense, Employer bears the burden of proof to establish that all five elements of the IEAD are present by a preponderance of the evidence. (*Sacramento County Water Agency Department of Water Resources*, *supra,* Cal/OSHA App. 1237932.) Additionally, where there are multiple employees involved, the employer must prove all elements as to all employees. (*Fedex Freight Inc.*, *supra*, Cal/OSHA App. 1099855.) As Employer must prove all elements, it is only necessary to discuss elements three and five below because those elements most clearly demonstrate Employer's shortcomings in meeting its burden of proof to establish the IEAD.

a. Element three: Does Employer effectively enforce its safety program?

The Appeals Board has long held that the IEAD does not apply where a supervisor or foreperson commits the violation. (*Brunton Enterprises, Inc*., Cal/OSHA App. 08-3445, Decision After Reconsideration (Oct. 11, 2013).) The Appeals Board has explained that the issue of whether a supervisor commits the violation is not a true exception to the IEAD, but rather a situation where the third element required under the IEAD is not met. (*Ibid.*) Additionally, as noted above, a supervisor's violation of a safety rule is attributed to an employer and such a violation supports the conclusion that an employer has failed to enforce its safety program. (*PDM Steel Service Centers, Inc., supra,* Cal/OSHA App. 13-2446.) Because of the importance of a supervisor's role in enforcing safety programs, a supervisor's involvement in a violation of the safety program becomes a threshold issue for the third element of the IEAD. In this case, Employer does not contest that Askew was a supervisor present and participating in the operation that is the subject of the citation. As discussed in element five below, Askew participated in violations of Employer's safety policy. Therefore, Employer's safety policy was not being effectively enforced at the work site. Accordingly, Employer failed to establish element three of the IEAD.

b. Element five: Did the employees cause a safety violation which they knew was contrary to the Employer's safety rules?

The fifth element of the IEAD requires that the employee involved in the violation caused the safety violation which he knew was contrary to the employer's safety rules. In *Synergy Tree Trimming, Inc.*, *supra,* Cal/OSHA App. 317253953, the Appeals Board explained:

> The final element requires the employer to demonstrate that the employee causing the infraction knew he was acting contra to the employer's safety requirements. [Citation.] In *Macco Constructors*, Inc. Cal/OSHA App. 83-147, Decision After Reconsideration (Oct. 2, 1987), the Board describes the purpose of the IEAD as follows:
>
> > The independent employee action defense is designed to relieve an employer from the consequences of willful or intentional violation of one of its safety rules by non-supervisory employees, when specified criteria are met. See *Mercury Service, Inc.*, [Cal/OSHA App.] 77-1133, Decision After Reconsideration (Oct. 16, 1980).
>
> […]

> Whether an action was inadvertent or constituted a conscious disregard of a safety rule is a question that must be examined in each case, in light of all facts and circumstances.

Bradley Middleton, Employer's safety director, testified that employees should not be exposed to hazardous energy from the drill rig because they should not be in any pinch points or in a position for the drill rig to be able to hit them. Jose Padilla, Employer's general superintendent, testified that there should be constant communication between the drill operator and the groundman. Exhibit 16, Employer's response to the Division's 1BY, provides that Employer trained vehicle operators to keep hands off controls any time they are aware of an employee "putting themselves in harm's way."

Askew testified that he did not communicate with Michalowski prior to moving the Kelly bar and that he did not know Michalowski's fingers were in the hole of the box on the spin bottom. This testimony demonstrates that Employer did not ensure an employee in plain view stayed out of a pinch point, that the supervisor operating the drill rig moved the Kelly bar while the employee was close enough to be hit by the equipment (as he was touching the spin bottom at the time of the incident), and that communication did not occur before making more than a minor adjustment to the Kelly bar's position as it was lifted out of the spin bottom for the cleaning task. Employer's IEAD argument does not address Askew's role in the violations of its safety policy and Askew did not provide testimony on whether he intended to violate Employer's safety policy.

Employer asserts that the blame for the violation lies solely with Michalowski for placing his fingers in a pinch point. However, Michalowski testified credibly that he did not recall what he was thinking at the time of the incident and that his best guess is that he was thinking about the job and not the pinch point. Therefore, Employer did not establish that Michalowski caused the safety violation which he knew was contrary to the employer's safety rules.

Pursuant to the foregoing, Employer did not meet its burden of proof to establish the IEAD.

4. Did Employer establish the *Newbery* Defense?

In *Newbery Electric Corp. v. Occupational Safety & Health Appeals Bd.* (1981) 123 Cal.App.3d 641, the Court of Appeal recognized that where an employee's violation of a safety order was unforeseeable, the employer was not held responsible for the violation. In *Gaehwiler v. Occupational Safety & Health Appeals Bd.* (1983) 141 Cal.App.3d 1041, 1045, the elements of the defense recognized in *Newbery Electric Corp. v. Occupational Safety & Health Appeals*

Bd., *supra,* 123 Cal.App.3d (*Newbery* Defense), were articulated. As explained by the Appeals Board in *Brunton Enterprises, Inc*., *supra,* Cal/OSHA App. 08-3445:

> A violation is deemed unforeseeable, therefore not punishable, if none of the following four criteria exist:
>
> (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.

As a preliminary consideration, the *Newbery* defense is unavailable where the violation is caused by a supervisor. In *Brunton Enterprises, Inc*., *supra,* Cal/OSHA App. 08-3445, the Appeals Board explained:

> However, an employer cannot utilize the *Newbery* defense when a supervisor commits the violation. (*Davey Tree Surgery Co. v. Occupational Safety & Health Appeals Bd.* (1985) 167 Cal.App.3d 1232, 1243 [employer necessarily fails the second prong of the *Newbery* defense when a supervisor violates a safety order].) The Board has also previously considered this issue and denied the Newbery defense when a supervisor committed the violation. (See *Hollander Home Fashions*, Cal/OSHA App. 10-3706, Denial of Petition for Reconsideration (Jan. 13, 2012), citing *MCI Worldcom, Inc.*, Cal/OSHA App. 00-440, Decision After Reconsideration (Feb. 13, 2008) [*Newbery* defense fails since supervisor's knowledge is imputed to employer].)

As noted previously, it is undisputed that Askew was a supervisor. As such, a violation by Askew establishes that Employer failed to exercise supervision adequate to ensure safety and, therefore, Employer cannot establish element two of the *Newbery* Defense.

Additionally, regarding element three, Employer's efforts to ensure employee compliance with its safety rules were insufficient. As discussed above, Askew's actions as a supervisor are imputed to Employer. Therefore, Employer failed to ensure that the drill rig operator, Askew, complied with its safety policy and that Michalowski, an employee in plain view, complied with Employer's safety policy to keep clear of a pinch point. These failures establish that Employer did not ensure compliance with its own safety rules.

Additionally, regarding element four, Askew's testimony that he believed that he did not need to communicate movement of the drill rig while Michalowski was in contact with the spin bottom makes the violation of moving the equipment while Michalowski was exposed foreseeable. Askew's knowledge is imputed to Employer because Askew was a supervisor and, as noted in *Brunton Enterprises, Inc*., *supra,* Cal/OSHA App. 08-3445, a supervisor's knowledge is imputed to the employer. As such, Askew's knowledge that he was moving the drill rig for the cleaning operation without ensuring Michalowski was clear of the pinch point and without communicating with Michalowski in accordance with Employer's safety policy makes the violation foreseeable.

As noted above, to establish the *Newbery* Defense, Employer must establish that none of the four elements exist. Therefore, the existence of just one element is sufficient to find that the *Newbery* Defense does not apply and, as three elements are found to have existed, it is unnecessary to examine further to consider whether the first element existed. Accordingly, Employer failed to meet its burden of proof to establish the requisite elements of the *Newbery* Defense.

5. Did the Division establish that Citation 3 was properly classified as Serious?

Labor Code section 6432, subdivision (a),[10] 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.

"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.

[10] Labor Code section 6432 was amended effective January 1, 2021. The portions discussed herein reflect the version of Labor Code section 6432 as it was in effect at the time of issuance of the citation.

(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 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 parties stipulated that Michalowski experienced a partial amputation of two fingers on his left hand as a result of the incident on July 17, 2019. Additionally, Travis Haskins (Haskins) testified on behalf of the Division that he was the investigator involved in the case. While Haskins was not an employee of the Division at the time of the hearing, the Division designated him as an expert for the purpose of testifying about the realistic possibility of serious physical harm as it relates to Lockout/Tagout. Haskins testified that a Lockout/Tagout failure can result in fractures, lacerations, amputations, and other injuries up to and including death.

Finger amputation falls within the meaning of "serious physical harm" as set forth in the Labor Code. In the instant matter, there was both credible testimony that a Lockout/Tagout failure can result in a realistic possibility of serious physical harm or death and stipulated facts sufficient to establish that such a failure actually resulted in serious physical harm. Accordingly, the Division established a rebuttable presumption that Citation 3 was properly classified as Serious.

6. Did Employer rebut the presumption that the violation in Citation 3 was Serious by demonstrating that it did not know, and could not, with the exercise of reasonable diligence, have known of the existence of the violation?

Labor Code section 6432, subdivision (c), provides that an employer may rebut the presumption that a serious violation exists by demonstrating that the employer did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation. In order to satisfactorily rebut the presumption, the employer must demonstrate both:

(1) The employer took all the steps a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation, taking into consideration the severity of the harm that could be expected to occur and the likelihood of that harm

occurring in connection with the work activity during which the violation occurred. Factors relevant to this determination include, but are not limited to, those listed in subdivision (b) [; and]

(2) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered.

As discussed above, Employer had an ineffective safety policy. Askew, a supervisor, moved the drill rig while Michalowski was adjacent to the spin bottom and Askew failed to ensure that Michalowski was not exposure to the hazard of the energized machinery before moving the drill rig for the cleaning operation. Accordingly, Employer failed to take 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 by failing to ensure enforcement of an effective safety policy.

It is, therefore, unnecessary to consider here whether Employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered because rebuttal of the presumption requires that Employer establish both elements. As such, Employer failed to rebut the presumption of a Serious classification and the Serious classification was properly established.

7. Are the proposed penalties 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. (*Sacramento County Water Agency Department of Water Resources, supra,* Cal/OSHA App. 1237932, citing *RNR Construction, Inc., supra,* Cal/OSHA App. 1092600.)

However, the Appeals Board has held that "while there is a presumption of reasonableness to the penalties proposed by the Division in accordance with the Director's regulations, the presumption does not immunize the Division's proposal from effective review by the Board... ." (*DPS Plastering, Inc*., Cal/OSHA App. 00-3865, Decision After Reconsideration (Nov. 17, 2003).) Nor does the presumptive reasonableness of the penalty calculated in accordance with the penalty-setting regulations relieve the Division of its duty to offer evidence in support of its determination of the penalty since the Board has historically required proof that a proposed penalty is, in fact, calculated in accordance with the penalty-setting regulations. (*Plantel Nurseries*, Cal/OSHA App. 01-2346, Decision After Reconsideration (Jan. 8, 2004); *RII Plastering, Inc*, Cal/OSHA App. 00-4250, Decision After Reconsideration (Oct. 21, 2003).)

Although the Division submitted its Proposed Penalty Worksheet, there was no testimony that the penalties were calculated in accordance with the Division's policies and procedures based on the penalty-setting regulations. (See *M1 Construction, Inc.*, Cal/OSHA App. 12-0222, Decision After Reconsideration (Jul. 31, 2014), and *Ventura Coastal, LLC,* Cal/OSHA App. 317808970, Decision after Reconsideration (Sept. 22, 2017).) As such, it is necessary to examine the evidence adduced at hearing to determine the reasonableness of the penalties.

The Board has held that maximum credits and the minimum penalty allowed under the regulations are to be assessed when the Division fails to justify its proposed penalty. (*Armour Steel Co.*, Cal/OSHA App. 08-2649, Decision After Reconsideration (Feb. 7, 2014); *Plantel Nurseries, supra,* Cal/OSHA App. 01-2346.) Where the Division does not provide evidence to support its proposed penalty, it is appropriate that Employer be given the maximum credits and adjustments provided under the penalty-setting regulations such that the minimum penalty provided under the regulations for the violation is assessed. (*RII Plastering, Inc*, *supra*, Cal/OSHA App. 00-4250.)

Section 336, subdivision (b), provides that a base penalty will be initially based on the Severity of the violation and thereafter adjusted based on the Extent and Likelihood. Section 335, subdivision (a), provides in part:

> (a) The Gravity of the Violation--the Division establishes the degree of gravity of General and Serious violations from its findings and evidence obtained during the inspection/investigation, from its files and records, and other records of governmental agencies pertaining to occupational injury, illness or disease. The degree of gravity of General and Serious violations is determined by assessing and evaluating the following criteria:
>
> (1) Severity.
>
> (A) General Violation.
>
> […]
>
> ii. When the safety order violated does not pertain to employee illness or disease, Severity shall be based upon the type and amount of medical treatment likely to be required or which would be appropriate for the type of injury that would most likely result from the violation. Depending on such treatment, Severity shall be rated as follows:
>
> LOW-- Requiring first-aid only.

MEDIUM-- Requiring medical attention but not more than 24-hour hospitalization.

HIGH-- Requiring more than 24-hour hospitalization.

[…]

(2) Extent.

[…]

ii. When the safety order violated does not pertain to employee illness or disease, Extent shall be based upon the degree to which a safety order is violated. It is related to the ratio of the number of violations of a certain order to the number of possibilities for a violation on the premises or site. It is an indication of how widespread the violation is. Depending on the foregoing, Extent is rated as:

LOW-- When an isolated violation of the standard occurs, or less than 15% of the units are in violation.

MEDIUM-- When occasional violation of the standard occurs or 15-50% of the units are in violation.

HIGH-- When numerous violations of the standard occur, or more than 50% of the units are in violation.

(3) Likelihood.

Likelihood is the probability that injury, illness or disease will occur as a result of the violation. Thus, Likelihood is based on (i) the number of employees exposed to the hazard created by the violation, and (ii) the extent to which the violation has in the past resulted in injury, illness or disease to the employees of the firm and/or industry in general, as shown by experience, available statistics or records. Depending on the above two criteria, Likelihood is rated as:

LOW, MODERATE OR HIGH

a. Citation 1

Severity

For Citation 1, a General violation, Haskins testified that Severity was rated as Medium because the expected injury would result in hospitalization for less than 24 hours. Haskins did not provide further details explaining why the injury would be expected to result in hospitalization for less than 24 hours. Additionally, the Division did not establish that Haskins had sufficient expertise to offer an opinion as to the medical treatment likely to be required or appropriate for the type of injury most likely resulting from a violation. Indeed, the Division did not establish the type of injury most likely to result from the violation in Citation 1. Further, the Division did not provide other evidence supporting Haskins's conclusions or the basis for his opinion. As such, the Division did not meet its burden of proof to establish that the Severity was properly determined to be Medium.

Extent

Haskins testified that Extent was rated as High because 100 percent of the "units" were in violation but, in explaining, identified that it meant there was only one instance. Further, Haskins testified that one "unit" referred to a single person who was "not afforded the warning for being in the danger zone during the operation of the drill." The evidence presented only references a single instance. The Division did not provide further evidence establishing the spread of the violation. Therefore, the Division did not meet its burden of proof to establish that Extent was properly determined to be High.

Likelihood

Haskins testified that Likelihood was rated as Moderate, indicating "it's average and based on a number of factors, but it was an average probability." It is noted that Haskins testified that one employee was exposed to the hazard posed by the violation identified in Citation 1 but did not testify about the extent to which the violation has in the past resulted in injuries. As such, the Division did not present evidence as to how the number of employees exposed to the actual hazard created by the violation affected the Likelihood in contemplation of the extent to which the violation has in the past resulted in injury, illness, or disease to employees of Employer and/or the industry in general. Accordingly, the Division did not meet its burden of proof to establish that Likelihood was properly determined to be Moderate.

As noted above, it is necessary to award an employer the maximum credits and the minimum penalty allowed under the regulations when the Division fails to justify its proposed penalty. (*Armour Steel Co.*, *supra,* Cal/OSHA App. 08-2649; *Plantel Nurseries, supra,*

Cal/OSHA App. 01-2346.) Pursuant to the foregoing, the Division failed to establish Severity, Extent, or Likelihood at ratings above Low. Therefore, Severity is held to be Low, which results in a Base Penalty of $1,000. (§336, subd. (b).) As Extent is Low, Employer is entitled to a 25 percent penalty reduction. (*Id*.) Further, as Likelihood is Low, the Base Penalty is reduced by another 25 percent. (*Id*.) The resulting Gravity-based Penalty is $500.

Section 336 also provides adjustment factors for Good Faith, Size, and History.

Good Faith

Section 335, subdivision (c), provides:

> Good Faith of the Employer – is based upon the quality and extent of the safety program the employer has in effect and operating. It includes the employer's awareness of Cal/OSHA, and any indications of the employer's desire to comply with the Act, by specific displays of accomplishments. Depending on such safety programs and the efforts of the employer to comply with the Act, Good Faith is rated as: GOOD—Effective safety program; FAIR—Average safety program; POOR—No effective safety program.

Haskins testified that the Division determined that Employer had a Fair rating for Good Faith "based on the average of employers." However, further evidence was not adduced as to how this was determined or evaluated. As such, the Division did not provide sufficient evidence to support its determination that Good Faith was properly calculated as Fair. Section 336, subdivision (d)(2), allows for a reduction of 30 percent for the maximum credits for a Good rating of Good Faith. Accordingly, the Gravity-based Penalty shall be reduced by 30 percent.

Size

Section 335, subdivision (b), and section 336, subdivision (d)(1), provide that a Gravity-based Penalty may be reduced for employers with 100 or fewer employees, but not for employers with more than 100 employees. Haskins's testimony can be inferred to imply that Employer had more than 100 employees at the time of the inspection. However, the Division did not provide support that Haskins had personal knowledge of the number of employees employed by Employer at the time of the inspection. As such, maximum credits are awarded, and the Gravity-based penalty shall be reduced by 40 percent for Size.

History

Section 335, subdivision (d), provides:

> (d) The History of Previous Violations--is the employer's history of compliance, determined by examining and evaluating the employer's records in the Division's files. Depending on such records, the History of Previous Violations is rated as:
>
> GOOD-- Within the last three years, no Serious, Repeat, or Willful violations and less than one General or Regulatory violation per 100 employees at the establishment.
>
> FAIR-- Within the last three years, no Serious, Repeat, or Willful violations and less than 20 General or Regulatory violations per 100 employees at the establishment.
>
> POOR-- Within the last three years, a Serious, Repeat, or Willful violation or more than 20 General or Regulatory violations per 100 employees at the establishment.
>
> For the purpose of this subsection, establishment and the three-year computation, shall have the same meaning as in Section 334(d) of this Article.

Section 336, subdivision (d)(3), provides a 10 percent reduction to the Gravity-based Penalty for employers with a Good rating for History and a five percent reduction to the Gravity-based Penalty for employers with a Fair rating for History. Haskins testified:

> So, history is based on the Employer's citation history in California in the last three years. So, when I looked up their citation history, if they have citations particularly general violations, it's a ratio between the number of general violations and the number of employees that they had and that's the -- the number five is based on that ratio.

The Division did not put on further evidence supporting its rating of Employer's History. Therefore, the Division did not establish sufficient evidence to support the Fair rating. As such, Employer's History shall be assessed as Good, as a maximum credit, and Employer is entitled to a 10 percent reduction of the Gravity-based Penalty.

The additional adjustment factors for Good Faith and History result in an 80 percent adjustment to the Gravity-based Penalty, for an Adjusted Penalty of $100. Additionally, the resulting Adjusted Penalty is reduced by 50 percent for an abatement credit pursuant to section 336, subdivision (e), resulting in a penalty of $50.

b. Citation 3

Section 336, subdivision (c), provides that a Base Penalty for a Serious violation will be initially set at $18,000 and thereafter adjusted based on the Extent and Likelihood.

Extent

Haskins testified that Extent for Citation 3 was rated as High because 100 percent of the operations, which he identified as the operation of "changing the bit that wasn't locked out," were in violation and explained it was similar to his testimony for Extent for Citation 1. As discussed above, the evidence presented only referenced a single instance. The Division did not provide further evidence establishing the spread of the violation. Therefore, the Division did not meet its burden of proof to establish that Extent was properly determined to be High.

Likelihood

Haskins testified that Likelihood was rated as Moderate indicating its similarity to Citation 1. It is noted, as above, that Haskins testified that one employee was exposed to the hazard posed by the violation identified in Citation 1, and the Division did not provide other evidence of employee exposure. Similarly, Haskins did not testify about the extent to which the violation in Citation 3 has, in the past, resulted in injuries. As such, the Division did not present evidence as to how the number of employees exposed to the actual hazard created by the violation affected the Likelihood in contemplation of the extent to which the violation has in the past resulted in injury, illness, or disease to employees of Employer and/or the industry in general. Accordingly, the Division did not meet its burden of proof to establish that Likelihood was properly determined to be Moderate.

As noted above, it is necessary to award an employer the maximum credits and the minimum penalty allowed under the regulations when the Division fails to justify its proposed penalty. (*Armour Steel Co.*, *supra,* Cal/OSHA App. 08-2649; *Plantel Nurseries, supra,* Cal/OSHA App. 01-2346.) Pursuant to the foregoing, the Division failed to establish Extent or Likelihood at ratings above Low. As the Gravity-based Penalty for a Serious citation is $18,000, it is reduced by 25 percent for Extent and 25 percent for Likelihood, for a total of 50 percent reduction pursuant to section 336, subdivision (c). The resulting Gravity-based Penalty is $9,000.

As above, section 336 provides adjustment factors for Good Faith, Size, and History which are found to be 30 percent, 40 percent, and 10 percent, respectively. These adjustment factors result in an 80 percent adjustment to the Gravity-based Penalty, with a resulting Adjusted Penalty of $1,800.

However, the Division asserts, through Haskins's testimony, that because Employer has an "ineffective IIPP […] the only penalty adjustment would be for the size of the Employer." The Division's assertion appears to be based on section 336, subdivision (d)(8), which provides:

> Injury Prevention Program -- The penalty for any Serious violation shall not be subject to adjustment pursuant to this subsection other than for Size as set forth in part (1) of this subsection where the employer does not have an operative injury prevention program as set forth in Labor Code section 6401.7 and applicable regulations of the California Occupational Safety and Health Standards Board.

It is noted that section 336, subdivision (d)(8), restricts reduction of penalties where an employer "does not have an operative injury prevention program." Although Employer's IIPP was ineffectively enforced, the evidence presented supports the conclusion that Employer had an IIPP in operation at the time of the violation. Further, the parties did not brief this matter, or indeed, brief the issue of penalties in the post-hearing briefs. As such, this contention is found unpersuasive.

Therefore, the Adjusted Penalty is calculated at $1,800. Haskins testified that Employer abated the violation prior to the inspection being closed and, as such, an abatement credit was calculated as a 50 percent reduction pursuant to section 336, subdivision (e). Accordingly, the resulting penalty is $900.

Conclusion

The evidence supports a finding that Employer violated section 1509, subdivision (a), by failing to maintain an effective Injury and Illness Prevention Program. The penalty, as adjusted and discussed above, is found reasonable.

The evidence supports a finding that Employer violated section 3314, subdivision (c), by failing to ensure that a machine was stopped and de-energized or disengaged from the power source and, if necessary, mechanically blocked or locked at its movable parts to prevent inadvertent movement or release of stored energy during a cleaning, setting-up or adjusting operation. The violation was properly classified as Serious. The penalty, as adjusted and discussed above, is found reasonable.

ORDER

Pursuant to the stipulation of the parties by email on May 31, 2023, the court reporter's transcripts of these proceedings created for the Appeals Board by the Northern California Court Reporters is designated as the official record. Further, the parties have stipulated that the audio record of these proceedings remains available to supplement or explain the transcript.

It is hereby ordered that Citation 1, Item 1, is affirmed and the associated penalty is modified and assessed as set forth in the attached Summary Table.

It is hereby ordered that Citation 2, Item 1, and its associated penalty are vacated pursuant to the terms of settlement set forth by the parties.

It is hereby ordered that Citation 3, Item 1, is affirmed and the associated penalty is modified and assessed as set forth in the attached Summary Table.

Dated: 07/21/2023

Christopher Jessup
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.**